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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1250

[Docket No. PY-94-001]

RIN 0581-AB13

Amendments to Egg Research and Promotion Order

AGENCY: Agricultural Marketing Service.

ACTION: Final rule.

SUMMARY: This rule amends the Egg Research and Promotion Order to exempt certain producers from the provisions of the Egg Research and Consumer Information Act and to provide for certain funding of research projects. The changes are required by amendments to the Egg Research and Consumer Information Act, which were enacted December 14, 1993.

EFFECTIVE DATE: August 1, 1994.

FOR FURTHER INFORMATION CONTACT: Janice L. Lockard, 202-720-3506.

SUPPLEMENTARY INFORMATION:

Executive Orders 12866 and 12778

This rule is exempt from Executive Order 12866 review.

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

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 14 of the Act, a person subject to an order may file a petition with the Secretary stating that such order, any provisions of such order or any obligations imposed in connection with such order are not in accordance with law; and requesting a modification of the order or an exemption therefrom. Such person is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which such person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling on the petition, if a complaint is filed within 20 days after date of the entry of the ruling.

Effect on Small Entities

The Administrator of the Agricultural Marketing Service has determined that this rule will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

This action eliminates virtually all of the regulatory requirements under the egg research and promotion program on a major share of the egg producers currently subject to those requirements and who certify their eligibility for the statutory exemption. The action substantially reduces the regulatory burden on handlers as well. Approximately 618 producers pay assessments to the American Egg Board (AEB) at the rate of 5 cents per 30-dozen case of commercial eggs marketed or the equivalent thereof. This action exempts an estimated 253 small egg producers who own 75,000 or fewer laying hens from requirements of the egg research and promotion program. These producers are no longer required to pay the assessment of 5 cents per 30-dozen case of commercial eggs.

Paperwork Reduction

Information collection requirements and recordkeeping provisions contained in 7 CFR part 1250 have been previously approved by the Office of Management and Budget and assigned OMB Control No. 0581-0093 under the Paperwork Reduction Act of 1980.

This action should reduce, by approximately 70 percent, the number of collecting handlers required to file handler reports on a monthly basis. Currently, there are approximately 399 collecting handlers under the research and promotion program. An estimated 281 of these handlers are no longer required to file monthly handler reports. In addition, handlers do not have to include production from exempted flocks in their monthly handler reports. The 253 small egg producers who own 75,000 or fewer laying hens are required to file, through their handlers, an annual certification of exemption.

Background and Proposed Changes

The Egg Research and Promotion Order (7 CFR 1250.301-1250.363) established pursuant to the Egg Research and Consumer Information Act, as amended (7 U.S.C. 2701 *et seq.*), provides in section 1250.348 that the following are to be exempt from paying assessments: "(a) Any egg producer whose aggregate number of laying hens at any time during a 3-consecutive-month period immediately prior to the date assessments are due and payable has not exceeded 30,000 laying hens, and (b) Any producer owning a flock of breeding hens whose production of eggs is primarily utilized for the hatching of baby chicks." Currently there are 579 producers who come under the 30,000-laying-hen exemption. Section 12(a)(1) of the Act (7 U.S.C. 2711) was amended December 14, 1993 (Pub. L. 103-188), to exempt those producers whose aggregate number of laying hens at any given time during a 3-consecutive-month period immediately prior to the date assessments are due and payable has not exceeded 75,000 laying hens.

According to statistics of AEB, 253 producers owning 75,000 or fewer laying hens currently pay mandatory assessments at 5 cents per 30-dozen case of commercial eggs or the equivalent thereof to finance research, promotion, and education activities. Although producers in this category represent 41 percent of the total producers covered by the Act, they represent only 4 percent of the total assessment income collected by AEB. Exempting producers owning 75,000 or fewer laying hens, therefore, exempts a number of smaller producers without adversely impacting the capability of AEB to carry out the programs authorized under the Act.

Section 8(d) of the Act (7 U.S.C. 2707) was also amended (Pub. L. 103-188) to require that AEB, to the maximum extent practicable, allocate a proportion of funds for research projects in the 1994 and subsequent fiscal year budgets that is comparable to the amount appropriated for research projects in the 1993 fiscal year budget.

Comments

Public Law 103-188 provides that these amendments to the Order shall be

issued after public notice and opportunity for comment in accordance with 5 U.S.C. 553 and without regard to 5 U.S.C. 556 and 557 and shall be not be subject to a referendum.

A proposed rule was published in the **Federal Register** (59 FR 13460) on March 22, 1994. Comments on the proposed rule were solicited from interested parties until May 23, 1994. One comment was received in support of the amendments from a trade association.

After consideration of all relevant matters, including the proposal set forth in the notice of proposed rulemaking, it is found that the amendments hereinafter set forth will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is further found that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) The provisions of this final rule are the same as those published on March 22, 1994; (2) interested persons were afforded a 60-day comment period to submit written comments, and one comment in support of the amenndments was received; and (3) this action will relieve approximately 253 producers from the regulatory provisions of the Act and Order under conditions prescribed by the Secretary.

List of Subjects in 7 CFR Part 1250

Administrative practice and procedure, Advertising, Agricultural research, Eggs and egg products, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, Title 7, CFR part 1250 is amended as follows:

PART 1250—EGG RESEARCH AND PROMOTION

1. The authority citation of part 1250 continues to read as follows:

Authority: Pub. L. 93–428, 88 Stat. 1171, as amended, 7 U.S.C. 2701–2718.

2. In § 1250.336, paragraph (c) is revised to read as follows:

§ 1250.336 Duties.

* * * * *

(c) To prepare and submit to the Secretary for his approval budgets on a fiscal-period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable cost of plans and projects as estimated in the budget or budgets submitted to it by prospective contractors, with the Board's recommendations with respect thereto. In preparing a budget for each of the 1994 and subsequent fiscal years, the Board shall, to the maximum extent practicable, allocate a proportion of funds for research projects comparable to the proportion of funds allocated for research projects in the Board's fiscal year 1993 budget.

* * * * *

3. In § 1250.348, the introductory text is republished and the first sentence of paragraph (a) introductory text is revised to read as follows:

§ 1250.348 Exemptions.

The following shall be exempt from the specific provisions of the Act:

(a) Any egg producer whose aggregate number of laying hens at any time during a 3-consecutive-month period immediately prior to the date assessments are due and payable has not exceeded 75,000 laying hens. * * *

* * * * *

Dated: July 26, 1994.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 94–18600 Filed 7–29–94; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 204

[INS No. 1395–92]

RIN 1115–AD28

Petitioning for Foreign-Born Orphans by United States Citizens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This regulation addresses a number of issues that have arisen in the recent past because of the increased interest by United States citizens in the adoption of foreign-born orphans. It revises prior regulations by clarifying language and procedures for prospective adoptive parents and other interested parties. This regulation also enhances the ability of the Immigration and Naturalization Service (Service) to help ensure that children who are eligible for orphan status will receive proper care.

EFFECTIVE DATE: This rule is effective on September 30, 1994.

FOR FURTHER INFORMATION CONTACT: Jack Tabaka, Senior Immigration Examiner, Karen Eckert, Supervisory Immigration Examiner or, Rita A. Arthur, Senior Immigration Examiner, Immigration and Naturalization Service, 425 I Street, NW., Room 7122, Washington, DC 20536, telephone (202) 514–5014.

SUPPLEMENTARY INFORMATION: The word "orphan" is defined in many dictionaries as a child whose parents have both died. Under the Immigration and Nationality Act (Act), Congress expanded the definition to include not only children who were orphans because of the death of both parents, but also children who were orphans because of the "disappearance of, abandonment or desertion by, or separation or loss from both parents * * *" [8 U.S.C. 1101(b)(1)(F)]. Congress also established additional circumstances under which the child of a sole or surviving parent could be considered an orphan.

A review of the legislative history leading to the statutory definition of orphan, as it appears in section 101(b)(1)(F) of the Act, and a review of the preceding legislation clearly show that Congress intended the orphan statute to apply to "homeless" and parentless children. The original legislation was drafted after World War II when there were many children who had been permanently torn from their parents and homes. In fact, the origin of the legislation can be traced to the Displaced Persons Act of 1948, Pub. L. 80–7874, § 2, 62 Stat. 1009 (1948).

Amendments to the original statute included raising the age of an eligible orphan, eliminating the two orphans per petitioner limit, allowing an unmarried individual to petition for an orphan, and defining the impact of the Immigration Reform and Control Act of 1986 on section 101(b)(1)(D) of the Act regarding the relationship of an illegitimate child to its father in an orphan case. Additional legislation required that a home study be completed in every case before the prospective adoptive parents are eligible to petition for an orphan. Throughout these changes, Congress continued to refer to the orphan statute as pertaining to homeless children, thereby distinguishing it from the provisions of the adopted child statute under section 101(b)(1)(E) of the Act.

On November 8, 1993, the Service published a proposed rule in the **Federal Register** at 58 FR 59200–59210 to revise the regulations at 8 CFR 204.3 governing the petition for foreign-born orphans. The proposed rule was drafted to address a number of issues that have arisen in the recent past because of the increased interest by United States citizens in the adoption of foreign-born orphans. Public comments were solicited, and eight letters were received during the comment period. All comments have been thoughtfully considered. Six of the eight commenters

indicated their overall support or their support in large measure for the proposed regulations. Since most discussed several issues, the total number of comments exceeds the number of persons who commented.

General

It should be noted that the proposed rule was *not* drafted in connection with possible United States ratification and implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption. Rather, the rule was drafted on the basis of the current provisions of the Immigration and Nationality Act, as amended, as indicated in the "Authorities" section in the preamble to the proposed rule. One commenter suggested that the Service make it clear for individuals without legal backgrounds that the rule is *not* related to the Hague Convention. The Service agrees with this suggestion and has included this clarification in the final rule.

Definitions

The Service has received the following comments regarding the definitions contained in this rule:

(1) One commenter objected to the use of the term "parental interest" used in the definition "abandoned by both parents." The commenter said the phrase has proven to be "* * * problematic in domestic cases." It was stated that the term's "* * * vagueness could lead to many otherwise eligible orphans being denied the chance for adoption." Although the term "parental interest" may have proven to be problematic in domestic cases, the Service does not believe that the term's incorporation in the final rule "* * * could lead to many *otherwise eligible orphans* being denied the chance for adoption", as stated (emphasis added).

The term "parental interest" relates to children who are *not* eligible orphans as indicated by the context of the sentence in which it appeared:

> A child shall not be considered to be abandoned if he or she is placed temporarily in an orphanage, if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit parental interest in the child.

Like "express an intention to retrieve the child" and "contributing or attempting to contribute to the support of the child," the "parental interest" test applies only in the case of a child who has been placed *temporarily* in an orphanage. Additionally, the "parental interest" test was included in the proposed rule to help differentiate between a child who is abandoned to an orphanage and a child who is placed in, perhaps, the same orphanage temporarily because the natural parents are currently unable to adequately provide for the child.

The Service will retain the term "parental interest" in the final rule. However, review of this comment has pointed to the need to clarify that this term contemplates continuous interest rather than a one-time action. Accordingly, this provision in the final rule will be reworded and the word "ongoing" will be added to the definition of "abandoned by both parents" to read "ongoing parental interest."

(2) The proposed rule requires fingerprint checks and an evaluation in the home study of each "adult member of the prospective adoptive parents' household," defined as "an individual, other than a prospective adoptive parent, over the age of 18 whose principal or only residence is the home of the prospective adoptive parents." One commenter asked the Service to ensure that an approved advanced processing application or orphan petition will not be affected if a child in the household of the prospective adoptive parents turns 18 during the validity of the approved application or petition.

The Service basically agrees with this recommendation and will accordingly amend its definition of "adult member of the prospective adoptive parents' household" to exclude such a person unless there is an articulable and substantive reason for requiring fingerprint checks and a home study evaluation after the advanced processing application has been filed.

(3) One commenter welcomed the definition of the "foreign sending country" and the specific exclusion of "a country to which the orphan travels temporarily * * *." The commenter stated that this language in conjunction with other language in the rule "* * * concerning evidence of custody in accordance with the laws of the foreign sending country will place a reasonable requirement for evidence that a child has not been taken across an international border to evade laws designed to protect the rights and interests of the child." The Service agrees with this evaluation and will retain this definition as presented in the proposed rule.

(4) The term "prospective adoptive parents" is in part defined as "* * * a married United States citizen of any age and his or her spouse of any age * * *." One commenter asked if this meant a man and woman married to each other. The term "prospective adoptive parents" includes a man and a woman married to each other provided that they meet all the criteria set forth in the definition.

(5) One commenter indicated that the definition of "sole parent" might have an impact on the determination of whether certain children were orphans under the Act. This definition imposes no new requirements, and it is simply a codification of longstanding requirements which are contained in several related portions of the Act. Accordingly, this definition has not been changed in the final rule.

(6) One commenter expressed support for the fact that the Service has provided regulatory definitions for several key phrases. In working under the prior regulations, most persons have focused on the term "abandonment" by both parents in determining whether a child was an orphan under the Act, and have paid minimal attention to the other ways in which a child could qualify as an orphan. In drafting this rule, the Service sought to expand that focus. This has been achieved by providing definitions for other terms appearing in the Act that allow a finding that a child is an orphan: "disappearance" of both parents, "desertion" by both parents, "separation" from both parents, and "loss" from both parents. Other definitions have also been added for clarity and consistency.

(7) When the proposed rule was drafted, the Service anticipated that a revised Form I–130 (Relative Petition), which would include orphan processing, would be in use by the time the rule became final. This was reflected in the definitions of "advanced processing application" and "orphan petition," as well as in references to the Form I–130 listed elsewhere in the proposed rule. However, the revised Form I–130 is not in use at this time. Accordingly, all references to the Form I–130 have been eliminated and references to Form I–600A (Application for Advance Processing of Orphan Petition) and Form I–600 (Petition to Classify Orphan as Immediate Relative) have been inserted, as appropriate.

Fingerprints

(1) One commenter expressed support for the proposal to fingerprint adult members of the prospective adoptive parents' household as "* * * a good abuse deterrent * * *."

(2) The final rule eliminates what was proposed as an optional process under which fingerprint cards could be filed directly with the FBI. This elimination stems from the fact that the proposed optional process has proven

inconsistent with ongoing efforts to enhance the existing fingerprint-check process used in a number of types of cases, including orphan cases. The fingerprint enhancement effort will be discussed in a forthcoming rule.

Extending the Validity of Approved Advanced Processing Applications

The Service received three comments on extending the validity of approved advanced processing applications. Two commenters supported the Service's extending the validity from 12 to 18 months while one commenter stated that 12 months was sufficient. It is no longer uncommon for circumstances beyond the control of prospective adoptive parents to hamper their best efforts to complete an orphan adoption within 12 months of the approval of their advanced processing application. In order to better assist prospective adoptive parents in such circumstances, the Service proposed to extend the validity to 18 months. The extension eliminates the need for a second advanced processing application at this juncture, when the prospective adoptive parents are focused on complying with foreign requirements and on bringing the orphan home.

Nothing in the comment has convinced the Service that it should eliminate the 18-month validity period from the final rule. Therefore, the final rule will retain the 18-month validity period.

Petition for an Identified Orphan

(1) The Service received two favorable comments on the fact that the proposed rule exhibits respect for the law of the orphan's home country.

The Service considers it vital that the prospective adoptive parents (or the person or entity working on their behalf) obtain legal custody of the orphan. Failure to comply with the applicable foreign requirements could potentially expose prospective adoptive parents to questionable, if not illegal, practices abroad and could have detrimental consequences on international adoptions.

(2) One commenter expressed concern over the phrase "the prospective adoptive parents, or the adoption agency working on their behalf" which appeared twice in the proposed rule. The commenter said that the express mention of adoption agencies "* * * may lead to the interpretation that non-agency adoption providers (e.g., lawyers, social workers, facilitators) may not be allowed to represent adoptive parents in an international adoption."

The Service never intended that the language in question would exclude non-agency providers. Accordingly, the words "or the adoption agency" will be removed and the words "or a person or entity working on their behalf," will be substituted.

(3) As part of its review of the proposed rule, the Service has decided to eliminate the requirement for a separate statement by the prospective adoptive parents that they intend to adopt the child in the United States. The Service believes that this intention is adequately conveyed by the prospective adoptive parents, whose orphan is coming to the United States for adoption, when they complete and sign Form I–600.

(4) After Service-initiated consultations with three knowledgeable sources in the adoption community who advised that all States allow adoption by unmarried persons, the Service has eliminated the requirement that an unmarried petitioner submit evidence that the state of the orphan's proposed residence does not preclude adoption by an unmarried person.

Home Study Requirements

(1) One commenter said that the proposed requirement that the home study must be submitted to the Service within six months of the filing date of the advanced processing application "* * * might cause needless reapplications or a hasty grind to meet the deadline. We understand your desire to have materials as timely as possible, but this seems to create an unnecessary push." In light of this comment, the Service has reconsidered this requirement and will extend the time for submitting the home study to one year after the filing of the advanced processing application.

(2) One commenter wanted to know if a statement to the effect that "the financial resources have been checked and deemed sufficient to support a child" would be sufficient to satisfy the financial-ability requirements set forth in the proposed rule. Since experience has shown that such a statement does not give the Service sufficient information regarding the financial ability of the prospective adoptive parents, such a statement will not be sufficient to satisfy this requirement. The rule requires a general discussion of the prospective adoptive parents' finances and a listing of the evidence which the home study preparer reviewed in making his or her assessment. The Service is *not* routinely requiring a detailed financial statement or supporting financial documents. However, should the need arise, the Service reserves the right to ask for such detailed documentation. This requirement will be clarified in the final rule.

(3) In commenting on the proposal that the home study preparer must ensure that a check has been made with available child abuse registries, one commenter identified a state which he said does not maintain a child abuse registry and identified another which he said precludes a check of such records by private adoption agencies.

Based on this comment, the Service amended this requirement to more clearly address how various levels of access to such records affect compliance with this requirement. Failure on the part of the prospective adoptive parents and/or adult members of the prospective adoptive parents' household to cooperate in having available registries checked will be grounds for denial.

(4) One commenter said that while it was clear that any history of abuse and/or violence had to be disclosed to the home study preparer and the Service, it was unclear whether any criminal record for other activities had to be disclosed.

In drafting the proposed rule, it was the Service's intention to clearly state that the prospective adoptive parents and/or adult members of their household are required to disclose any criminal record to the home study preparer and to the Service. Failure to make this clear was inadvertent. Since the fingerprint checks which are part of the advanced processing procedure would reveal such records, it makes no sense for the prospective adoptive parents and/or an adult member of their household to withhold such information. Indeed, early disclosure provides the prospective adoptive parents with the best opportunity to gather and present evidence of rehabilitation or mitigating circumstances, and it gives the home study preparer and the Service the opportunity to properly evaluate the criminal record in light of such evidence.

Such information is eventually disclosed when the fingerprint checks are received by the Service. Delays may be especially problematic at this stage. The prospective adoptive parents are usually well into preadoption proceedings, may have identified a child, and may even have established travel plans. At times, these travel plans may have to be rescheduled while the issues raised by the criminal record are addressed. It is in the best interest of all parties to have any criminal records disclosed and resolved early in the

process. Accordingly, the Service has clarified this in the final rule.

(5) One commenter suggested that the Service require a finding of good moral character [as statutorily defined in section 101(f) of the Act] for any prospective adoptive parent before the advanced processing application can be approved. The commenter said that a State may approve a person as a prospective adoptive parent even if he or she has committed a recent felony as long as it appears he or she would not abuse the child and would properly provide for the child's needs. The commenter said that, in one case, a State Court found a prospective adoptive parent to be suitable when he would fail to meet the good moral character standard for citizenship or for suspension of deportation under the Act.

The Service is neither endorsing nor rejecting this suggestion. The Service notes that this suggestion could not be considered for incorporation into this rule at this stage of the process because of its potentially far-reaching impact and the need for extensive study and consultation.

(6) One commenter evidently believed that the proposed rule was requiring that each home study specify the country or countries from which the prospective adoptive parents may adopt. The proposed rule did not require country-specific home studies. What the proposed rule did require is that *if* the home study preparer imposes such a restriction, it must be clearly stated in the home study report. This requirement will be retained in the final rule.

(7) One commenter recommended that any specific restrictions such as the nationality, age, or gender of the orphan as required by the home study preparer be included in the telegraphic notification to the overseas site. The Service plans to modify the orphan-related approval cable formats to include such information.

(8) Unless a home study reflects relatively current conditions, its value is severely limited or non-existent, regardless of how conscientiously it was conducted. Since the prior regulation did not specify a validity period for home studies, some prospective adoptive parents submitted home studies that were several years old.

To rectify this deficiency and to make the home study a more valuable tool, the Service will require that the home study be submitted within six months of its completion. Any home study that is more than six months old when it is submitted to the Service must be accompanied by an update which is current, that is, not more than six months old. Ordinarily, a home study (or a home study and/or update as discussed above) will not have to be updated after it has been submitted to the Service unless there is a significant change. Significant changes would include a change in the residence of the prospective adoptive parents, marital status, criminal history, financial resources, and/or the addition of one or more children or other dependents to the family prior to the orphan's immigration into the United States. This was not clear to one commenter who evidently thought that the home study would have to be updated every six months until the orphan petition was approved. Since this was unclear, the Service has included clarifying language in the final rule.

In reviewing the proposed rule in light of this commenter's request, the Service also determined that using the words "update" and "amendment" (and derivative words from each) may have contributed to some of the confusion. Therefore, the Service has rewritten that portion of the rule dealing with home study updates and amendments for clarity, while retaining the original intent. In doing so, the Service will use "update" (and derivative words) in reference to making an outdated home study current before it is submitted to the Service. The Service will use "amendment" (and derivative words) in reference to making a home study reflect any significant changes after it has been submitted to the Service.

Finally, it should be noted that requiring a home study to be less than six months old at the time of its submission to the Service is reasonable in light of the fact that the home study has an additional "life span" of 18 months after the approval of the advanced processing application, which is largely based on the home study. This means that the home study may be as much as two years old at the time the orphan petition is filed.

(9) The proposed rule included a provision to require every stateside home study completed by a home study preparer who is not an adoption agency to be reviewed and endorsed by an appropriate State Government agency or an adoption agency. In reviewing the rule for final publication, the Service decided to strike this proposed requirement because it added an additional step to the process. Accordingly, that portion of the proposed rule has been amended to reflect that a stateside home study (whether prepared by an adoption agency or a non-agency) must be reviewed and/or endorsed by an appropriate State Government agency only if such a review is required by applicable State law and/or regulations. Additionally, such a review must be made prior to submission of the home study to the Service. The requirement that any home study for prospective adoptive parents who reside abroad must receive a favorable recommendation remains in the final rule, since it is clearly and specifically required by law. It should be noted that the paragraph title has been changed.

(10) Two commenters stated their overall support for the home study requirements.

(11) One commenter stated that "* * * the Service should be able to refuse to accept Home Study Reports prepared by preparers who have a pattern or practice of willfully submitting Home Study Reports that do not contain the required information and disclosures."

The Service will consider each home study on its individual merits and will not reject a home study simply because it is authored by a particular home study preparer. If a home study preparer has a pattern of submitting questionable home studies, the Service expects the director to discuss this with the appropriate State authorities as part of his or her liaison with the State adoption authorities. The Service believes that control over conduct of home study preparers, including the institution of adverse actions, is a matter for State Government authorities. Accordingly, the Service will not accept the commenter's suggestion.

(12) One commenter suggested that the home study preparer be required to attach a photograph of the adoptive parents to the home study. No examples were given, or are known, of incidents in which photographs of the adoptive parents would have proven beneficial. Therefore, the Service will not adopt this suggestion at the present time, but reserves the right to revisit the issue should evidence come to light which would justify its implementation.

(13) One commenter suggested that a form be developed to assist the home study preparer in meeting the rule's requirements for home studies. Since the Service is working to reduce the number of its forms, this suggestion will not be accepted. However, the Service plans to include the requirements for home studies in its publication, *The Immigration Of Adopted And Prospective Adoptive Children (Form M-249)*, which will be revised to conform with this rule.

(14) A commenter suggested that the home study preparer "* * * obtain from the interviewees the names and addresses of two credible references and

that such references be interviewed with respect to suitability of the prospective adopting parents." It is doubtful that prospective adoptive parents would provide references whose statements would be detrimental to their prospects for adoption. Additionally, the suggestion would no doubt extend the time necessary to complete a home study and add to its cost. Given these factors, the Service will not adopt this suggestion. It should be noted, however, that if applicable State law or regulation requires such reference checks, they must be made.

(15) One commenter suggested that the home study preparer be required to sign and otherwise execute the home study report under penalty of perjury. The commenter said this would serve as a disincentive to unethical and otherwise illegal conduct by certain home study preparers. The commenter called for criminal liability for such unethical or illegal conduct in addition to state licensure revocation proceedings.

The fact that the prospective adoptive parents sign the advanced processing application and orphan petition under penalty of perjury is sufficient for the Service's purposes since such proceedings are between the prospective adoptive parents and the Service. Furthermore, the Service believes that control over conduct of home study preparers, including the institution of adverse actions, is a matter for State Government authorities. Accordingly, the Service will not accept the commenter's suggestion.

(16) As part of its review of the proposed rule, the Service has amended the requirement that two copies of the home study be submitted. The final rule requires that only one copy of the home study be submitted.

Adjudication

The proposed rule provided for denial of an advanced processing application and/or an orphan petition if the prospective adoptive parents or adult members of the prospective adoptive parents' household fail to disclose an arrest, conviction, or history of substance, sexual or child abuse, and/or domestic violence.

One commenter suggested that the final rule should also include an explicit provision to revoke the approval of an advanced processing application or orphan petition if such failure to disclose comes to light after the approval. The commenter stated that in many instances knowledge of such activity is not discovered until an advanced processing application or an orphan petition has been approved. The commenter continued: "This would serve as an expressed disincentive to hiding or concealing such required disclosures. It would further serve to protect the physical and emotional well-being of an orphaned child who has been placed into a home with adoptive parents who have had such a history." The same commenter also suggested that the rule provide for revocation if a home study update fails to disclose any significant changes in the prospective adoptive parents' ability to provide proper care for the orphan.

The Service's authority to revoke an approval is inherent in its authority to approve and is explicit in section 205 of the Act. To make this clear, the final rule will reflect the Service's authority to revoke the approval of an advanced processing application or orphan petition if the director becomes aware of information that would have resulted in denial had it been known at the time of adjudication or if the relationship upon which the petition is based ceases to exist.

Child-Buying as a Ground for Denial

Two parties expressed support for making child-buying a ground for denial. One commenter called it a "* * * disgraceful de-humanizing practice." The other commenter noted that the processing time of suspect cases may be increased. In reviewing the child-buying preclusion in light of the comments discussed above, the Service noted that it had inadvertently written this provision so that it could be read as only applicable to adoptive parents but not to prospective adoptive parents. To correct this, the words "prospective adoptive parents or" have been inserted before the words "adoptive parents."

Telegraphic Notification

One commenter welcomed the establishment of uniform procedures for sending telegraphic notification and for requesting a change in visa-issuing posts.

Other Considerations

(1) The Department of State expressed its concurrence with the paragraphs addressing the I–604 investigations and the authority of consular officers. Additionally, the Department of State asked that a sentence be included to encourage direct communication between the appropriate consular and immigration officers when there are significant differences between the evidence presented in support of the approved orphan petition and the evidence uncovered by the I–604 investigation. The Service will comply with this request and accordingly amend the I–604 provision.

(2) One commenter evidently thought that the paragraph which states that children in the United States illegally or as nonimmigrants are ineligible for orphan status is a new provision. This provision was carried forward from § 204.3(e) of the prior regulation.

Miscellaneous Comments

(1) Pursuant to section 101(b)(1)(F) of the Act, the adoptive parent(s) must be in compliance with the preadoption requirements of the State of residence unless both of the parents or the single parent "* * * personally saw and observed the child prior to or during the adoption proceedings."

In several places in the proposed rule the words "see" and "saw" were used in this context, thereby reflecting the statutory language. According to one commenter, the use of the words "saw" or "see" could be interpreted as disqualifying a blind person from adopting. To the best of the Service's knowledge, no application or petition in orphan proceedings has ever been denied solely on the basis of blindness, and the Service has no intention of changing this practice. Therefore, the recommended change will not be made.

(2) One commenter asked if the Freedom of Information Act will give adoptive parents the right to obtain their own child abuse records or clearance.

The Freedom of Information Act (FOIA) (5 U.S.C. 552) and the Privacy Act (PA) (5 U.S.C. 552a) pertain to records created by U.S. Government agencies. If such a record were created by a U.S. Government agency, then a request could be made under FOIA or the PA. Since the child abuse indices referred to in this rule are State records, the applicable State law, if any, would govern access to the records.

(3) Two commenters pointed out several typographical errors which occurred when the proposed rule was prepared for publication in the **Federal Register**. The Service has corrected these errors. The Service also has made some editorial changes for clarity and consistency which do not have an impact on the intent of the rule.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that the rule will not have a significant economic impact on a substantial number of small entities for the following reason: the rule primarily affects applications and

petitions in orphan proceedings which can only be filed by married couples ad individuals, but not by small entities.

Executive Order 12866

This rule is not considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, § 3(f), Regulatory Planning and Review, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

Executive Order 12612

The regulations proposed 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 does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12606

The Commissioner of the Immigration and Naturalization Service certifies that she has assessed this rule in light of the criteria in Executive Order 12606 and has determined that this regulation will enhance family well-being: (1) by making the welfare of the orphan the foremost consideration when screening the prospective adoptive parents and other adults in the household through the fingerprint checks and the home study; (2) by providing prospective adoptive parents with guidelines which are clearer than the previous ones regarding the adoption of orphans; (3) by ameliorating some of the impact of the prior regulations without sacrificing the welfare of the orphan; (4) by providing improved guidelines for home studies which require that the home study preparer counsel the prospective adoptive parents about the intricacies of foreign processes with which they will come into contact; (5) by providing definitions for terms including "abandonment," "disappearance," "desertion," "separation," and, "loss" which appear in the Act, thereby expanding the focus for determining whether a child is an orphan under the Act beyond the term "abandonment," which has been nearly the exclusive focus in the past; and (6) by requiring the Service's directors to maintain liaison with the adoption community.

Paperwork Reduction Act

The information collection requirements contained in this rule have been cleared by the Office of Management and Budget under the provisions of the Paperwork Reduction Act. Clearance numbers for these collections are contained in 8 CFR 299.5, Display of Control Numbers.

List of Subjects in 8 CFR Part 204

Administrative practice and procedure, Adoption, Children, Orphans.

According, part 204 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 204—IMMIGRANT PETITIONS

1. The authority citation for part 204 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1186a, 1255; 8 CFR part 2.

2. Section 204.3 is revised to read as follows:

§ 204.3 Orphans.

(a) *General.*

(1) *Background.* This section addresses a number of issues that have arisen in the recent past because of the increased interest by United States citizens in the adoption of foreign-born orphans and is based on applicable provisions of the Act. It should be noted that this section was *not* drafted in connection with possible United States ratification and implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.

(2) *Overview.* The processing and adjudication of orphan cases is a Service priority. A child who meets the definition of orphan contained in section 101(b)(1)(F) of the Act is eligible for classification as the immediate relative of a United States citizen. Petitioning for an orphan involves two distinct determinations. The first determination concerns the advanced processing application which focuses on the ability of the prospective adoptive parents to provide a proper home environment and on their suitability as parents. This determination, based primarily on a home study and fingerprint checks, is essential for the protection of the orphan. The second determination concerns the orphan petition which focuses on whether the child is an orphan under section 101(b)(1)(F) of the Act. The prospective adoptive parents may submit the documentation necessary for each of these determinations separately or at one time, depending on when the orphan is identified. An orphan petition cannot be approved unless there is a favorable determination on the advanced processing application. However, a favorable determination on the advanced processing application does not guarantee that the orphan petition will be approved. Prospective adoptive parents may consult with the local Service office on matters relating to an advanced processing application and/or orphan petition.

(b) *Definitions.* As used in this section, the term:

Abandonment by both parents means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrending such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

Adult member of the prospective adoptive parents' household means an individual, other than a prospective adoptive parent, over the age of 18 whose principal or only residence is the home of the prospective adoptive parents. This definition excludes any child of the prospective adoptive parents, whose principal or only residence is the home of the prospective adoptive parents, who reaches his or her eighteenth birthday after the prospective adoptive parents have filed the advanced processing application (or the advanced processing application concurrently with the orphan petition) unless the director has an articulable and substantive reason for requiring an

evaluation by a home study preparer and/or fingerprint check.

Advanced processing application means Form I–600A (Application for Advanced Processing of Orphan Petition) completed in accordance with the form's instructions and submitted with the required supporting documentation and the fee as required in 8 CFR 103.7(b)(1). The application must be signed in accordance with the form's instructions by the married petitioner and spouse, or by the unmarried petitioner.

Application is synonymous with *advanced processing application.*

Competent authority means a court or governmental agency of a foreign-sending country having jurisdiction and authority to make decisions in matters of child welfare, including adoption.

Desertion by both parents means that the parents have willfully forsaken their child and have refused to carry out their parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country.

Disappearance of both parents means that both parents have unaccountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.

Foreign-sending country means the country of the orphan's citizenship, or if he or she is not permanently residing in the country of citizenship, the country of the orphan's habitual residence. This excludes a country to which the orphan travels temporarily, or to which he or she travels either as a prelude to, or in conjunction with, his or her adoption and/or immigration to the United States.

Home study preparer means any party licensed or otherwise authorized under the law of the State of the orphan's proposed residence to conduct the research and preparation for a home study, including the required personal interview(s). This term includes a public agency with authority under that State's law in adoption matters, public or private adoption agencies licensed or otherwise authorized by the laws of that State to place children for adoption, and organizations or individuals licensed or otherwise authorized to conduct the research and preparation for a home study, including the required personal interview(s), under the laws of the State of the orphan's proposed residence. In the case of an orphan whose adoption has been finalized abroad and whose adoptive parents reside abroad, the home study preparer includes any party licensed or otherwise authorized to conduct home studies under the law of any State of the United States, or any party licensed or otherwise authorized by the foreign country's adoption authorities to conduct home studies under the laws of the foreign country.

Incapable of providing proper care means that a sole or surviving parent is unable to provide for the child's basic needs, consistent with the local standards of the *foreign sending country.*

Loss from both parents means the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority in accordance with the laws of the foreign sending country.

Orphan petition means Form I–600 (Petition to Classify Orphan as an Immediate Relative). The petition must be completed in accordance with the form's instructions and submitted with the required supporting documentation and, if there is not an advanced processing application approved within the previous 18 months or pending, the fee as required in 8 CFR 103.7(b)(1). The petition must be signed in accordance with the form's instructions by the married petitioner and spouse, or the unmarried petitioner.

Overseas site means the Department of State immigrant visa-issuing post having jurisdiction over the orphan's residence, or in foreign countries in which the Services has an office or offices, the Service office having jurisdiction over the orphan's residence.

Petition is synonymous with *orphan petition.*

Petitioner means a married United States citizen of any age, or an unmarried United States citizen who is at least 24 years old at the time he or she files the advanced processing application and at least 25 years old at the time he or she files the orphan petition. In the case of a married couple, both of whom are United States citizens, either party may be the petitioner.

Prospective adoptive parents means a married United States citizen of any age and his or her spouse of any age, or an unmarried United States citizen who is at least 24 years old at the time he or she files the advanced processing application and at least 25 years old at the time he or she files the orphan petition. The spouse of the United States citizen may be a citizen or an alien. An alien spouse must be in lawful immigration status if residing in the United States.

Separation from both parents means the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

Sole parent means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate. In all cases, a sole parent must be *incapable of providing proper care* as that term is defined in this section.

Surviving parent means the child's living parent when the child's other parent is dead, and the child has not acquired another parent within the meaning of section 101(b)(2) of the Act. In all cases, a surviving parent must be *incapable of providing proper care* as that term is defined in this section.

(c) *Supporting documentation for an advanced processing application.* The prospective adoptive parents may file an advanced processing application before an orphan is identified in order to secure the necessary clearance to file the orphan petition. Any document not in the English language must be accompanied by a certified English translation.

(1) *Required supporting documentation that must accompany the advanced processing application.* The following supporting documentation must accompany an advanced processing application at the time of filing:

(i) Evidence of the petitioner's United States citizenship as set forth in § 204.1(g) and, if the petitioner is married and the married couple is residing in the United States, evidence of the spouse's United States citizenship or lawful immigration status;

(ii) A copy of the petitioner's marriage certificate to his or her spouse, if the petitioner is currently married;

(iii) Evidence of legal termination of all previous marriages for the petitioner and/or spouse, if previously married;

(iv) Two sets of completed and fully-classifiable fingerprint cards for each member of the married prospective adoptive couple or the unmarried prospective adoptive parent. The fingerprints must be submitted on Form FD–258 (Applicant Fingerprint Card) with the office code of the Service office having jurisdiction over the petitioner's place of residence preprinted in the box marked "ORI"; and

(v) Evidence of compliance with preadoption requirements, if any, of the State of the orphan's proposed residence in cases where it is known that there will be no adoption abroad, or that both members of the married prospective adoptive couple or the unmarried prospective adoptive parent will not personally see the child prior to, or during, the adoption abroad, and/or that the adoption abroad will not be full and final. Any preadoption requirements which cannot be met at the time the advanced processing application is filed because of operation of State law must be noted and explained when the application is filed. Preadoption requirements must be met at the time the petition is filed, except for those which cannot be met until the orphan arrives in the United States; and

(vi) Two sets of fingerprint cards which conform to the requirements in paragraph (c)(1)(iv) of this section for each additional adult member of the prospective adoptive parents' household. The Service may waive this requirement when it determines that such an adult is physically unable to be fingerprinted because of age or medical condition.

(2) *Home study.* The home study must comply with the requirements contained in paragraph (e) of this section. If the home study is not submitted when the advanced processing application is filed, it must be submitted within one year of the filing date of the advanced processing application, or the application will be denied pursuant to paragraph (h)(5) of this section.

(d) *Supporting documentation for a petition for an identified orphan.* Any document not in the English language must be accompanied by a certified English translation. If an orphan has been identified for adoption and the advanced processing application is pending, the prospective adoptive parents may file the orphan petition at the Service office where the application is pending. The prospective adoptive parents who have an approved advanced processing application must file an orphan petition and all supporting documents within eighteen months of the date of the approval of the advanced processing application. If the prospective adoptive parents fail to file the orphan petition within the eighteen-month period, the advanced processing application shall be deemed abandoned pursuant to paragraph (h)(7) of this section. If the prospective adoptive parents file the orphan petition after the eighteen-month period, the petition shall be denied pursuant to paragraph (h)(13) of this section. Prospective adoptive parents who do not have an advanced processing application approved or pending may file the application and petition concurrently on one Form I–600 if they have identified an orphan for adoption. An orphan petition must be accompanied by full documentation as follows:

(1) *Filing an orphan petition after the advanced processing application has been approved.* The following supporting documentation must accompany an orphan petition filed after approval of the advanced processing application:

(i) Evidence of approval of the advanced processing application;

(ii) The orphan's birth certificate, or if such a certificate is not available, an explanation together with other proof of identity and age;

(iii) Evidence that the child is an orphan as appropriate to the case:

(A) Evidence that the orphan has been abandoned or deserted by, separated or lost from both parents, or that both parents have disappeared as those terms are defined in paragraph (b) of this section; or

(B) The death certificate(s) of the orphan's parent(s), if applicable;

(C) If the orphan has only a sole or surviving parent, as defined in paragraph (b) of this section, evidence of this fact and evidence that the sole or surviving parent is incapable of providing for the orphan's care and has irrevocably released the orphan for emigration and adoption; and

(iv) Evidence of adoption abroad or that the prospective adoptive parents have, or a person or entity working on their behalf has, custody of the orphan for emigration and adoption in accordance with the laws of the foreign-sending country:

(A) A legible, certified copy of the adoption decree, if the orphan has been the subject of a full and final adoption abroad, and evidence that the unmarried petitioner, or married petitioner and spouse, saw the orphan prior to or during the adoption proceeding abroad; or

(B) If the orphan is to be adopted in the United States because there was no adoption abroad, or the unmarried petitioner, or married petitioner and spouse, did not personally see the orphan prior to or during the adoption proceeding abroad, and/or the adoption abroad was not full and final:

(*1*) Evidence that the prospective adoptive parents have, or a person or entity working on their behalf has, secured custody of the orphan in accordance with the laws of the foreign-sending country;

(*2*) An irrevocable release of the orphan for emigration and adoption from the person, organization, or competent authority which had the immediately previous legal custody or control over the orphan if the adoption was not full and final under the laws of the foreign-sending country;

(*3*) Evidence of compliance with all preadoption requirements, if any, of the State of the orphan's proposed residence. (Any such requirements that cannot be complied with prior to the orphan's arrival in the United States because of State law must be noted and explained); and

(*4*) Evidence that the State of the orphan's proposed residence allows readoption or provides for judicial recognition of the adoption abroad if there was an adoption abroad which does not meet statutory requirements pursuant to section 101(b)(1)(F) of the Act, because the unmarried petitioner, or married petitioner *and* spouse, did not personally see the orphan prior to or during the adoption proceeding abroad, and/or the adoption abroad was not full and final.

(2) *Filing an orphan petition while the advanced processing application is pending.* An orphan petition filed while an advanced processing application is pending must be filed at the Service office where the application is pending. The following supporting documentation must accompany an orphan petition filed while the advanced processing application is pending:

(i) A photocopy of the fee receipt relating to the advanced processing application, or if not available, other evidence that the advanced processing application has been filed, such as a statement including the date when the application was filed;

(ii) The home study, if not already submitted; and

(iii) The supporting documentation for an orphan petition required in paragraph (d)(1) of this section, except for paragraph (d)(1)(i) of this section.

(3) *Filing an orphan petition concurrently with the advanced*

processing application. A petition filed concurrently with the advanced processing application must be submitted on Form I–600, completed and signed in accordance with the form's instructions. (Under this concurrent procedure, Form I–600 serves as both the Forms I–600A and I–600, and the prospective adoptive parents should not file a separate Form I–600A). The following supporting documentation must accompany a petition filed concurrently with the application under this provision:

(i) The supporting documentation for an advanced processing application required in paragraph (c) of this section; and

(ii) The supporting documentation for an orphan petition required in paragraph (d)(1) of this section, except for paragraph (d)(1)(i) of this section.

(e) *Home study requirements.* For immigration purposes, a home study is a process for screening and preparing prospective adoptive parents who are interested in adopting an orphan from another country. The home study should be tailored to the particular situation of the prospective adoptive parents: for example, a family which previously has adopted children will require different preparation than a family that has no adopted children. If there are any additional adult members of the prospective adoptive parents' household, the home study must address this fact. The home study preparer must interview any additional adult member of the prospective adoptive parents' household and assess him or her in light of the requirements of paragraphs (e)(1), (e)(2)(i), (iii), (iv), and (v) of this section. A home study must be conducted by a home study preparer, as defined in paragraph (b) of this section. The home study, or the most recent update to the home study, must not be more than six months old at the time the home study is submitted to the Service. Only one copy of the home study must be submitted to the Service. Ordinarily, a home study (or a home study and update as discussed above) will not have to be updated after it has been submitted to the Service unless there is a significant change in the household of the prospective adoptive parents such as a change in residence, marital status, criminal history, financial resources, and/or the addition of one or more children or other dependents to the family prior to the orphan's immigration into the United States. In addition to meeting any State, professional, or agency requirements, a home study must include the following:

(1) *Personal interview(s) and home visit(s).* The home study preparer must conduct at least one interview in person, and at least one home visit, with the prospective adoptive couple or the unmarried prospective adoptive parent. Each additional adult member of the prospective adoptive parents' household must also be interviewed in person at least once. The home study report must state the number of such interviews and visits, and must specify any other contacts with the prospective adoptive parents and any adult member of the prospective adoptive parents' household.

(2) *Assessment of the capabilities of the prospective adoptive parents to properly parent the orphan.* The home study must include a discussion of the following areas:

(i) *Assessment of the physical, mental, and emotional capabilities of the prospective adoptive parents to properly parent the orphan.* The home study preparer must make an initial assessment of how the physical, mental, and emotional health of the prospective adoptive parents would affect their ability to properly care for the prospective orphan. If the home study preparer determines that there are areas beyond his or her expertise which need to be addressed, he or she shall refer the prospective adoptive parents to an appropriate licensed professional, such as a physician, psychiatrist, clinical psychologist, or clinical social worker for an evaluation. Some problems may not necessarily disqualify applicants. For example, certain physical limitations may indicate which categories of children may be most appropriately placed with certain prospective adoptive parents. Certain mental and emotional health problems may be successfully treated. The home study must include the home study preparer's assessment of any such potential problem areas, a copy of any outside evaluation(s), and the home study preparer's recommended restrictions, if any, on the characteristics of the child to be placed in the home. Additionally, the home study preparer must apply the requirements of this paragraph to each adult member of the prospective adoptive parents' household.

(ii) *Assessment of the finances of the prospective adoptive parents.* The financial assessment must include a description of the income, financial resources, debts, and expenses of the prospective adoptive parents. A statement concerning the evidence that was considered to verify the source and amount of income and financial resources must be included. Any income designated for the support of one or more children in the care and custody of the prospective adoptive parents, such as funds for foster care, or any income designated for the support of another member of the household must not be counted towards the financial resources available for the support of a prospective orphan. The Service will not routinely require a detailed financial statement or supporting financial documents. However, should the need arise, the Service reserves the right to ask for such detailed documentation.

(ii) *History of abuse and/or violence.*

(A) *Screening for abuse and violence.*

(*1*) *Checking available child abuse registries.* The home study preparer must ensure that a check of each prospective adoptive parent and each adult member of the prospective adoptive parents' household has been made with available child abuse registries and must include in the home study the results of the checks including, if applicable, a report that no record was found to exist. Depending on the access allowed by the state of proposed residence of the orphan, the home study preparer must take one of the following courses of action:

(*i*) If the home study preparer is allowed access to information from the child abuse registries, he or she shall make the appropriate checks for each of the prospective adoptive parents and for each adult member of the prospective adoptive parents' household;

(*ii*) If the State requires the home study preparer to secure permission from each of the prospective adoptive parents and for each adult member of the prospective adoptive parents' household before gaining access to information in such registries, the home study preparer must secure such permission from those individuals, and make the appropriate checks;

(*iii*) If the State will only release information directly to each of the prospective adoptive parents and directly to the adult member of the prospective adoptive parents' household, those individuals must secure such information and provide it to the home study preparer. The home study preparer must include the results of these checks in the home study;

(*iv*) If the State will not release information to either the home study preparer or the prospective adoptive parents and the adult members of the prospective adoptive parents' household, this must be noted in the home study; or

(*v*) If the State does not have a child abuse registry, this must be noted in the home study.

(2) *Inquiring about abuse and violence.* The home study preparer must ask each prospective adoptive parent whether he or she has a history of substance abuse, sexual or child abuse, or domestic violence, even if it did not result in an arrest or conviction. The home study preparer must include each prospective adoptive parent's response to the questions regarding abuse and violence. Additionally, the home study preparer must apply the requirements of this paragraph to each adult member of the prospective adoptive parents' household.

(B) *Information concerning history of abuse and/or violence.* If the petitioner and/or spouse, if married, disclose(s) any history of abuse and/or violence as set forth in paragraph (e)(2)(iii)(A) of this section, or if, in the absence of such disclosure, the home study preparer becomes aware of any of the foregoing, the home study report must contain an evaluation of the suitability of the home for adoptive placement of an orphan in light of this history. This evaluation must include information concerning all arrests or convictions or history of substance abuse, sexual or child abuse, and/or domestic violence and the date of each occurrence. A certified copy of the documentation showing the final disposition of each incident, which resulted in arrest, indictment, conviction, and/or any other judicial or administrative action, must accompany the home study. Additionally, the prospective adoptive parent must submit a signed statement giving details including mitigating circumstances, if any, about each incident. The home study preparer must apply the requirements of this paragraph to each adult member of the prospective adoptive parents' household.

(C) *Evidence of rehabilitation.* If a prospective adoptive parent has a history of substance abuse, sexual or child abuse, and/or domestic violence, the home study preparer may, nevertheless, make a favorable finding if the prospective adoptive parent has demonstrated appropriate rehabilitation. In such a case, a discussion of such rehabilitation which demonstrates that the prospective adoptive parent is and will be able to provide proper care for the orphan must be included in the home study. Evidence of rehabilitation may include an evaluation of the seriousness of the arrest(s), conviction(s), or history of abuse, the number of such incidents, the length of time since the last incident, and any type of counseling or rehabilitation programs which have been successfully completed. Evidence of rehabilitation may also be provided by an appropriate licensed professional, such as a psychiatrist, clinical psychologist, or clinical social worker. The home study report must include all facts and circumstances which the home study preparer has considered, as well as the preparer's reasons for a favorable decision regarding the prospective adoptive parent. Additionally, if any adult member of the prospective adoptive parents' household has a history of substance abuse, sexual or child abuse, and/or domestic violence, the home study preparer must apply the requirements of this paragraph to that adult member of the prospective adoptive parents' household.

(D) *Failure to disclose or cooperate.* Failure to disclose an arrest, conviction, or history of substance abuse, sexual or child abuse, and/or domestic violence by the prospective adoptive parents or an adult member of the prospective adoptive parents' household to the home study preparer and to the Service, may result in the denial of the advanced processing application or, if applicable, the application and orphan petition, pursuant to paragraph (h)(4) of this section. Failure by the prospective adoptive parents or an adult member of the prospective adoptive parents' household to cooperate in having available child abuse registries in accordance with paragraphs (e)(2)(iii)(A)(*1*) and (e)(2)(iii)(A)(*1*)(*i*) through (e)(2)(iii)(A)(*1*)(*iii*) of this section will result in the denial of the advanced processing application or, if applicable, the application and orphan petition, pursuant to paragraph (h)(4) of this section.

(iv) *Previous rejection for adoption or prior unfavorable home study.* The home study preparer must ask each prospective adoptive parent whether he or she previously has been rejected as a prospective adoptive parent or has been the subject of an unfavorable home study, and must include each prospective adoptive parent's response to this question in the home study report. If a prospective adoptive parent previously has been rejected or found to be unsuitable, the reasons for such a finding must be set forth as well as the reason(s) why he or she is not being favorably considered as a prospective adoptive parent. A copy of each previous rejection and/or unfavorable home study must be attached to the favorable home study. Additionally, the home study preparer must apply the requirements of this paragraph to each adult member of the prospective adoptive parents' household.

(v) *Criminal history.* The prospective adoptive parents and the adult members of the prospective adoptive parents' household are expected to disclose to the home study preparer and the Service any history of arrest and/or conviction early in the advanced processing procedure. Failure to do so may result in denial pursuant to paragraph (h)(4) of this section or in delays. Early disclosure provides the prospective adoptive parents with the best opportunity to gather and present evidence, and it gives the home study preparer and the Service the opportunity to properly evaluate the criminal record in light of such evidence. When such information is not presented early in the process, it comes to light when the fingerprint checks are received by the Service. By that time, the prospective adoptive parents are usually well into preadoption proceedings of identifying a child and may even have firm travel plans. At times, the travel plans have to be rescheduled while the issues raised by the criminal record are addressed. It is in the best interests of all parties to have any criminal records disclosed and resolved early in the process.

(3) *Living accommodations.* The home study must include a detailed description of the living accommodations where the prospective adoptive parents currently reside. If the prospective adoptive parents are planning to move, the home study must include a description of the living accommodations where the child will reside with the prospective adoptive parents, if known. If the prospective adoptive parents are residing abroad at the time of the home study, the home study must include a description of the living accommodations where the child will reside in the United States with the prospective adoptive parents, if known. Each description must include an assessment of the suitability of accommodations for a child and a determination whether such space meets applicable State requirements, if any.

(4) *Handicapped or special needs orphan.* A home study conducted in conjunction with the proposed adoption of a special needs or handicapped orphan must contain a discussion of the prospective adoptive parents' preparation, willingness, and ability to provide proper care for such an orphan.

(5) *Summary of the counseling given and plans for post-placement counseling.* The home study must include a summary of the counseling given to prepare the prospective adoptive parents for an international adoption and any plans for post-placement counseling. Such preadoption counseling must include a discussion of the processing, expenses,

difficulties, and delays associated with international adoptions.

(6) *Specific approval of the prospective adoptive parents for adoption.* If the home study preparer's findings are favorable, the home study must contain his or her specific approval of the prospective adoptive parents for adoption and a discussion of the reasons for such approval. The home study must include the number of orphans which the prospective adoptive parents may adopt. The home study must state whether there are any specific restrictions to the adoption such as nationality, age, or gender of the orphan. If the home study preparer has approved the prospective parents for a handicapped or special needs adoption, this fact must be clearly stated.

(7) *Home study preparer's certification and statement of authority to conduct home studies.* The home study must include a statement in which the home study preparer certifies that he or she is licensed or otherwise authorized by the State of the orphan's proposed residence to research and prepare home studies. In the case of an orphan whose adoption was finalized abroad and whose adoptive parents reside abroad, the home study preparer must certify that he or she is licensed or otherwise authorized to conduct home studies under the law of any State of the United States, or authorized by the adoption authorities of the foreign country to conduct home studies under the laws of the foreign country. In every case, this statement must cite the State or country under whose authority the home study preparer is licensed or authorized, the specific law or regulation authorizing the preparer to conduct home studies, the license number, if any, and the expiration date, if any, of this authorization or license.

(8) *Review of home study.* If the prospective adoptive parents reside in a State which requires the State to review the home study, such a review must occur and be documented before the home study is submitted to the Service. If the prospective adoptive parents reside abroad, an appropriate public or private adoption agency licensed, or otherwise authorized, by any State of the United States to place children for adoption, must review and favorably recommend the home study before it is submitted to the Service.

(9) *Home study updates and amendments.*

(i) *Updates.* If the home study is more than six months old at the time it would be submitted to the Service, the prospective adoptive parents must ensure that it is updated by a home study preparer before it is submitted to the Service. Each update must include screening in accordance with paragraphs (e)(2)(iii) (A) and (B) of this section.

(ii) *Amendments.* If there have been any significant changes, such as a change in the residence of the prospective adoptive parents, marital status, criminal history, financial resources, and/or the addition of one or more children or other dependents to the family, the prospective adoptive parents must ensure that the home study is amended by a home study preparer to reflect any such changes. If the orphan's proposed State of residence has changed, the home study amendment must contain a recommendation in accordance with paragraph (e)(8) of this section, if required by State law. Any preadoption requirements of the new State must be complied with in the case of an orphan coming to the United States to be adopted.

(10) *"Grandfather" provision for home study.* A home study properly completed in conformance with the regulations in force prior to September 30, 1994, shall be considered acceptable if submitted to the Service within 90 days of September 30, 1994. Any such home study accepted under this "grandfather" provision must include screening in accordance with paragraphs (e)(2)(iii) (A) and (B) of this section. Additionally, any such home study submitted under this "grandfather" provision which is more than six months old at the time of its submission must be amended or updated pursuant to the requirements of paragraph (e)(9) of this section.

(f) *State preadoption requirements.*

(1) *General.* Many States have preadoption requirements which, under the Act, must be complied with in every case in which a child is coming to such a State as an orphan to be adopted in the United States.

(2) *Child coming to be adopted in the United States.* An orphan is coming to be adopted in the United States if he or she will not be or has not been adopted abroad, or if the unmarried petitioner or both the married petitioner and spouse did not or will not personally see the orphan prior to or during the adoption proceeding abroad, and/or if the adoption abroad will not be, or was not, full and final. If the prospective adoptive parents reside in a State with preadoption requirements and they plan to have the child come to the United States for adoption, they must submit evidence of compliance with the State's preadoption requirements to the Service. Any preadoption requirements which by operation of State law cannot be met before filing the advanced processing application must be noted. Such requirements must be met prior to filing the petition, except for those which cannot be met by operation of State law until the orphan is physically in the United States. Those requirements which cannot be met until the orphan is physically present in the United States must be noted.

(3) *Special circumstances.* If both members of the prospective adoptive couple or the unmarried prospective adoptive parent intend to travel abroad to see the child prior to or during the adoption, the Act permits the application and/or petition, if otherwise approvable, to be approved without preadoption requirements having been met. However, if plans change and both members of the prospective adoptive couple or the unmarried prospective adoptive parent fail to see the child prior to or during the adoption, then preadoption requirements must be met before the immigrant visa can be issued, except for those preadoption requirements that cannot be met until the child is physically in the United States because of operation of State law.

(4) *Evidence of compliance.* In every case where compliance with preadoption requirements is required, the evidence of compliance must be in accordance with applicable State law, regulation, and procedure.

(g) *Where to file.*

(1) *Where to file an advanced processing application.* An advanced processing application must be filed with the Service as follows:

(i) *Prospective adoptive parents residing in the United States.* If the prospective adoptive parents reside in the United States, the application must be filed with the Service office having jurisdiction over their place of residence.

(ii) *Prospective adoptive parents residing in Canada.* If the prospective adoptive parents reside in Canada, the application must be filed with the stateside Service office having jurisdiction over the proposed place of residence of the prospective adoptive parents in the United States.

(iii) *Prospective adoptive parents residing in a foreign country other than Canada.* If the prospective adoptive parents reside outside of the United States or Canada, the application may be filed with the overseas Service office having jurisdiction over the current place of residence pursuant to § 100.4(b) of this chapter, or with the stateside Service office having jurisdiction over the proposed place of residence of the prospective adoptive parents in the United States.

(2) *Where to file an orphan petition when the advanced processing application has been approved.* An orphan petition must be filed with the appropriate Service office or immigrant visa-issuing post of the Department of State as follows:

(i) *Prospective adoptive parents residing in the United States who do not travel abroad to locate and/or adopt an orphan.* If the prospective adoptive parents reside in the United States and do not travel abroad to locate and/or adopt an orphan, the petition must be filed with the Service office having jurisdiction over the place of residence of the prospective adoptive parents.

(ii) *Prospective adoptive parents residing in the United States, with one or both members of the prospective adoptive couple, or the unmarried prospective adoptive parent, traveling abroad to locate and/or adopt an orphan.* If the prospective adoptive parents reside in the United States, and one or both members of the prospective adoptive couple, or the unmarried prospective adoptive parent, travel abroad to locate and/or adopt an orphan, the petition may be filed with the stateside Service office having jurisdiction over the place of residence of the prospective adoptive parents in the United States or at the overseas site. The petitioner may file the orphan petition at the overseas site only while he or she is physically present within the jurisdiction of the overseas site. If only one member of a married couple, which includes an alien, travels abroad to file the petition, it must be the United States citizen who travels abroad so that the overseas site will have jurisdiction over the petition.

(iii) *Prospective adoptive parents residing outside the United States.* Prospective adoptive parents residing outside of the United States may file the petition with the overseas site, or with the stateside Service office having jurisdiction over the proposed place of residence of the prospective adoptive parents in the United States.

(3) *Where to file an orphan petition when the advanced processing application is pending.* When the advanced processing application is pending, the petition must be filed at the Service office at which the application is pending.

(4) *Where to file an orphan petition concurrently with the advanced processing application.* When the petition is filed concurrently with the advanced processing application, it must be filed in accordance with the instruction for filing an advanced processing application in paragraphs (g)(1)(i) through (g)(1)(iii) of this section.

(h) *Adjudication and decision.*

(1) *"Grandfather" provision for advanced processing application and/or orphan petition.* All applications and petitions filed under prior regulations which are filed before and are still pending on September 30, 1994, shall be processed and adjudicated under the prior regulations.

(2) *Director's responsibility to make an independent decision in an advanced processing application.* No advanced processing application shall be approved unless the director is satisfied that proper care will be provided for the orphan. If the director has reason to believe that a favorable home study, or update, or both are based on an inadequate or erroneous evaluation of all the facts, he or she shall attempt to resolve the issue with the home study preparer, the agency making the recommendation pursuant to paragraph (e)(8) of this section, if any, and the prospective adoptive parents. If such consultations are unsatisfactory, the director may request a review and opinion from the appropriate State Government authorities.

(3) *Advanced processing application approved.* If the advanced processing application is approved, the prospective adoptive parents shall be advised in writing. The application and supporting documents shall be forwarded to the overseas site where the orphan resides. Additionally, if the petitioner advises the director that he or she intends to travel abroad to file the petition, telegraphic notification shall be sent overseas as detailed in paragraph (j)(1) of this section. The approved application shall be valid for eighteen months from its approval date. During this time, the prospective adoptive parents may file an orphan petition for one orphan without fee. If approved in the home study for more than one orphan, the prospective adoptive parents may file a petition for each of the additional children, to the maximum number approved. If the orphans are siblings, no additional fee is required. If the orphans are not siblings, an additional fee is required for each orphan beyond the first orphan. Approval of an advanced processing application does not guarantee that the orphan petition will be approved.

(4) *Advanced processing application denied for failure to disclose history of abuse and/or violence, or for failure to disclose a criminal history, or for failure to cooperate in checking child abuse registries.* Failure to disclose an arrest, conviction, or history of substance abuse, sexual or child abuse, and/or domestic violence, or a criminal history to the home study preparer and to the Service in accordance with paragraphs (e)(2)(iii) (A) and (B) and (e)(2)(v) of this section may result in the denial of the advanced processing application, or if applicable, the application and orphan petition filed concurrently. Failure by the prospective adoptive parents or an adult member of the prospective adoptive parents' household to cooperate in having available child abuse registries checked in accordance with paragraphs (e)(2)(iii)(A)(*1*) and (e)(2)(iii)(A)(*1*)(*i*) through (e)(2)(iii)(A)(*1*)(*iii*) of this section will result in the denial of the advanced processing application or, if applicable, the application and orphan petition filed concurrently. Any new application and/or petition filed within a year of such denial will also be denied.

(5) *Advanced processing denied for failure to submit home study.* If the home study is not submitted within one year of the filing date of the advanced processing application, the application shall be denied. This action shall be without prejudice to a new filing at any time with fee.

(6) *Advanced processing application otherwise denied.* If the director finds that the prospective adoptive parents have otherwise failed to establish eligibility, the applicable provisions of 8 CFR part 103 regarding a letter of intent to deny, if appropriate, and denial and notification of appeal rights shall govern.

(7) *Advanced processing application deemed abandoned for failure to file orphan petition within eighteen months of application's approval date.* If an orphan petition is not properly filed within eighteen months of the approval date of the advanced processing application, the application shall be deemed abandoned. Supporting documentation shall be returned to the prospective adoptive parents, except for documentation submitted by a third party which shall be returned to the third party, and documentation relating to the fingerprint checks. The director shall dispose of documentation relating to fingerprint checks in accordance with current policy. Such abandonment shall be without prejudice to a new filing at any time with fee.

(8) *Orphan petition approved by a stateside Service office.* If the orphan petition is approved by a stateside Service office, the prospective adoptive parents shall be advised in writing, telegraphic notification shall be sent to the immigrant visa-issuing post pursuant to paragraph (j)(3) of this section, and the petition and supporting documents shall be forwarded to the Department of State.

(9) *Orphan petition approved by an overseas Service office.* If the orphan petition is approved by an overseas Service office located in the country of the orphan's residence, the prospective adoptive parents shall be advised in writing, and the petition and supporting documents shall be forwarded to the immigrant visa-issuing post having jurisdiction for immigrant visa processing.

(10) *Orphan petition approved at an immigrant visa-issuing post.* If the orphan petition is approved at an immigrant visa-issuing post, the post shall initiate immigrant visa processing.

(11) *Orphan petition found to be "not readily approvable" by a consular officer.* If the consular officer adjudicating the orphan petition finds that it is "not readily approvable," he or she shall notify the prospective adoptive parents in his or her consular district and forward the petition, the supporting documents, the findings of the I–604 investigation conducted pursuant to paragraph (k)(1) of this section, and any other relating documentation to the overseas Service office having jurisdiction pursuant to § 100.4(b) of this chapter.

(12) *Orphan petition denied: petitioner fails to establish that the child is an orphan.* If the director finds that the petitioner has failed to establish that the child is an orphan who is eligible for the benefits sought, the applicable provisions of 8 CFR part 103 regarding a letter of intent to deny and notification of appeal rights shall govern.

(13) *Orphan petition denied: petitioner files orphan petition more than eighteen months after the approval of the advanced processing application.* If the petitioner files the orphan petition more than eighteen months after the approval date of the advanced processing application, the petition shall be denied. This action shall be without prejudice to a new filing at any time with fee.

(14) *Revocation.* The approval of an advanced processing application or an orphan petition shall be automatically revoked in accordance with § 205.1 of this chapter, if an applicable reason exists. The approval of an advanced processing application or an orphan petition shall be revoked if the director becomes aware of information that would have resulted in denial had it been known at the time of adjudication. Such a revocation or any other revocation on notice shall be made in accordance with § 205.2 of this chapter.

(i) *Child-buying as a ground for denial.* An orphan petition must be denied under this section if the prospective adoptive parents or adoptive parent(s), or a person or entity working on their behalf, have given or will given money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity as payment for the child or as an inducement to release the child. Nothing in this paragraph shall be regarded as precluding reasonable payment for necessary activities such as administrative, court, legal, translation, and/or medical services related to the adoption proceedings.

(j) *Telegraphic notifications.*

(1) *Telegraphic notification of approval of advanced processing application.* Unless conditions preclude normal telegraphic transmissions, whenever an advanced processing application is approved in the United States, the director shall send telegraphic notification of the approval to the overseas site if a prospective adoptive parent advises the director that the petitioner intends to travel abroad and file the orphan petition abroad.

(2) *Requesting a change in visa-issuing posts.* If a prospective adoptive parent is in the United States, he or she may request the director to transfer notification of the approved advanced processing application to another visa-issuing post. Such a request shall be made on Form I–824 (Application for Action on an Approved Application or Petition) with the appropriate fee. The director shall send a Visas 37 telegram to both the previously and the newly designated posts. The following shall be inserted after the last numbered standard entry. "To: [insert name of previously designated visa-issuing post or overseas Service office]. Pursuant to the petitioner's request, the Visas 37 cable previously sent to your post/office in this matter is hereby invalidated. The approval is being transferred to the other post/office addressed in this telegram. Please forward the approved advanced processing application to that destination." Prior to sending such a telegram, the director must ensure that the change in posts does not alter any conditions of the approval.

(3) *Telegraphic notification of approval of an orphan petition.* Unless conditions preclude normal telegraphic transmissions, whenever a petition is approved by a stateside Service office, the director shall send telegraphic notification of the approval to the immigrant visa-issuing post.

(k) *Other considerations.*

(1) *I–604 investigations.* An I–604 investigation must be completed in every orphan case. The investigation must be completed by a consular officer except when the petition is properly filed at a Service office overseas, in which case it must be completed by a Service officer. An I–604 investigation shall be completed before a petition is adjudicated abroad. When a petition is adjudicated by a stateside Service office, the I–604 investigation is normally completed after the case has been forwarded to visa-issuing post abroad. However, in a case where the director of a stateside Service office adjudicating the petition has articulable concerns that can only be resolved through the I–604 investigation, he or she shall request the investigation prior to adjudication. In any case in which there are significant differences between the facts presented in the approved advanced processing application and/or orphan petition and the facts uncovered by the I–604 investigation, the overseas site may consult directly with the appropriate Service office. In any instance where an I–604 investigation reveals negative information sufficient to sustain a denial or revocation, the investigation report, supporting documentation, and petition shall be forwarded to the appropriate Service office for action. Depending on the circumstances surrounding the case, the I–604 investigation shall include, but shall not necessarily be limited to, document checks, telephonic checks, interview(s) with the natural parent(s), and/or a field investigation.

(2) *Authority of consular officers.* An American consular officer is authorized to approve an orphan petition if the Service has made a favorable determination on the related advanced processing application, and the petitioner, who has traveled abroad to a country with no Service office in order to locate or adopt an orphan, has properly filed the petition, and the petition is approvable. A consular officer, however, shall refer any petition which is "not clearly approvable" for a decision by the Service office having jurisdiction pursuant to § 100.4(b) of this chapter. The consular officer's adjudication includes all aspects of eligibility for classification as an orphan under section 101(b)(1)(F) of the Act other than the issue of the ability of the prospective adoptive parents to furnish proper care to the orphan. However, if the consular officer has a well-founded and substantive reason to believe that the advanced processing approval was obtained on the basis of fraud or misrepresentation, or has knowledge of a change in material fact subsequent to the approval of the advanced processing application, he or she shall consult with the Service office having jurisdiction pursuant to § 100.4(b) of this chapter.

(3) *Child in the United States.* A child who is in parole status and who has not been adopted in the United States is eligible for the benefits of an orphan petition when all the requirements of sections 101(b)(1)(F) and 204 (d) and (e) of the Act have been met. A child in the United States either illegally or as a nonimmigrant, however, is ineligible for the benefits of an orphan petition.

(4) *Liaison.* Each director shall develop and maintain liaison with State Government adoption authorities having jurisdiction within his or her jurisdiction, including the administrator(s) of the Interstate Compact on the Placement of Children, and with other parties with interest in international adoptions. Such parties include, but are not necessarily limited to, adoption agencies, organizations representing adoption agencies, organizations representing adoptive parents, and adoption attorneys.

Dated: June 10, 1994.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 94–18367 Filed 7–29–94; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 73

RIN 3150–AE81

Protection Against Malevolent Use of Vehicles at Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its physical protection regulations for operating nuclear power reactors. The amendments modify the design basis threat for radiological sabotage to include use of a land vehicle by adversaries for transporting personnel and their hand-carried equipment to the proximity of vital areas and to include a land vehicle bomb. The amendments also require reactor licensees to install vehicle control measures, including vehicle barrier systems, to protect against the malevolent use of a land vehicle. The Commission believes this action is prudent based on an evaluation of an intrusion incident at the Three Mile Island (TMI) nuclear power station and a bombing of the World Trade Center. The objective of this final rule is to enhance reactor safety by protecting against the use of a vehicle to gain unauthorized proximity to vital areas. Further, the amendments will enhance reactor safety by protecting vital equipment from damage by detonation of a large explosive charge at the point of vehicle denial.

EFFECTIVE DATE: August 31, 1994.

FOR FURTHER INFORMATION CONTACT: Phillip F. McKee, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC, telephone (301) 504–2933.

SUPPLEMENTARY INFORMATION:

Background

On November 4, 1993 (58 FR 58804), the Commission published a proposed rule in the **Federal Register** for public comment that presented amendments to the physical protection requirements for operating commercial nuclear power reactors. The amendments proposed to modify the design basis threat for radiological sabotage to include use of a land vehicle by adversaries for transporting personnel, hand-carried equipment, and/or explosives. A total of 35 letters of public comment were received from respondents representing more than 160 individual comments. Comments received in association with a public meeting conducted by the NRC on May 10, 1993, on this same topic have also been analyzed as part of this final rulemaking. An additional 11 comments were received as a result of the meeting, representing an additional 38 individual comments. Written comments received from the Advisory Committee on Reactor Safeguards (ACRS) and public comments made at a February 10, 1994, meeting of the ACRS are also addressed under the following analysis. Copies of the public comments received on this proposed rule are available for inspection and copying for a fee at the NRC Public Document Room, 2120 L Street NW (Lower Level), Washington, DC.

Public Comment Analysis

General

Public comment on the rule was received from 25 licensees that operate commercial nuclear power reactors; two industry groups, the Nuclear Management and Resources Council (NUMARC) and the Nuclear Utility Backfitting and Reform Group (NUBARG); two public citizens and one citizen's group, Ohio Citizen's for Responsible Energy; two advocacy groups, the Nuclear Control Institute (NCI) and the Committee to Bridge the Gap; one State nuclear safety agency; and two vendors.

Additional comments were received as a result of an NRC-sponsored public meeting of May 10, 1993. Comments were received from eight private citizens (the letter from one enclosed a petition signed by 40 individuals); two utilities; and one public interest group, Ohio Citizens for Responsible Energy. The proposed rule indicated that comments regarding malevolent use of vehicles submitted in association with the meeting would be treated under this final rule and that duplicate comments need not be submitted. Many of these respondents recommended strengthening the design basis threat to cover the maximum credible threat and increasing the number of security force members at power reactor sites as the best method to counter a terrorist vehicle bomb attack. The aforementioned petition, submitted to the Chairman of the NRC, indicated, among other things, that Congress should strengthen safeguards at nuclear facilities and should legislate the use of Federal guards at NRC-licensed sites. Comments received from 2 utilities that operate commercial nuclear power reactors either indicated support for the then-developing NUMARC comments or were similar to comments received on the proposed rule.

A variety of general comments were received on the proposed rule and supporting documentation. Several strongly supported the rulemaking as proposed and expressed the view that rulemaking on this topic was the proper, proactive approach. A number of comments strongly supported a belief that vehicle intrusion and vehicle bomb threats exist. These comments refer to the Three Mile Island intrusion event and the World Trade Center bombing event as evidence of these threats. The NCI commented that the rule was long overdue. Some of those that supported the rule offered more detailed comments proposing further expansion of the design basis threat and placing more rigid controls on licensee actions to implement the rule.

NUMARC provided detailed comments on behalf of the industry. Fourteen utilities confirmed their support or agreement with NUMARC's comments. NUMARC commented that industry believes that it is important to deter unauthorized land vehicle penetration challenges to a licensee's protected area and that industry recognizes that facilities must be able to shut down safely in the unlikely event of the detonation of an explosive device outside the protected area. NUMARC considers these actions to be prudent for the protection of its employees, investment, and public confidence. NUMARC commented that because the NRC (as expressed in the proposed rule)

and NUMARC agree in principle, the issue should be addressed in an integrated manner using a reasonable and realistic approach without imposing unnecessary conservatism. The details of NUMARC's comments identified areas where they considered the proposed rule took too conservative an approach. NUMARC also expressed general concerns about the backfit justification for the rule and the schedule for implementation.

NUBARG, whose members include 15 nuclear utilities, provided comments that generally challenge the backfitting and regulatory analyses based on their concerns that the analyses did not provide a sufficient quantified basis for finding the requisite "substantial increase" in safety under the NRC's backfitting rule. Two of the comment letters provided by utilities confirmed their support or agreement with NUBARG's comments.

Several comments expressed the view that the proposed rule could not be substantiated based on the current threat. As support for this position, comments referred to conclusions reached by the NRC in denial of a 1991 petition for rulemaking to require licensees to protect against truck bombs. Other comments indicated that two isolated events (the Three Mile Island intrusion event and World Trade Center bombing) did not justify rulemaking, particularly in light of the fact that the Federal Bureau of Investigation (FBI), by their account, does not support the position that the threat of malevolent use of vehicles has increased and the NRC position is that no actual vehicle bomb threat against power reactors exists.

Several comments opposed the proposed rule because they considered that it did not provide a substantial increase in protection of public health and safety or common defense and security at a justifiable cost. Other comments indicated that the rule was extreme and unnecessarily burdensome with little if any safety benefit and that contingency plans for vehicle bombs currently in place adequately addressed the threat of malevolent use of vehicles.

The NRC staff presented the proposed rulemaking package to the Security Subcommittee of the Advisory Committee on Reactor Safeguards (ACRS) on November 3, 1993, and the full committee on November 4, 1993. The full committee was briefed on December 10, 1993, in a closed session, by the Director, Office of Nuclear Material Safety and Safeguards. Following these briefings, ACRS's December 10, 1993 letter to the Chairman raised concerns about the rulemaking, particularly the justification for the rule, the lack of a quantitative risk assessment to support it, and the expedited nature of the rulemaking. A minority of four members of the ACRS expressed a view that the proposed rule represents a prudent and effective step toward enhancing public health and safety. On February 10, 1994, the ACRS heard presentations on the rulemaking from the NUMARC, the NCI, one public citizen, and the NRC staff members. On April 7, 1994, the staff briefed the ACRS in a closed session regarding additional, quantitative evaluations that supported this rulemaking. Issues raised by the ACRS in their December 10, 1993, letter are encompassed by issues raised by the public and are addressed in the following responses.

Like the ACRS, NUMARC, NUBARG, and numerous utilities expressed concern that the safety benefit was not adequately justified or quantified. They challenged the validity of the regulatory and backfit analyses because of lack of quantification of the threat. They contended that the analyses contain no quantified risk data or safety goal evaluation to support the conclusion that the proposed regulations result in a substantial increase in public health and safety. Another comment, while acknowledging the potential difficulty in quantification of the threat, stated that the analyses were no more than "conclusionary" and fall short of demonstrating the requisite substantial increase in radiological safety.

The Commission notes that the use of probabilistic risk assessment (PRA) as a tool for estimating risk is sound when based on results from demonstrable, repeatable events and test data—for example, establishing the probability of failure and the mean time to failure for aircraft wing root structures due to metal fatigue or for valve failures due to water hammer or corrosion, etc. The NRC has examined the use of PRA to predict sabotage as an initiating event and concluded that to do so would not be credible or valid because terrorist attacks, by their very nature, may not be quantified. Past attempts to apply PRA techniques to acts of sabotage have resulted in similar findings. For example, in 1978, NUREG/CR-0400, the "Risk Assessment Review Group Report to the U.S. Nuclear Regulatory Commission" stated, "it was recognized that the probability of sabotage of a nuclear power plant cannot be estimated with any confidence." For this same reason, according to this report, consideration of risk of sabotage was deliberately omitted in the Reactor Safety Study (WASH-1400).

In the "Policy Statement on Safety Goals for the Operation of Nuclear Power Plants" published on March 14, 1983 (48 FR 10772), the Commission stated:

> The possible effects of sabotage or diversion of nuclear materials is not presently included in the safety goal. At present there is no basis on which to provide a measure of the risk of these matters. It is the Commission's intention that everything that is needed shall be done to keep such risks at their present, very low, level; and it is our expectation that efforts on this point will continue to be successful. With these exceptions it is our intent that the risk from all various initiating mechanisms be taken into account to the best of the capability of the current evaluation techniques.

In the 1983 Indian Point licensing hearings, the NRC staff testified that PRA is unable to predict the probability of sabotage as an initiating event. Also, in a June 11, 1991, petition to institute an individual plant examination program for threats beyond the design basis, the NCI stated a position similar to the NRC's by recognizing that PRA-type methods cannot be used to analyze for core damage frequency since one cannot quantify the likelihood of a terrorist attack.

The Commission continues to believe that arbitrary selection of numbers to "quantify" threat probability without demonstrable, actual, supporting event data would yield misleading results at best. Knowledgeable terrorism analysts recognize the danger and are unwilling to quantify the risk. Over the past several years, a number of National Intelligence Estimates have been produced addressing the likelihood of nuclear terrorism. The analyses and conclusions are not presented in terms of quantified probability but recognize the unpredictable nature of terrorist activity in terms of likelihood. The NRC continues to believe that, although in many cases considerations of probabilities can provide insights into the relative risk of an event, in some cases it is not possible, with current knowledge and methods, to usefully quantify the probability of a specific vulnerability threat.

The NRC notes that, although not quantified, its regulatory analysis recognizes the importance of the perception of the likelihood of an attempt to create radiological sabotage in assessing whether to redefine adequate protection. The NRC's assessment that there is no indication of an actual vehicle threat against the domestic commercial nuclear industry was an important consideration in concluding that neither the Three Mile Island intrusion nor the World Trade

Center bombing demonstrated a need to redefine adequate protection.

The NRC does not agree that quantifying the probability of an actual attack is necessary to a judgment of a substantial increase in overall protection of the public health and safety (a less stringent test of the justification for a rule change). Inherent in the NRC's current regulations is a policy decision that the threat, although not quantified, is likely in a range that warrants protection against a violent external assault as a matter of prudence.

The potential threat posed by malevolent use of vehicles as part of a violent external assault and the need to protect against it have been the subject of detailed consideration and reconsideration by the Commission for more than fifteen years. The original requirements for physical security at power reactor sites proposed in the mid-1970s included a requirement for barriers to prevent ready access to vital areas by ground vehicles. The Commission decided not to include the requirement at that time.

The Commission reexamined the vehicle issue in great detail in the 1980s. In 1986, the Commission concluded that, even though perimeter chain link fences would not prevent vehicle intrusion, the requirement for prompt response by guards armed with shoulder-fired weapons would limit actions of intruders. In reconsidering the risk from use of a vehicle to gain proximity to vital areas, the NRC's regulatory analysis does not suggest that the likelihood of a violent external assault has increased. Rather, the staff focussed its regulatory analysis on whether a vehicle could provide an advantage to an adversary with the characteristics of the design basis threat.

The NRC assessed lessons learned from the TMI intrusion and concluded that a vehicle could provide advantages to an adversary not previously considered. In SECY-86-101, "Design Basis Threat—Options for Consideration," March 31, 1986, the NRC concluded that, even though perimeter chain link fences would not prevent vehicle intrusion, the requirement for prompt response by guards armed with shoulder-fired weapons would limit actions of intruders. Accordingly, in 1986, the NRC concluded that the installation of vehicle barriers might not constitute a substantial overall increase in the protection of public health and safety. More recently, the NRC has analyzed the capability of existing licensee security measures to protect against a violent external assault that includes a vehicle as a mode of transportation. These new analyses support the NRC's conclusions in the regulatory analysis for the proposed rulemaking. The NRC believes that the vehicle intrusion issue alone warrants the installation of vehicle barriers at nuclear power plants.

In the 1980s, the NRC also consulted with other Federal agencies, including the National Security Council, regarding the use of vehicle bombs in the Middle East and their possible impact on the domestic threat situation. In June 1988, the NRC decided that it would not be necessary to change the design basis threat for radiological sabotage (10 CFR 73.1(a)(1)) nor to require long-range planning by power reactor licensees for permanent protection against land vehicle bombs. However, as a matter of prudence, it directed development of NRC and licensee contingency plans for dealing with a possible land vehicle bomb threat to power reactors, should one arise.

On June 11, 1991 (56 FR 26782), the Commission denied a petition for rulemaking to revise the design basis threat to include explosive-laden vehicles (PRN-73-9). In denying that petition, the NRC noted that the decision was based, in part, on the fact that only one truck bomb attack (1970) had occurred in the United States; there had been no other vehicle bomb attacks in the Western Hemisphere; there had been none outside areas of civil unrest; and there had been none directed against a nuclear activity. The vehicle bomb attack on the World Trade Center represented a significant change to the domestic threat environment that changed many of the points used in denying the petition and eroded the basis for concluding that vehicle bombs could be excluded from any consideration of the domestic threat environment. For the first time in the United States, a conspiracy with ties to Middle East extremists clearly demonstrated the capability and motivation to organize, plan, and successfully conduct a major vehicle bomb attack. Regardless of the motivations or connections of the conspirators, it is significant that the bombing was organized within the United States and implemented with materials obtained on the open market in the United States. Accordingly, the Commission believes that the threat characterized in the final rule is appropriate.

As a result of the World Trade Center bombing, the NRC believes that the construction of a vehicle bomb is more likely to develop without advance indications. The NRC does not believe that it can quantify the likelihood of vehicle bomb attack. However, it has performed a conditional probabilistic risk analysis for an existing power reactor site, assuming an attempt to damage a nuclear power plant with a design basis vehicle bomb placed at locations within the protected area that would create the greatest risk to public health and safety. The analysis indicated that the contribution to core damage frequency could be high.

Barriers installed to protect against vehicle intrusion into protected areas would also protect, to varying degrees, against vehicle bombs. The NRC believes that adjusting the location of barriers where necessary to ensure a capability of protecting vital equipment against a design basis vehicle bomb would provide an additional, substantial increase in the overall protection of the public health and safety. Further, the NRC believes that the incremental costs to licensees to analyze the degree of protection against a vehicle bomb and to make adjustments in vehicle control measures in limited cases are justified, particularly considering the provisions in the rule allowing licensees to propose alternative measures if a site-specific analysis indicates that the costs of fully meeting the rule's design goals and criteria are not justified by the added protection that would be provided. The NRC's additional deterministic evaluations and limited probabilistic assessments have supported the NRC's earlier findings that protecting against vehicle intrusion and a vehicle bomb would substantially increase the overall protection of public health and safety. The NRC has updated the regulatory analysis to include these evaluations.

Additional issues raised and the NRC response to these issues are provided in the sections listed below that follow:

I. Threat Considerations
- A. Coupling Vehicle Intrusion and Vehicle Bomb Threat
- B. Characteristics of Design Basis Vehicle/Explosive
- C. "Margin of Prudence"
- D. Design Basis Threat Re-Evaluation
- E. Applicability of 10 CFR 50.13
- F. "Threat" or "Alert" Program

II. Regulatory and Backfit Analyses
- A. Redundant Engineered Safeguards Systems
- B. Peer Review of Analyses
- C. Clarification

III. Rule Implementation
- A. Schedule
- B. NRC Review and Approval of Submittals
- C. Vehicle Barriers
- D. Passive Vehicle Barriers
- E. Active Vehicle Barriers
- F. Alternative Measures to Protect Against Explosives

IV. NRC Inspection

V. Miscellaneous
- A. Research Reactors

B. Independent Spent Fuel Storage Installations
C. Office of Management and Budget Supporting Statement

I. Threat Considerations

A. Coupling Vehicle Intrusion and Vehicle Bomb Threat

Comment. NUMARC and several utilities commented that the proposed rule unnecessarily linked vehicle intrusion with a vehicle bomb. NUMARC commented that the proposed rule contemplates that the intruding vehicle would be fully loaded with personnel, equipment, and a large explosive device. NUMARC also commented that any considerations of a vehicle bomb should be for a stationary vehicle. NUMARC stated that coupling the vehicle intrusion event and vehicle bomb event added unnecessary conservatism. For example, to protect against a moving vehicle, bomb barriers would, in some cases, need to be more substantial to stop penetration of vehicle. NUMARC proposed that the revised design basis threat should include either a land vehicle intrusion or a detonation of explosives outside the protected area, but not a combination of the two. Along this same line, one comment expressed the opinion that the proposed language implies the need to protect against a vehicle used for transport, not for breaching a barrier or for use as a truck bomb.

Another comment expressed a concern that a major defect in the rule is the lack of the assumption that the adversary could blast away a fence if a licensee were to choose to use, for example, cabling in the fence as the means to stop a vehicle. The respondent proposed that any barrier should be a heavy mass which would be resistant to destruction.

Response. The Commission agrees with the NUMARC comment that the proposed rule could be read to imply that licensees would be required to provide protection against an intrusion by adversaries using a vehicle for transportation coincident with a vehicle bomb. This was not the intent and the rule wording has been revised to clarify this point. Commission deliberations on the rule have considered use of the vehicle as transportation for an adversary and a vehicle bomb as separate threats to be protected against. Any coupling of adversary tactics associated with the rule was intended to allow for more efficient and cost effective protection against either a vehicle intrusion to gain rapid access to vital areas, as a single act, or against a vehicle bomb.

Meeting the requirements of the final rule will result in substantial protection from a vehicle bomb whether it is moving or stationary. The NRC's regulatory analysis indicated that, because of the short distances between vital areas and portions of some protected area boundaries, protection against a vehicle at those boundaries would be inconsistent with NUMARC's stated goal of being able to safely shut down a plant following the detonation of an explosive device outside the protected area.

Regarding the comment that the rule should include the assumption that adversaries may use devices to destroy less substantial barriers and then gain access, the Commission does not agree that this assumption should be included in the rule. The NRC assessment of the threat environment does not support this assumption. Further, use of such a technique by an adversary would tend to diminish one of the major advantages of use of a vehicle—the element of surprise.

B. Characteristics of Design Basis Vehicle/Explosive

Comment. NUMARC provided a detailed proposal for characteristics of a design basis vehicle that could be used to attempt penetration of a nuclear power plant protected area and a design basis bomb that could be used in an attempt to damage plant equipment. Other comments indicated that vehicle speed should take into consideration terrain and seasonal conditions and that the proposed vehicle explosive device size was excessive and not justified by historical experience, particularly that in the United States.

Response. The Commission notes that it has relied on analogous historical data when enumerating the attributes of a design basis threat because there has never been a terrorist attack on an NRC-licensed power reactor facility or a credible threat of an attack. This was the methodology used in formulating the original design basis threat statements in the late 1970s, and it was used in defining the proposed design basis vehicle threat. The design basis vehicle was defined after examining several hundred actual vehicle bombing attacks occurring worldwide during approximately the past decade. Historical data indicates that vehicle bombs, similar to the design basis vehicle, have been used in the past and their use can reasonably be expected to continue to occur in the future. The Commission has made some changes in the detailed characteristics of the design basis vehicle. The revised characteristics will require licensees to provide substantial protection against a moving vehicle bomb. In addition, the NRC's implementation guidance discusses how the design of barrier systems can account for site-specific limits on the speed that a vehicle could attain because of factors such as terrain.

Comment. One comment expressed confusion over reference to the design basis vehicle as a "4-wheel drive vehicle" in that this could imply that non 4-wheel drive vehicles would not have to be protected against. The comment recommended that the final rule language be changed to require protection against all land vehicles.

Response. The Commission disagrees that the term "4-wheel drive vehicle" needs clarification. It reasons that protection against intrusion by a 4-wheel drive vehicle encompasses protection against a land vehicle with less than 4-wheel drive.

Comment. Other comments noted that the regulatory language should be changed to remove reference to equipment and explosives capable of being hand-carried, as opposed to that which the vehicle could carry.

Response. As stated previously, this issue is being clarified by a revision of the design basis threat statement to separate the threat of intrusion versus vehicle bomb. In an intrusion event, the vehicle is obviously capable of transporting the equipment and explosives proposed to be hand-carried by an adversary. While the vehicle could carry more equipment than can be carried by the persons being transported, it is unlikely that this additional equipment would be of use to the adversaries. The vehicle is essentially a means of transport for the adversaries, and it is unlikely that once adversaries have left the vehicle they would be able to return to obtain additional equipment or explosives.

Comment. One utility provided specific questions regarding several assumptions associated with the vehicle bomb. These included whether:

The vehicle is under control by adversaries up to the point of detonation;

The vehicle bomb automatically detonates when the adversary loses control of the vehicle or after a pre-defined time period;

The vehicle is used in combination with a secondary external event, e.g., loss of offsite power; and,

Point of detonation, i.e., crash point or at a later point as vehicle rolls towards a facility.

Response. With respect to a vehicle bomb, for analysis purposes the device would be considered to detonate at the point where the vehicle impacted the

vehicle barrier system. Whether adversaries still have control of the vehicle or whether the detonation of the device is delayed should have little impact on the analysis of the effect of the explosive blast. Because the barrier system is intended to protect against vehicles gaining proximity to vital areas, the barrier system should not allow a vehicle to fully penetrate it and continue to roll towards a facility.

With respect to a secondary external event, power reactor licensees must protect against all capabilities and attributes described by the design basis threat for radiological sabotage. This would not include protection against other natural events, such as damage from a hurricane, coincident with a sabotage threat. However, with respect to loss of off-site power, licensees should consider its loss, if vital equipment is assumed damaged, in their analysis of the effects of a vehicle bomb. This consideration is compatible with the basic premise that equipment not designated and protected as vital is vulnerable to damage and is not available.

C. "Margin of Prudence"

Comment. NUMARC and several utilities commented on NRC's use of the term "margin of prudence" as the basis for support of the proposed rulemaking. NUMARC commented that it is inappropriate to use such an undefined concept as a basis for rulemaking. These comments indicated that NRC expansion into matters of prudence is unwarranted and would result in expansion of the NRC's sphere of regulatory influence beyond plant safety.

Response. Use of the term "margin of prudence" must be put in perspective as used by the NRC in this rulemaking. The NRC requires an established level of security at nuclear power reactor sites as a provision against possible security contingencies that might arise. The NRC has concluded that a satisfactory level of security is one that is designed and implemented to protect against a hypothetical threat (design basis threat) that contains certain adversary attributes. These attributes have been selected based on Commission analyses of actual terrorist attributes and on judgment. The term "margin of prudence" was used in recent Commission deliberations to suggest that the World Trade Center bombing and the Three Mile Island intrusion had caused a change in the domestic threat environment or in the NRC's understanding of the sabotage threat that was not satisfactorily addressed by the existing design basis threat. Further, the term was used to suggest that a modification of the design basis threat was necessary to reestablish a level of security commensurate with the nature of security contingencies that might arise. Its use was illustrative only of the relationship between an actual threat and the hypothetical design basis threat and the change in that relationship caused by the World Trade Center and Three Mile Island events. The NRC intended no wider or expanded use of the term.

D. Design Basis Threat Re-Evaluation

Comment. NUMARC and several utilities commented that the revision to the design basis threat to address malevolent use of vehicles should be addressed in an integrated manner so that rulemaking on this topic would not be impacted after completion of an ongoing, more comprehensive review of the design basis threat. Other comments expressed concerns about deficiencies in the design basis threat that need to be addressed. Deficiencies identified by these comments included: protection against more than one insider, protection against a larger number of external attackers, capability of attackers to operate as more than one team, and use of aquatic vehicles. One comment was made that ongoing considerations for reductions in the insider requirements should be part of the overall reconsideration of the design basis threat.

Response. The Commission notes that use of a vehicle by adversaries was addressed under Phase I of a re-evaluation of the design basis threat which the NRC began in the Spring of 1993. This phase of the re-evaluation has been completed. Other attributes associated with the design basis threat, such as those characterized in comments on the proposed rule, have been reviewed and considered as part of Phase II of the re-evaluation. NRC staff recommendations on this part of the re-evaluation were provided to the Commission in a classified paper on March 15, 1994.

E. Applicability of 10 CFR 50.13

Comment. NUMARC, NUBARG, and several utilities stated that the proposed change in the design basis threat to include malevolent use of a vehicle amounts to escalation of the threat to efforts by an enemy of the United States. The comments contended that the proposed changes to the design basis threat are, therefore, in conflict with 10 CFR 50.13, which specifies that licensees are not required to provide for design features to protect against attacks and destructive acts by an enemy of the United States. One comment recommended that NRC should re-evaluate the design basis threat assumption to now include foreign enemies of the United States.

Response. In 10 CFR 50.13, which was promulgated on September 26, 1967 (32 FR 13445), the regulations provide that applicants for construction permits, operating licenses, or amendments thereto, need not provide for design features or other measures to protect against the attacks or destructive acts, including sabotage, by an enemy of the United States. The issue raised in a contested application for a power reactor construction permit, which led to the promulgation of 10 CFR 50.13, was whether the reactor should be constructed to withstand a missile attack from Cuba. There is a significant difference in the practicality of defending against a missile attack and constructing a vehicle barrier at a safe standoff distance from vital areas.

The statement of considerations for 10 CFR 50.13 makes it clear that the scope of that regulation is to relieve applicants of the need to provide protective measures that are the assigned responsibility of the nation's defense establishment. The Atomic Energy Commission recognized that it was not practical for the licensees of civilian nuclear power reactors to provide design features that could protect against the full range of the modern arsenal of weapons. The statement concluded with the observation that assessing whether another nation would use force against a nuclear power plant was speculative in the extreme and, in any case, would involve the use of sensitive information regarding both the capabilities of the United States' defense establishment and diplomatic relations.

The new rule, with its addition to the design basis threat and added performance requirements, is in response to a clearly demonstrated domestic capability for acts of extreme violence directed at civilian structures. The participation or sponsorship of a foreign state in the use of an explosives-laden vehicle is not necessary. The vehicle, explosives, and know-how are all readily available in a purely domestic context. It is simply not the case that a vehicle bomb attack on a nuclear power plant would almost certainly represent an attack by an enemy of the United States, within the meaning of that phrase in 10 CFR 50.13.

Further, characterizing the threat as "para-military" adds little to the understanding of the intent of 10 CFR 50.13. "Para-military" suggests an armed, trained group acting outside of a legally constituted military

organization. In that sense, the design basis threat prior to this amendment already described a "para-military" group. "Para-military" groups of entirely domestic origin exist. Accordingly, the amended regulation and supporting analyses need not address 10 CFR 50.13, either on the grounds that a vehicle bomb attack is an attack by an enemy of the United States or the action of a "paramilitary" group. That regulation is irrelevant to the present rulemaking.

The implication of the comments regarding 10 CFR 50.13 is that the simple addition of a vehicle bomb to the design basis threat should shift the function of providing physical security for nuclear power plants from the licensee to the Federal Government. The respondents present no real evidence or persuasive arguments for such a radical change in the regulatory environment.

F. "Threat" or "Alert" Program

Comment. One comment suggested that the NRC develop and implement a "threat or alert" program similar to the Department of Defense's Defense Condition "DEFCON" program. It was recommended that, under such a program, the NRC would immediately notify the industry when information is received from the intelligence community of an impending security alert and provide a recommended level of action. Licensees, in turn, would be required to develop security response plans based on NRC-established threat levels.

Response. The Commission believes that its current Information Assessment Team approach for notifying licensees of significant events has been effective in disseminating and coordinating such information. The Information Assessment Team (IAT) assesses in a timely manner reported threats to NRC-licensed facilities, materials, and activities to determine credibility and make recommendations to NRC management. The IAT is composed of experienced Headquarter's and Regional staff who are on-call 24 hours a day and bring a variety of expertise to the assessment process, such as reactor systems, site specific information, and liaison with other Federal agencies, including close coordination with the Department of Energy on threat advisories to the utility industry and NRC licensees. The IAT was established in 1976, and since that time has supported NRC decision makers responding to a range of threats, from bomb threats against reactors to times of international tension during Operation Desert Shield and Storm. For example, coordinated threat advisories related to the latter were issued by the IAT on August 24, 1990, January 9, 1991, and April 2, 1991. However, the NRC does not believe that the IAT is an adequate alternative to vehicles barriers at nuclear power plants.

II. Regulatory and Backfit Analysis

A. Redundant Engineered Safeguards Systems

Comment. One comment indicated that the proposed rule did not adequately take into consideration the existing engineered safeguards systems installed at nuclear power plants. The comment was made that unauthorized access and possible damage to any one vital area does not necessarily prevent the safe shut down of the nuclear reactor.

Response. The Commission agrees that consideration should be given to engineered safeguards systems and believes that flexibility has been built into the rule to allow for consideration of such existing systems. The redundancy and diversity of existing engineered safeguards systems was considered in the NRC analysis of the capability of existing licensee security measures to protect against a violent external assault that includes a vehicle as a mode of transportation. Specific plant equipment layout can be a factor in protective considerations against a vehicle bomb. Equipment that is redundant or provides backup to equipment assumed to be damaged by a vehicle bomb may be considered in the analysis for determining whether protective measures established to protect against vehicle intrusion fully meet the design goals and criteria for protection against a land vehicle bomb.

B. Peer Review of Analysis

Comment. One comment recommended that any research results, risk analyses, cost calculations and other work by the NRC should be subject to peer review.

Response. The NRC believes that its work is subject to various types of review and, in a sense, is subject to peer review. Portions of the risk analyses were conducted by groups with appropriate expertise, including threat assessment, physical security system performance evaluation, critical target set analysis, safety system inspections, probabilistic risk analysis, vehicle barrier design, and vehicle bomb analysis. In addition, the types of efforts mentioned by the comment are often the subject of multiple office review within the NRC. Several technical review groups, both within and external to the NRC, provide further consideration of NRC staff work. Finally, with respect to rulemaking, analyses are the subject of public comment.

C. Clarification

Comment. One comment noted that the wording associated with the backfit analysis in the proposed **Federal Register** notice did not precisely coincide with that found under 10 CFR 50.109 (a)(3).

Response. The Commission notes that the wording in the notice is wording that is used for most NRC rules that are subject to backfitting. The Commission considers that this wording is consistent with the requirement cited.

III. Rule Implementation

A. Schedule

Comment. A large number of comments were received on the schedules associated with the proposed rule. Some indicated that the proposed schedule to submit a summary description of the barrier system and results of vehicle bomb comparison within 90 days was not long enough. One comment was received supporting the proposed schedule. Those commenting that the schedule was too tight expressed concern that 90 days did not provide sufficient time to perform a thorough design analysis, particularly if alternative measures were to be proposed. NUMARC, and several other respondents, recommended that licensees be provided 180 days after issuance of the rule to provide a summary description of the barrier system.

A number of comments were also received stating that the proposed schedule to confirm implementation within 360 days after issuance of the rule was not long enough. Those commenting that the schedule for completion of installation was too tight expressed concern that the schedule did not adequately account for material procurement and availability, outage schedules, and weather circumstances. NUMARC and several other respondents recommended that licensees be provided 18 months after issuance of the rule to complete installation of measures to meet the rule. A few comments were received that recommended that implementation schedules be established on a case-by-case basis.

Response. The Commission agrees that an extension to the schedule is reasonable based on the fact that this is a new program for power reactor sites, that there may be some difficulty in procurement of active vehicle barrier systems, and that possible deleterious

effects on scheduling may result from the weather or planned outages. Accordingly, the time period for submission of the summary required by 10 CFR 73.55(c)(9)(i) is extended from 90 to 180 days from the effective date of the rule. The implementation period required under 10 CFR 73.55 (c)(9)(ii) is extended from 360 days to 18 months from the rule's effective date.

B. NRC Review and Approval of Submittals

Comment. Three comments recommended that the NRC should review and approve all licensee submittals, including the summary description of the proposed measures to protect against vehicle intrusion, the results of the vehicle bomb comparison, and, for applicable licensees, alternative measures to protect against an explosive device.

Response. The NRC believes that approval of all summaries submitted under 10 CFR 73.55(c)(9)(i) would unnecessarily delay expeditious implementation of this rule. All licensees are required to amend their physical security plans to commit to the implementation and use of the vehicle barrier system described by the regulations. These commitments are fully inspectable and enforceable by the NRC. The NRC would review and approve the limited number of requests expected to use alternative measures that might not fully meet the design goals and criteria for protection against a vehicle bomb. The final rule has been changed to clarify that proposals for alternative measures be submitted in accordance with the provisions of 10 CFR 50.90.

C. Vehicle Barriers

Comment. NUMARC and several other respondents expressed concern that barrier systems would be required to be "nuclear grade" and that this would unnecessarily escalate costs. Another comment expressed the opinion that, instead of licensees certifying to the NRC that vehicle barriers meet requirements, they be able to choose barriers from some pre-approved list. NUMARC commented that design and certification needed to utilize existing technology and barrier device test results, or costs would unnecessarily escalate. NUMARC also requested that the discussion in the Regulatory Guide be expanded to describe flexibility available to licensees in designing and installing barriers.

Response. The NRC is unaware of any requirement for "nuclear grade equipment" and notes that the expression does not appear in the proposed rule or supporting guidance. The NRC agrees with the industry comment that commercially available materials suffice for the construction of the vehicle barrier if the barrier is capable of countering the design basis vehicle threat. As suggested by many respondents, the NRC recommends that affected licensees take advantage of available information on vehicle barrier testing, much of which has been conducted by Federal laboratories and agencies.

With respect to the use of "pre-approved barriers," the Commission believes that most vendors of commercial vehicle barrier systems know what the "stopping powers" of their barriers are. Licensees should use this as a resource in determining what barrier can counter the attributes of the Commission's design basis vehicle most cost effectively. In addition, the NRC has provided information on performance levels of several types of barriers to affected licensees. The Commission agrees with the NUMARC comment concerning expansion of the discussion on the flexibility of designing and installing barriers in the regulatory guide supporting the rule. The regulatory guide now reflects this.

Comment. NUMARC expressed the view that compensatory measures, not explicitly addressed in the proposed rule or regulatory guide, for maintenance or repair of barriers should be determined by the licensee. Another comment stated that compensatory measures required if a barrier is temporarily inoperable, as with maintenance, need to be addressed at an early stage.

Response. The NRC anticipates that vehicle barriers, particularly passive barriers, will infrequently become non-functional once installed. For those infrequent cases, any compensatory measures should take into consideration the type and cause of the problem and the time the barrier will be non-functional. For example, for short term problems with active or passive barriers, compensatory measures would not be expected to be extensive. In cases where barriers are non-functional for longer periods, compensatory measures may include placement of heavy vehicular equipment, concrete highway median barriers arranged in a serpentine fashion, installation of strands of airplane arresting wires, or the positioning of an officer armed with a high power contingency weapon may be appropriate. The regulatory guide issued in support of this rulemaking has been revised to include guidance regarding compensatory measures.

D. Passive Vehicle Barriers

Comment. One comment was directed at the guidance that specified measures should be established to periodically verify the integrity of passive barriers outside the protected area. It was commented that passive barriers by their nature (ditches, berms, concrete filled embedded poles, etc.) do not require inspection, or if so, the period for inspecting should be on the order of several years. If licensees were to install a unique passive barrier that should need periodic inspection, it should be addressed on a case-by-case basis.

Response. The Commission agrees that the components of many passive barrier systems do not need to be inspected on a weekly or monthly basis due to the nature of their construction. Observations by routine security patrols should be sufficient to detect any degradation in the barrier. Some types of barriers may be more susceptible to deterioration, damage, or tampering and therefore should be subject to more frequent observation by security patrols or, in some cases, periodic inspection. Given the large variation in components of passive barriers, the Commission considers it appropriate to provide licensees with flexibility on how to assure the continued integrity of barrier components. If the barrier system is damaged, the Commission expects that such damage would be identified in a reasonable period and actions would be taken promptly to repair the damage.

E. Active Vehicle Barriers

Comment. Two comments were received requesting that the wording in the proposed regulatory guidance clarify that only one active barrier is needed to deny access. Also, one utility commented that the provision in the regulatory guide that specified vehicles and their operators be authorized for entry before being permitted access inside the vehicle barrier system would preclude their current practice of searching the vehicle after entry inside the active barrier.

Response. The NRC agrees with these comments and the guidance in the regulatory guide supporting the rule has been changed.

Comment. Another comment recommended that specific kinetic energy be identified for use in design of active barriers with documented performance satisfying specific energy requirements because this approach would help avoid costly independent testing to demonstrate performance.

Response. Guidance previously forwarded to licensees, designated as Safeguards Information, defines the

kinetic energy associated with the design basis vehicle. As previously stated, the NRC has provided information to affected licensees on performance levels of several types of barriers to help avoid costly independent testing.

F. Alternative Measures to Protect Against Explosives

Comment. One comment objected to the rule's provisions that would allow some licensees to provide only "substantial protection" and not equivalent protection to fully meet the Commission's design goals and criteria for protection against a vehicle bomb. One comment indicated that the NRC should not be considering costs in determining the acceptability of alternative measures because costs should not be considered relative to enforcing adequate protection. NUMARC commented that it was reasonable for licensees to have the option to propose alternative measures for Commission review when the design goals and criteria for protection against a vehicle bomb cannot be met without a significant resource burden.

Response. The NRC's regulatory analysis concluded that neither the Three Mile Island or World Trade Center events demonstrated a need to redefine adequate protection. The NRC's basis for the backfit being implemented by this rulemaking was a determination that it would result in a substantial increase in protection of the public health and safety. Paragraph 50.109(a)(3) of Title 10, Code of Federal Regulations, authorizes such a backfit only if the costs of implementation are justified in view of the increased protection. The NRC concluded that the estimated costs for all licensees to provide barriers to protect against vehicle intrusion were justified. However, at some sites, the location of barriers to protect against vehicle intrusion could provide substantial protection against a vehicle bomb without fully meeting the NRC's design goals and criteria for protection against an explosive device. For these licensees, the incremental costs for placing barriers further from vital areas or for providing additional protective measures to fully meet the design goal and criteria may not be justified by the incremental protection beyond the substantial level.

Comment. NUMARC objected to the provision that licensees proposing alternative measures must compare their costs with the costs of measures needed to fully meet the design goals and criteria for protection against a vehicle bomb and must provide an assessment supporting a finding that the additional costs are not justified by the added protection that would be provided. NUMARC asserted that the NRC was requiring licensees to perform analyses beyond what the NRC staff has done in support of the proposed rule.

NUBARG similarly asserted that the NRC was requiring licensees to prove that alternative measures substantially increase safety, which is unfair. NUBARG asserts that this requires licensees to perform a backfit analysis on why they should not install a proposed modification (one that would fully meet the design goals and criteria) and that this runs counter to the backfit principle of the NRC providing the analysis.

Several respondents stated that they understood that the rule and regulatory guidance specified that those licensees proposing alternative measures would need to submit to the NRC a quantitative analysis to justify that the cost of plant specific measures are not justified by the added protection afforded. The comments indicated that, based on this understanding, such a task would be difficult, if not impossible.

A public interest group expressed the opinion that contingency planning as part of alternative measures is unacceptable when compared to a permanent vehicle control system.

Response. The optional licensee analysis provided for in the revised regulations is intended to be similar in approach to that performed by the NRC in the development of the regulatory analysis for the rulemaking. The Commission recognizes the difficulties with respect to quantification of the protection provided (see general discussion) and would expect licensees to provide a more deterministic analysis in comparing the relative protection provided by alternative measures taken by the licensee that don't fully meet the Commission design goal and criteria for protection against a vehicle bomb. The Commission did not intend to require its licensees to do more of an analysis or a different type of analysis than that performed by the NRC. The quantitative aspects of the analysis required by the regulation only apply to cost considerations, particularly the comparison of costs needed to fully meet the Commission's design goals and criteria for protection against a vehicle bomb with the cost of alternative measures.

The comment that contingency planning would be an unacceptable alternative to permanent vehicle barriers does not recognize the provision in the rule that specifies that all licensees are required to establish a vehicle barrier system to protect against use of a land vehicle as a means of transportation to gain unauthorized proximity to vital areas. Licensees may not substitute contingency plans for vehicle barriers. Rather, contingency plans were identified as one possible option for licensees (those few where it may be practical for them to propose alternative measures to protect against explosives) to supplement protection provided by the licensee's vehicle barrier system for protection against a vehicle bomb.

IV. NRC Inspection

Comment. One comment indicated that the NRC should establish procedures to assure licensee compliance with the rule.

Response. The NRC plans to inspect licensee implementation of the rule as part of the ongoing reactor inspection program. Most likely the inspection will be accomplished using a temporary inspection procedure, which is planned to be prepared after publication of the rule but before the required implementation date.

As previously stated, all affected licensees are required to amend their physical security plans in response to this rule. All commitments in physical security plans are fully inspectable and enforceable by the NRC.

V. Miscellaneous

A. Research Reactors

Comment. One comment recommended that, in light of the upcoming 1996 Olympics, all reactor fuel, heavy water, and kilocuries of Co and Cs be removed immediately from the Georgia Tech campus.

Response. While research reactors do not fall within the scope of this rulemaking, the Commission notes that its threat assessment activities are performed on a continuing basis, in close liaison with the intelligence community. Should the level of domestic threat change at any time, appropriate action will be taken by the NRC. Specifically, the Atlanta Field Office of the FBI has established liaison with all Federal agencies in Georgia, including the NRC, relative to the Olympics. The FBI is the lead law enforcement agency in charge of the Olympics and, to date, has not indicated that there is any threat to NRC-licensed facilities or materials relative to the Olympics.

B. Independent Spent Fuel Storage Installations

Comment. NUMARC commented that independent spent fuel storage installations (ISFSIs) should be clearly exempted from the rule.

Response. The NRC did not intend for ISFSIs to be subject to this regulation because of the lower consequences associated with storage of irradiated fuel removed from a power reactor core, particularly since spent fuel stored at ISFSIs must be aged for at least one year. The NRC is currently preparing a proposed rule to clarify physical protection requirements for ISFSIs. The lessons learned from the TMI intrusion will be considered in that rulemaking. In addition, the NRC is attempting to quantify the consequences of a vehicle bomb detonated in the vicinity of an ISFSI. The results of this study will assist in making a determination as to whether vehicle bomb protection is needed at ISFSIs. In the interim, the staff believes that the inherent nature of the fuel, along with the degree of protection provided by the approved storage means for spent fuel, provides adequate protection against a vehicle bomb.

C. Office of Management and Budget Supporting Statement

Comment. One comment identified that the NRC-estimated financial burden to licensees did not include capital costs for modifications.

Response. The NRC notes that the financial burden cited by the comment was derived from the Office of Management and Budget Supporting Statement, required under the Paperwork Reduction Act. This statement deals solely with the licensee recordkeeping and reporting burden resulting from the new rule, i.e., the paperwork burden. Actual construction costs are considered in the regulatory analysis that supports the rule.

Summary of Changes Made to Rule

The following changes have been made as a result of public comment analysis:

1. The design basis threat statement for radiological sabotage has been clarified to separate the threat of a land vehicle used for intrusion with that of a land vehicle used as a vehicle bomb.
2. ISFSIs have been specifically exempted from the rule.
3. Clarification of what is meant by "the Commission's design goals and criteria" has been added to the regulatory text.
4. The appropriate means for submitting alternative measures has been clarified under 10 CFR 73.55(c)(9)(i) by adding the phrase "in accordance with 10 CFR 50.90."
5. Summary and implementation schedules have been revised—from 90 to 180 days for summary submittals, and from 360 to 540 days (18 months) for completion of implementation. Both time periods are from the effective date of the rule which is 1 month from the date of publication in the **Federal Register.**

Availability of Supporting Guidance

Two guidance documents are being developed by the NRC in support of this rule and are expected to be distributed to affected licensees before the effective date of the rule. These documents are: (1) Regulatory Guide 5.68, "Protection Against Malevolent Use of Vehicles at Nuclear Power Plants" and (2) NUREG/CR 6190, "Protection Against Malevolent Use of Vehicles at Nuclear Power Plants."

Regulatory Guide 5.68 will be available for inspection and copying for a fee at the Commission's Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC. Copies of issued guides may be purchased from the Government Printing Office at the current GPO price. Information on current GPO prices may be obtained by contacting the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013–2171. Issued guides may also be purchased from the National Technical Information Service on a standing order basis. Details on this service may be obtained by writing NTIS, 5825 Port Royal Road, Springfield, VA 22161.

Copies of NUREG/CR–6190 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013–7082. Copies also will be available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. A copy also will be available for inspection and copying for a fee in the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

Electronic Submittals

Required paperwork may be submitted, in addition to an original paper copy, in electronic format on a DOS-formatted (IBM compatible) 5.25 or 3.5 inch computer diskette. Text files should be provided in WordPerfect format or unformatted ASCII code. The format and version should be identified on the diskette's external label.

Finding of No Significant Environmental Impact: Availability

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The rule involves installation of vehicle barriers at operating power reactor sites and an evaluation of these barriers by the licensee to determine whether they provide acceptable protection against a land vehicle bomb under design goals and criteria established by the Commission.

Implementation of these amendments will not involve release of or exposure to radioactivity from the site. Construction activities associated with passive vehicle barriers will involve some earth movement, either for excavation or development of berms, and possible destruction of trees and shrubbery. Since most active vehicle barriers are hydraulically operated, there may on occasion be leakage of this fluid to the environment. The activities required to implement these amendments involve no significant environmental impact.

The environmental assessment and finding of no significant impact on which this determination is based are available for inspection at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC. Single copies of the environmental assessment and finding of no significant impact are available from: Carrie Brown, U.S. Nuclear Regulatory Commission, Washington, DC, telephone (301) 504–2382.

Paperwork Reduction Act Statement

This final rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). These requirements were approved by the Office of Management and Budget approval number 3150–0002.

The public reporting burden for this collection of information is estimated to average 500 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information and Records Management Branch (MNBB–7714), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB–3019, (3150–0002), Office of Management and Budget, Washington, DC 20503.

Regulatory Analysis

The Commission has prepared a regulatory analysis on this regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. Interested persons may examine a copy of the regulatory analysis at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC. Single copies of the analysis may be obtained from Robert J. Dube, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 504–2912.

Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this final rule does not have a significant economic impact on a substantial number of small entities. The rule affects only licensees authorized to operate a nuclear power reactor. The utilities that operate these nuclear power reactors do not fall within the scope of the definition "small entities" as given in the Regulatory Flexibility Act or the Small Business Size Standards promulgated in regulations issued by the Small Business Administration (13 CFR Part 121).

Backfit Analysis

As required by 10 CFR 50.109, the Commission has completed a backfit analysis for the final rule. The Commission has determined, based on this analysis, that backfitting to comply with the requirements of this final rule provides a substantial increase in protection to public health and safety or the common defense and security at a cost which is justified by the substantial increase. The backfit analysis on which this determination is based reads as follows.

I. Statement of the specific objectives that the proposed action is designated to achieve.

To publish a rule in response to direction from the Commission in a staff requirements memorandum dated June 29, 1993. The Commissioners' decision to proceed with expedited rulemaking was the result of two events. On February 7, 1993, there was a forced vehicle entry into the protected area (PA) at Three Mile Island (TMI) Unit 1. On February 25, 1993, a van bomb, containing between 500 and 1,500 pounds of TNT equivalent, was detonated at the World Trade Center in New York City.

In its subsequent review of the threat environment, the NRC staff concluded that there is no indication of an actual vehicle threat against the domestic commercial nuclear industry. Nonetheless, in light of the vehicle intrusion at TMI and the World Trade Center vehicle bombing, the NRC staff concluded that a vehicle intrusion or bomb threat to a nuclear power plant could develop without warning in the future. The objective of the rulemaking is to enhance reactor safety by maintaining a prudent margin between what is the current threat estimate (low) and the design basis threat for radiological sabotage specified in 10 CFR 73.1(a) (higher).

II. General description of the activity that would be required by the licensee or applicant in order to complete the proposed action.

The rule requires each licensee authorized to operate a nuclear power plant to establish vehicle control measures to protect against the use of a design basis land vehicle as a means of transportation to gain unauthorized proximity to vital areas. This provides two benefits. First, it enhances a licensee's ability to interdict an adversary attempting to use a vehicle as an aid to reach critical safety equipment. Second, it provides protection against a land vehicle bomb.

The rule requires licensees to evaluate the effectiveness of their vehicle control measures with respect to the protection they provide against a land vehicle bomb. Licensees are required to confirm to the Commission that the vehicle control measures to protect against vehicle intrusion, alone or in combination with additional measures, fully meet the Commission's design goals and criteria for protection against a vehicle bomb. Licensees that can show that the additional costs for measures required to fully meet the Commission's design goals and criteria for protection against a vehicle bomb are not justified by the added protection that would be provided have the option to propose alternative measures to the Commission. These licensees will not be relieved of the requirement to protect the facility against vehicle intrusion.

Licensees that propose alternative measures are required to describe the level of protection that these measures would provide against a land vehicle bomb and compare the costs of the alternative measures with the costs of measures necessary to fully meet the criteria. The NRC will approve the alternative measures if the measures provide substantial protection against a land vehicle bomb and if the licensee demonstrates by an analysis, using the essential elements of the criteria in 10 CFR 50.109, that the costs of fully meeting measures needed to protect against a vehicle bomb are not justified by the added protection provided.

III. Potential change in the risk to the public from the accidental offsite release of radioactive material.

The potential change in the risk to the public from the accidental offsite release of radioactive material is discussed in detail in pages 4 through 7 and 10 through 14 of the regulatory analysis that supports the rulemaking. Failure to protect against attempted radiological sabotage could result in reactor core damage and large radiological releases. Based on its assessment, the NRC concludes that amending its regulations to protect against malevolent use of a vehicle against a nuclear power plant provides a substantial increase in overall protection of the public health and safety.

In summary, the TMI event demonstrated some aspects regarding use of a vehicle by a potential adversary that could present some challenges not previously considered by staff and licensees. The NRC considers that providing vehicle intrusion protection provides substantial enhancement against such a threat. Enhancements to protect against the vehicle intrusion threat also provide, to varying degrees dependent on site characteristics, enhancement for protection against vehicle bombs.

The World Trade Center event demonstrated a capability within the United States to construct a truck bomb undetected. This recently demonstrated capability indicates that although a vehicle bomb attack at a nuclear power plant is not reasonably to be expected, it is somewhat more likely to develop without advance indications than the NRC previously believed. Therefore, the NRC considers that providing permanently installed vehicle bomb protection provides substantial enhancement against such a threat.

IV. Potential impact on radiological exposure of facility employees and other onsite workers.

By enhancing protection against the malevolent use of a vehicle, the rule decreases the potential for radiological exposure of facility employees and other onsite workers. Although the threat of a determined, violent attack at a nuclear power plant is considered to be low, the rule also decreases the risk that onsite workers could be injured by weapons fire or an explosion.

V. Installation and continuing costs associated with the action, including the cost of facility downtime or the cost of construction delay.

Estimates of installation costs are discussed in detail on pages 7 through 10 and 14 of the regulatory analysis.

Ranges in cost estimates for three vehicle types illustrate the strong influence of vehicle characteristics. In addition, site-specific characteristics influence costs, including the need at some sites to extend the vehicle exclusion area beyond portions of the current PA boundary or providing a more substantial passive barrier.

The NRC staff estimates that about 80 to 90 percent of the sites will provide safe standoff distances against a vehicle bomb by providing a vehicle barrier in proximity to the present PA boundary. For these sites, cost estimates range from $290K for protecting the smallest protected area against a passenger vehicle to $2,955K for protecting the largest protected area against a large truck. (The characteristics of the design basis vehicle used to establish protection goals are described in a Safeguards Information document provided separately to affected licensees.) For the remaining 10 to 20 percent of the sites, cost estimates range from $440K to $3,655K.

An important consideration in assessing costs for the 10 to 20 percent of the sites that may have to protect beyond the existing protected areas is that the only definitive requirement for all licensees is that they provide measures to protect against the use of a land vehicle as a means of transportation to gain proximity to vital areas and that they assess any incremental measures, if necessary, to meet the design goal for a land vehicle bomb. The NRC will accept alternative measures if the measures provide substantial protection against a land vehicle bomb and if the licensee demonstrates by an analysis, using the essential elements of the criteria in 10 CFR 50.109, that the costs of fully meeting measures needed to protect against a vehicle bomb are not justified by the added protection provided.

Continuing costs to maintain barriers should be small. Implementation of the rule will not require facility downtime or construction delay.

VI. The potential safety impact of changes in plant or operational complexity, including the relationship to proposed and existing regulatory requirements and NRC staff positions.

There should be no adverse safety impact from the rule. Construction of barriers will be near or beyond existing protected area perimeters and should not delay authorized access to the protected area.

VII. The estimated resource burden on the NRC associated with the action and the availability of such resources.

There should be no new resource burden on the NRC. There will be no NRC staff licensing review of licensees' vehicle control measures before implementation. Licensees will be required to retain their analyses on site for NRC staff review during routine inspections. Inspection of the approximately 67 total sites for explosive protection will be about 1 FTE. Reviewing licensee proposals for alternative measures and 10 CFR 50.109 type analyses will require approximately 1 FTE and 40K of technical assistance from the United States Army Corps of Engineers.

VIII. The potential impact of differences in facility type, design, or age on the relevancy and practicality of the proposed action.

The action is relevant for all nuclear power reactors. The action should also be practical at most sites. If a barrier stopped a vehicle at the PA perimeter with little or no further penetration, about 90 percent of the sites would provide significant protection against the design basis vehicle bomb.

In those cases where licensees determine additional security measures may be needed to protect safe shutdown capability, the rule permits licensees to either implement the additional security measures or develop alternative protection strategies. The licensee may propose alternative measures if the measures provide substantial protection against a land vehicle bomb and if they demonstrate by an analysis, using the essential elements of the criteria in 10 CFR 50.109, that the costs of fully meeting measures needed to protect against a vehicle bomb are not justified by the added protection provided. The NRC staff will review licensee's alternative proposals and make an acceptability determination. The Commission will be notified of such NRC staff action.

NRC staff's analysis also indicates that there is a high likelihood that all sites will be capable of achieving and maintaining safe shutdown if a design basis bomb were detonated at any land accessible location of a nuclear power plant outside of the owner controlled area.

IX. Whether the proposed action is interim or final, and if interim, the justification for imposing the proposed action on an interim basis.

The action is to promulgate a final rule. The rulemaking does not involve interim actions.

List of Subjects in 10 CFR Part 73

Criminal penalties, Hazardous materials transportation, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 73.

PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS

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

Authority: Secs. 53, 161, 68 Stat. 930, 948, as amended, sec.147, 94 Stat. 780 (42 U.S.C. 2073, 2167, 2201); sec. 201, as amended, 204, 88 Stat. 1242, as amended, 1245 (42 U.S.C. 5841, 5844).

Section 73.1 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241, (42 U.S.C. 10155, 10161). Section 73.37(f) also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789 (42 U.S.C. 5841 note). Section 73.57 is issued under sec. 606, Pub. L. 99–399, 100 Stat. 876 (42 U.S.C. 2169).

2. In § 73.1, the introductory text of paragraph (a) and the text of (a)(1)(ii) are revised and new paragraphs (a)(1)(i)(E) and (a)(1)(iii) are added to read as follow:

§ 73.1 Purpose and scope.

(a) *Purpose.* This part prescribes requirements for the establishment and maintenance of a physical protection system which will have capabilities for the protection of special nuclear material at fixed sites and in transit and of plants in which special nuclear material is used. The following design basis threats, where referenced in ensuing sections of this part, shall be used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material. Licensees subject to the provisions of § 72.182, § 72.212, § 73.20, § 73.50, and § 73.60 are exempt from § 73.1(a)(1)(i)(E) and § 73.1(a)(1)(iii).

(1) * * *

(i) * * *

(E) A four-wheel drive land vehicle used for transporting personnel and their hand-carried equipment to the proximity of vital areas, and

(ii) An internal threat of an insider, including an employee (in any position), and

(iii) A four-wheel drive land vehicle bomb.

* * * * *

3. In § 73.21, a new paragraph (b)(1)(xiii) is added to read as follows:

§ 73.21 Requirements for the protection of safeguards information.

* * * * *

(b) * * *

(1) * * *

(xiii) Information required by the Commission pursuant to 10 CFR 73.55 (c) (8) and (9).

* * * * *

4. In § 73.55, new paragraphs (c) (7), (8), (9), and (10) are added to read as follow:

§ 73.55 Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage.

* * * * *

(c) * * *

(7) Vehicle control measures, including vehicle barrier systems, must be established to protect against use of a land vehicle, as specified by the Commission, as a means of transportation to gain unauthorized proximity to vital areas.

(8) Each licensee shall compare the vehicle control measures established in accordance with 10 CFR 73.55 (c)(7) to the Commission's design goals (i.e., to protect equipment, systems, devices, or material, the failure of which could directly or indirectly endanger public health and safety by exposure to radiation) and criteria for protection against a land vehicle bomb. Each licensee shall either:

(i) Confirm to the Commission that the vehicle control measures meet the design goals and criteria specified; or

(ii) Propose alternative measures, in addition to the measures established in accordance with 10 CFR 73.55 (c)(7), describe the level of protection that these measures would provide against a land vehicle bomb, and compare the costs of the alternative measures with the costs of measures necessary to fully meet the design goals and criteria. The Commission will approve the proposed alternative measures if they provide substantial protection against a land vehicle bomb, and it is determined by an analysis, using the essential elements of 10 CFR 50.109, that the costs of fully meeting the design goals and criteria are not justified by the added protection that would be provided.

(9) Each licensee authorized to operate a nuclear power reactor shall:

(i) By February 28, 1995 submit to the Commission a summary description of the proposed vehicle control measures as required by 10 CFR 73.55 (c)(7) and the results of the vehicle bomb comparison as required by 10 CFR 73.55 (c)(8). For licensees who choose to propose alternative measures as provided for in 10 CFR 73.55 (c)(8), the proposal must be submitted in accordance with 10 CFR 50.90 and include the analysis and justification for the proposed alternatives.

(ii) By February 29, 1996 fully implement the required vehicle control measures, including site-specific alternative measures as approved by the Commission.

(iii) Protect as Safeguards Information, information required by the Commission pursuant to 10 CFR 73.55(c) (8) and (9).

(iv) Retain, in accordance with 10 CFR 73.70, all comparisons and analyses prepared pursuant to 10 CFR 73.55 (c) (7) and (8).

(10) Each applicant for a license to operate a nuclear power reactor pursuant to 10 CFR 50.21(b) or 10 CFR 50.22, whose application was submitted prior to August 31, 1994, shall incorporate the required vehicle control program into the site Physical Security Plan and implement it by the date of receipt of the operating license.

* * * * *

Dated at Rockville, Maryland, this 26th day of July 1994.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Acting Secretary of the Commission.

[FR Doc. 94–18638 Filed 7–29–94; 8:45 am]

BILLING CODE 7590–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1260

NASA Research Grant Handbook, Inventory Listings; Reporting Period and Due Date

AGENCY: Office of Procurement, Procurement Policy Divisions, National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: NASA has revised its Research Grant Handbook to change the reporting period and report due date for annual equipment inventory listings from June 30 and July 31, respectively, to September 30 and October 31, respectively. This regulation is issued as an interim rule to avoid unnecessary work by grantees to comply with the present reporting requirements and to ensure that new awards reflect the revised requirements.

DATES: This interim rule is effective August, 1, 1994.

Comments are due on or before September 30, 1994.

ADDRESSES: Comments should be addressed to Tom O'Toole, NASA Headquarters, Office of Procurement, Procurement Policy Division (Code HP), Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Tom O'Toole, telephone: (202) 358–0478.

SUPPLEMENTARY INFORMATION:

Background

The Research Grant Handbook, 14 CFR part 1260, NHB 5800.1C, currently requires recipients of grants and cooperative agreements to submit an annual inventory of all Government furnished property. The reporting period and report due date, however, are not on a fiscal year basis, thereby creating an inconsistency with other financial data reported on a fiscal year basis. This FR notice changes the inventory report period and due date to a fiscal year basis.

Availability of NASA Grant Handbook

The NASA Research Grant Handbook, of which this regulation will become a part, is codified in 14 CFR part 1260 and is available in its entirety on a subscription basis from the Superintendent of Documents, Government Printing Office, Washington, DC 20402, (202) 783–3238. Cite GPO Subscription Stock Number 933–001–00000–8. It is not distributed to the public, whether in whole or in part, directly by NASA.

Impact

NASA certifies that this interim rule will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The reporting or recordkeeping requirements subject to the Paperwork Reduction Act are approved under OMB control number 2700–0047 through November 30, 1995.

List of Subjects in 14 CFR Part 1260

Grants.

Tom Luedtke,

Deputy Associate Administrator for Procurement.

Accordingly, 14 CFR part 1260 is amended as follows:

PART 1260—GRANTS AND COOPERATIVE AGREEMENTS

1. The authority citation for 14 CFR part 1260 continues to read as follows:

Authority: Pub. L. 97–258, 31 U.S.C. 6301 *et seq.*

Subpart 1260.4—Provisions and Special conditions

2. Section 1260.408 is amended by revising the undesignated center heading preceeding paragraph (a) and the first two sentences of paragraph (h) to read as follows:

§ 1260.408 Equipment and other property.

Equipment and Other Property (Jul. 1994)

* * * * *

(h) Annually by October 31, the grantee shall submit an inventory report which lists all Government furnished equipment in its custody as of September 30. The original of the report shall be submitted directly to the installation financial management officer, and two copies to the administrative grants officer. The grantee shall also submit two copies of a final inventory report to the administrative grants officer by 60 days after the expiration date of the grant. * * *

Subpart 1260.6—Reports

3. Section 1260.604 is revised to read as follows:

§ 1260.604 Inventory listings of equipment.

As provided in § 1260.408(h), an annual inventory listing of Government furnished equipment will be submitted by October 31 of each year. The grantee shall provide 1 copy of the listing directly to the installation financial management officer, and 2 copies to the administrative grant officer. The administrative grant officer will provide 1 copy to the installation industrial property officer. The listing shall include the information specified in § 1260.507(a)(1) and beginning and ending dollar value totals for the reporting period. A final inventory report of Government furnished equipment and grantee acquired equipment is due 60 days after the end of the grant, in accordance with § 1260.408(h). Upon receipt of the final inventory report, the administrative grant officer will provide 1 copy to the technical officer and 1 copy to the NASA installation industrial property officer.

[FR Doc. 94–18535 Filed 7–29–94; 8:45 am]

BILLING CODE 7510–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM93–4–000]

Standards for Electronic Bulletin Boards Required Under Part 284 of the Commission's Regulations

July 26, 1994.

AGENCY: Federal Energy Regulatory Commission, Energy.

ACTION: Notice of conference.

SUMMARY: The Federal Energy Regulatory Commission (Commission) will be holding a conference to discuss the current status of standards relating to Electronic Bulletin Boards. The conference will focus primarily on the status of the Index of Purchasers, although reports on other standards issues also will be discussed.

DATES: Thursday, August 11, 1994: beginning at 10:00 a.m.

ADDRESSES: Federal Energy Regulatory Commission, Hearing Room 1, 810 First Street NE., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT:

Marvin Rosenberg, Office of Economic Policy, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 208–1283

Brooks Carter, Office of Pipeline and Producer Regulation, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 208–0292

Michael Goldenberg, Office of General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 208–2294.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in Room 3104, 941 North Capitol Street NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397. To access CIPS, set your communications software to use 300, 1200 or 2400 bps, full duplex, no parity, 8 data bits, and 1 stop bit. CIPS can also be accessed at 9600 bps by dialing (202) 208–1781. The full text of this notice will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in Room 3104, 941 North Capitol Street NE., Washington, DC 20426.

Take notice that a conference to discuss the current status of standards relating to Electronic Bulletin Boards will be held on Thursday, August 11, 1994. The conference will focus primarily on the status of the Index of Purchasers, although reports on other standards issued also will be discussed. The conference will begin at 10:00 a.m., in Hearing Room 1, at the offices of the Federal Energy Regulatory Commission, 810 First Street NE., Washington, DC 20426.

All interested persons are invited to attend.

Lois D. Cashell,

Secretary.

[FR Doc. 94–18605 Filed 7–29–94; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 556 and 558

Animal Drugs, Feeds, and Related Products; Virginiamycin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by SmithKline Beecham Animal Health. The NADA provides for use of a virginiamycin Type A article to make a Type B feed used in turn to make a Type C feed for cattle fed in confinement for slaughter.

EFFECTIVE DATE: August 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jack Caldwell, Center For Veterinary Medicine (HFV–126), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1638.

SUPPLEMENTARY INFORMATION: SmithKline Beecham Animal Health, 1600 Paoli Pike, West Chester, PA 19380, filed NADA 140–998 which provides for a V-Max™ Type A article containing 50 percent virginiamycin to make a 1,000 gram per ton (g/t) virginiamycin Type B feed to make a Type C cattle feed containing 16 to 22.5 g/t virginiamycin for increased rate of weight gain, 11 to 16 g/t for improved feed efficiency, or 13.5 to 16 g/t for reduction in the incidence of liver abscesses. The application is approved as of June 24, 1994, and the regulations are amended in 21 CFR 556.750 and 558.635 to reflect the approval. The basis for approval is discussed in the freedom of information summary.

Under section 512(c)(2)(F)(ii) of the Federal Food, Drug, and Cosmetic Act, this approval for food producing animals qualifies for 3 years of marketing exclusivity beginning June 24, 1994, because the NADA contains reports of new clinical or field investigations (other than bioequivalence or residue studies) and,

in the case of food producing animals, human food safety studies (other than bioequivalence or residue studies) essential to the approval and conducted or sponsored by the applicant.

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

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

List of Subjects

21 CFR Part 556

Animal drugs, Foods.

21 CFR Part 558

Animal drugs, Animal feeds.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 556 and 558 are amended as follows:

PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

1. The authority citation for 21 CFR part 556 continues to read as follows:

Authority: Secs. 402, 512, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 342, 360b, 371).

2. Section 556.750 is amended by adding new paragraph (c) to read as follows:

§ 556.750 Virginiamycin.

* * * * *

(c) *Cattle.* A tolerance for residues of virginiamycin in cattle is not required.

PART 558— NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

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

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

4. Section 558.635 is revised by redesignating paragraph (f)(3) as (f)(4) and by adding new paragraph (f)(3) to read as follows:

§ 558.635 Virginiamycin.

* * * * *

(f) * * *

(3) *Cattle.* It is used as follows:

(i) 16.0 to 22.5 grams per ton to provide 100 to 340 milligrams per head per day for increased rate of weight gain.

(ii) 13.5 to 16.0 grams per ton to provide 85 to 240 milligrams per head per day for reduction of incidence of liver abscesses.

(iii) 11.0 to 16.0 grams per ton to provide 70 to 240 milligrams per head per day for improved feed efficiency.

(iv) Feed continuously as sole ration to cattle fed in confinement for slaughter. Not for use in animals intended for breeding.

* * * * *

Dated: July 23, 1994.

Stephen F. Sundlof,

Director, Center for Veterinary Medicine.

[FR Doc. 94–18621 Filed 7–29–94; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 8558]

RIN 1545–AM70

Levy and Distraint

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations regarding the authority to collect taxes from taxpayers by means of levy and distraint under section 6331 of the Internal Revenue Code. The Technical and Miscellaneous Revenue Act of 1988 (TAMRA) amended section 6331 in several respects.

EFFECTIVE DATE: These regulations are effective December 10, 1992.

FOR FURTHER INFORMATION CONTACT: Robert A. Walker, 202–622–3640 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

These final regulations contain changes to §§ 301.6331–1 and 301.6331–2, to reflect amendments made to sections 6331 and 6332(c) of the Internal Revenue Code (Code) by section 349(a) of TEFRA as well as by sections 6236(a), (b) and (d) of TAMRA.

The IRS published a notice of proposed rulemaking in the **Federal Register** on December 11, 1992, (57 FR 58760) providing proposed rules under section 6331 of the Code. No public comments were received and accordingly, these final regulations are substantially identical to the notice of proposed rulemaking. Certain stylistic changes have been made.

TAMRA increased the 10-day requirement for notification of intention to levy to 30 days, required specific types of information to be included in the notice, and expanded the reasons for releasing a levy on salary or wages to include all the situations described in section 6343(a). TAMRA also placed restrictions on levies that are uneconomical or that are scheduled to be made on the day a person is required to appear in response to a summons issued for the purpose of collecting any underpayment of tax by that person. The final regulations reflect these changes. In addition, the final regulations change the existing regulations with respect to levying on bank deposits to conform to section 6332(c), which was enacted by TAMRA. The final regulations also reflect two amendments to section 6331 made by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA): extending to "other property" of a taxpayer the requirement of notification of intention to levy that exists for a levy on salary or wages; and requiring that any mailing of that notice be done by certified or registered mail. Finally, several stylistic changes were made to clarify parts of the regulations that were not affected by the statutory changes.

Explanation of Provisions

The final regulations make a number of minor amendments to §§ 301.6331–1 and 301.6331–2. As these amendments have been fully described in the notice of proposed rulemaking and have not changed (except for certain minor stylistic changes) since that time, this explanation will not repeat them here.

For the most part, the amendments were made to reflect the additional protections provided to taxpayers by the Taxpayer Bill of Rights contained in TAMRA.

Special Analyses

It has been determined that this Treasury Decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory

assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, 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 author of these regulations is Robert A. Walker, Office of Assistant Chief Counsel, (General Litigation). However, other personnel from the IRS and Treasury Department participated in their development.

Lists of Subjects in 26 CFR Part 301

Employment taxes, Estate tax, Excise taxes, Gift tax, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

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

Par. 2. Section 301.6331–1 is amended as follows:

1. Paragraph (a)(1) is amended as follows:

a. A sentence is added immediately following the eighth sentence of the paragraph.

b. In the new tenth sentence, the reference "§ 301.6331–2(c)" is removed and "§ 301.6331–1(b)(1)" is added in its place.

c. The new thirteenth sentence of paragraph (a)(1) is revised.

2. Paragraph (a)(2) is revised.

3. Paragraph (b) is amended as follows:

a. Paragraph (b) is redesignated (b)(2):

b. A paragraph heading for new paragraph (b) is added.

c. A paragraph (b)(1) heading and text are added.

4. Paragraph (d) is added at the end of the section.

5. The additions and revisions read as follows:

§ 301.6331–1 Levy and distraint.

(a) * * *

(1) * * * A levy on a bank reaches any interest that accrues on the taxpayer's balance under the terms of the bank's agreement with the depositor during the 21-day holding period provided for in section 6332(c). * * * Similarly, a levy only reaches property in the possession of the person levied upon at the time the levy is made together with interest that accrues during the 21-day holding period provided for in section 6332(c). * * *

(2) *Jeopardy cases.* If the district director finds that the collection of any tax is in jeopardy, he or she may make notice and demand for immediate payment of such tax and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in section 6331(a), the 30-day period provided in section 6331(d), or the limitation on levy provided in section 6331(g)(1).

* * * * *

(b) *Continuing levies and successive seizures—(1) Continuing effect of levy on salary and wages.* A levy on salary or wages has continuous effect from the time the levy originally is made until the levy is released pursuant to section 6343. For this purpose, the term *salary or wages* includes compensation for services paid in the form of fees, commissions, bonuses, and similar items. The levy attaches to both salary or wages earned but not yet paid at the time of the levy, advances on salary or wages made subsequent to the date of the levy, and salary or wages earned and becoming payable subsequent to the date of the levy, until the levy is released pursuant to section 6343. In general, salaries or wages that are the subject of a continuing levy and are not exempt from levy under section 6334(a)(8) or (9), are to be paid to the district director, the service center director, or the compliance center director (director) on the same date the payor would otherwise pay over the money to the taxpayer. For example, if an individual normally is paid on the Wednesday following the close of each work week, a levy made upon his or her employer on any Monday would apply to both wages due for the prior work week and wages for succeeding work weeks as such wages become payable. In such a case, the levy would be satisfied if, on the first Wednesday after the levy and on each Wednesday thereafter until the employer receives a notice of release from levy described in section 6343, the employer pays over to the director wages that would otherwise be paid to the employee on such Wednesday (less any exempt amount pursuant to section 6334).

* * * * *

(d) *Effective date.* These regulations are effective December 10, 1992.

Par. 3. Section 301.6331–2 is revised to read as follows:

§ 301.6331–2 Procedures and restrictions on levies.

(a) *Notice of intent to levy*—(1) *In general.* Levy may be made upon the salary, wages, or other property of a taxpayer for any unpaid tax no less than 30 days after the district director, the service center director, or the compliance center director (director) has notified the taxpayer in writing of the intent to levy. The notice must be given in person, be left at the dwelling or usual place of business of the taxpayer, or be sent by registered or certified mail to the taxpayer's last known address. The notice of intent to levy is separate from, but may be given at the same time as, the notice and demand described in § 301.6331–1.

(2) *Content of Notice.* The notice of intent to levy is to contain a brief statement in nontechnical terms including the following information—

(i) The Internal Revenue Code provisions and the procedures relating to levy and sale of property;

(ii) The administrative appeals available with respect to the levy and sale of property and the procedures relating to such appeals;

(iii) The alternatives available that could prevent levy on the property (including the use of an installment agreement under section 6159); and

(iv) The Internal Revenue Code provisions and the procedures relating to redemption of property and release of liens on property.

(b) *Uneconomical levy*—(1) *In general.* No levy may be made on property if the director estimates that the anticipated expenses with respect to the levy and sale will exceed the fair market value of the property. The estimate is to be made on an aggregate basis for all of the items that are anticipated to be seized pursuant to the levy. Generally, no levy should be made on individual items of insignificant monetary value. For the definition of fair market value, see § 301.6325–1(b)(1)(i). See § 301.6341–1 concerning the expenses of levy and sale.

(2) *Time of estimate.* The estimate, which may be formal or informal, is to be made at the time of the seizure or within a reasonable period of time prior to a seizure. The estimate may be based on earlier estimates of fair market value and anticipated expenses of the same or similar property.

(3) *Examples.* The following examples illustrate the application of this paragraph (b):

Example 1. A director anticipates that the taxpayer has only one item of property that can be seized and sold. This item is estimated to have a fair market value of $250.00. The director also estimates that the costs of seizure and sale will total $300.00 if this item is seized. The director is prohibited from levying on this one item of the taxpayer's property because the costs of seizure and sale are estimated to exceed the property's fair market value.

Example 2. The facts are the same as in *Example 1* except that the director anticipates that the taxpayer has 10 items of property that can be seized and sold. Each of those items is estimated to have a fair market value of $250.00. The director also estimates that the costs of seizure and sale will total $300.00 regardless of how many of those items are seized. The director is prohibited from levying on only one item of the taxpayer's property because the costs of seizure and sale are estimated to exceed the fair market value of the single item of property. The director, however, would not be prohibited from levying on two or more items of the taxpayer's property because the aggregate fair market value of the seized property would exceed the estimated costs of seizure and sale.

Example 3. The taxpayer has three items of property, A, B, and C. The director anticipates that the value of items A, B, and C depends on their being sold as a unit. The director estimates that due to high anticipated costs of storing or maintaining item B prior to the sale, the aggregate fair market value of items A, B, and C will not exceed the anticipated expenses of seizure and sale if all three items are seized. Accordingly, the director is prohibited from levying on items A, B, and C.

Example 4. The facts are the same as in *Example 3* except that the director does not anticipate that the value of items A, B, and C depends on those items being sold as a unit. If the director estimates that the aggregate fair market value of items A and C exceeds the aggregate anticipated costs of the seizure and sale of those two items, items A and C can be seized and sold. The director is prohibited from levying on item B because the high cost of storing or maintaining item B is estimated to exceed the fair market value of item B.

(c) *Restriction on levy on date of appearance.* Except for continuing levies on salaries or wages described in § 301.6331–1(b)(1), no levy may be made on any property of a person on the day that person, or an officer or employee of that person, is required to appear in response to a summons served for the purpose of collecting any underpayment of tax from that person. For purposes of this paragraph (c), the date on which an appearance is required is the date fixed by an officer or employee of the Internal Revenue Service pursuant to section 7605 or the date (if any) fixed as the result of a judicial proceeding instituted under sections 7604 and 7402(b) seeking the enforcement of the summons.

(d) *Jeopardy.* Paragraphs (a) and (c) of this section do not apply to a levy if the director finds, for purposes of § 301.6331–1(a)(2), that the collection of tax is in jeopardy.

(e) *Effective date.* These regulations are effective December 10, 1992.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: June 24, 1994.

Leslie Samuels,

Assistant Secretary of the Treasury.

[FR Doc. 94–18305 Filed 7–29–94; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Parts 216 and 218

RIN 1010–AB82

Amendment of Regulations Governing Assessments for Incorrect Reports

AGENCY: Minerals Management Service, Interior.

ACTION: Final rule.

SUMMARY: The Minerals Management Service (MMS) is amending its Royalty Management Program (RMP) regulations governing assessments for incorrect reports submitted by royalty reporters, payors, lease operators, lessees, or other parties. The amendment will authorize MMS to assess reporters and payors submitting incorrect reports after the designated due date, in the same manner currently applied to incorrect reports received by the designated due date. Thus, this rule will provide consistency in MMS' practice for incorrect reporting assessments.

EFFECTIVE DATE: August 31, 1994.

FOR FURTHER INFORMATION CONTACT: David S. Guzy, Chief, Rules and Procedures Staff, (303) 231–3432, Minerals Management Service, Royalty Management Program, Denver Federal Center, Building 85, P.O. Box 25165, Mail Stop 3901, Denver, Colorado 80225–0165.

SUPPLEMENTARY INFORMATION: The principal authors of this rule are Philip Wilson of the Reports and Payments Division and David Steiber of the Compliance Verification Division, RMP, MMS, Lakewood, Colorado.

I. Background

Paragraphs 216.40(b) and 218.40(b) of title 30 of the Code of Federal Regulations (30 CFR) authorize MMS to assess an amount not to exceed $10 for each incorrectly completed report received by the designated due date. These paragraphs do not authorize assessments for incorrectly completed reports received after the designated due date. The assessments apply to reports submitted by royalty reporters, payors, lease operators, lessees or other parties in accordance with statutes, regulations, contracts, orders, or terms of Federal or Indian mineral leases. The assessments compensate the Government for the costs of researching and resolving reporting errors. Under § 216.40 (c) and (d), a report is defined as each line item on a Monthly Report of Operations (Form MMS–3160), an Oil and Gas Operations Report (Form MMS–4054), a Gas Analysis Report (Form MMS–4055), a Gas Plant Operations Report (Form MMS–4056), a Production Allocation Schedule Report (Form MMS–4058), a Solid Minerals Operations Report (Form MMS–4059), or a Solid Minerals Facility Report (Form MMS–4060). Under § 218.40(c), a report is defined as each line item on a Report of Sales and Royalty Remittance (Form MMS–2014). This amendment authorizes MMS to assess reporters and payors submitting incorrect reports after the designated due date, in the same manner currently applied to incorrect reports received by the designated due date.

In response to the proposed rulemaking, MMS received comments from four parties, representing independent oil and natural gas producers, royalty owners, industry consultants, and service/supply companies and other interested parties. The comments were considered in preparing this final rulemaking and are discussed, in detail, in Section II below. The final rule is summarized and discussed at the end of Section II.

II. Comments Received on Proposed Rule

All commenters expressed opposition to the proposed rule. The comments received are discussed below:

(1) Three commenters argued that the proposed rule would increase costs and place an even greater financial burden on small, independent producers.

Response: The rule is not intended to place a greater financial burden on small, independent producers. Rather, the intent is to provide consistency in MMS' assessments of incorrect reports by amending 216.40(b) and 218.40(b) to authorize assessments of all reports that are submitted incorrectly, regardless of whether the report was received timely or late.

(2) Three commenters suggested that MMS is attempting to raise revenue through greater administrative penalties on small entities when MMS should be encouraging producers to lease more

Federal land and drill for and produce more Federal oil and gas.

Response: The purpose of this rule is not to raise revenue. As currently structured, MMS regulations provide for assessments on incorrect reports received by the designated due date but authorize no assessment for incorrect reports received late. The costs of researching and resolving reporting errors are the same whether the report is received timely or late. Therefore, MMS is implementing this rulemaking to encourage accurate reporting and to begin to assess reports consistently whether they are received timely or late. This rule applies to reporting accuracy and is not intended to encourage or discourage oil and gas exploration and production on Federal land.

(3) Two commenters stated that if the proposed rule is intended to ensure that administrative costs are similarly addressed for similar situations, then a single $10 assessment would accomplish this objective, whether the report was timely submitted or not. The MMS currently assesses for late reporting as authorized under 30 CFR paragraphs 216.40(a) and 218.40(a). The commenters suggest that MMS' proposal represents "double-dipping" on late reports serving as a penalty and not as compensation for administrative costs.

Response: The intent of this rule is to recover the costs of resolving reporting errors and to make the regulations consistent for incorrect reporting. The MMS is aware that reporters and payors may be assessed for both late and incorrect reports. This rulemaking will encourage accurate reporting. The MMS will review the late assessment issue at a later date.

(4) All commenters argued that this proposed rule should be dropped because:

- Aside from unsubstantiated need to recover administrative costs, the proposed rule provides no justification for increasing penalties on small businesses; and
- Most of the errors are the result of MMS or Bureau of Land Management (BLM) actions or are beyond the control of lessees thus making the proposed fines counterproductive.

Response: The rule is intended to apply to all reporters and payors equally. It is designed to recover the costs of resolving reporting errors and not impose a sanction on small businesses. The MMS' practice is to assess for errors that are caused by reporters and payors when completing required MMS reports. Reporters and payors are not assessed for errors that are the result of MMS/BLM miscommunications.

This final rulemaking will be included in MMS regulations at 30 CFR 216.40(b) and 218.40(b). The final rule is summarized and discussed below:

Current MMS regulations provide for an assessment on incorrect reports received on or before the designated due date. However, the costs incurred by MMS to research and resolve reporting errors are identical whether the report is received timely or late. So that MMS may be compensated for all costs incurred due to reporting errors, MMS is amending § 216.40(b) and § 218.40(b) to include as assessable all reports that are submitted incorrectly, regardless of whether the report was received by the designated due date or was received late. Therefore, a report that is both late and incorrect may be subject to two assessments, one under 216.40(a) or 218.40(a) for being late and one under the amended subsection (b) for being incorrect.

III. Procedural Matters

The Regulatory Flexibility Act

The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rulemaking would compensate the Government for costs incurred as the result of reporting errors and provide for consistency in MMS' practice for incorrect reporting assessments.

Executive Order 12630

The Department certifies that this rule does not represent a governmental action capable of interference with constitutionally protected property rights. Thus a Takings Implication Assessment need not be prepared pursuant to Executive Order 12630, "Government Action and Interference with Constitutionally Protected Property Rights."

Executive Order 12778

The Department has certified to the Office of Management and Budget that these proposed regulations meet the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order 12778.

Executive Order 12866

This document has been reviewed under Executive Order 12866 and is not a significant regulatory action requiring review by the Office of Management and Budget.

Paperwork Reduction Act of 1980

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 et seq.

National Environmental Policy Act of 1969

It is hereby determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and a detailed statement pursuant to paragraph (2)(C) of § 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is not required.

List of Subjects

30 CFR Part 216

Coal, Continental shelf, Geothermal energy, Government contracts, Indians—lands, Mineral royalties, Natural gas, Penalties, Petroleum, Public lands—mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 218

Coal, Continental shelf, Electronic funds transfers, Geothermal energy, Government contracts, Indians—lands, Mineral royalties, Natural gas, Penalties, Petroleum, Public lands—mineral resources, Reporting and recordkeeping requirements.

Dated: July 22, 1994.

Bob Armstrong,

Assistant Secretary—Land and Minerals Management.

For the reasons set out in the preamble, 30 CFR parts 216 and 218 are amended as set forth below:

PART 216—PRODUCTION ACCOUNTING

1. The authority citation for part 216 is revised to read as follows:

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 3716, 3720A, 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, 1801 *et seq.*

2. Paragraph (b) of § 216.40 under Subpart A, General Provisions, is revised to read as follows:

§ 216.40 Assessments for incorrect or late reports and failure to report.

* * * * *

(b) An assessment of an amount not to exceed $10 may be charged for each incorrectly completed report.

* * * * *

PART 218—COLLECTION OF ROYALTIES, RENTALS, BONUSES AND OTHER MONIES DUE THE FEDERAL GOVERNMENT

1. The authority citation for part 218 is revised to read as follows:

Authority: 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 3716, 3720A, 9701; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, 1801 *et seq.*

2. Paragraph (b) of § 218.40 under Subpart A, General Provisions, is revised to read as follows:

§ 218.40 Assessments for incorrect or late reports and failure to report.

* * * * *

(b) An assessment of an amount not to exceed $10 may be charged for each incorrectly completed report.

* * * * *

[FR Doc. 94–18573 Filed 7–29–94; 8:45 am]

BILLING CODE 4310–MR–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 50

[AD–FDL–4735–5]

National Ambient Air Quality Standards for Carbon Monoxide—Final Decision

AGENCY: U.S. Environmental Protection Agency (U.S. EPA).

ACTION: Final decision.

SUMMARY: Identical primary (health-based) and secondary (welfare-based) national ambient air quality standards (NAAQS) for carbon monoxide (CO) were promulgated in 1971 at 9 parts per million (ppm), 8-hour average, and 35 ppm, 1-hour average, neither to be exceeded more than one time per year. In 1985, the EPA announced the decision not to revise the primary CO NAAQS and at the same time to revoke the secondary CO NAAQS. In accordance with sections 108 and 109 of the Clean Air Act (Act), the EPA has reviewed and revised the criteria upon which the existing NAAQS for CO are based. Based on that review, this document announces the EPA's final decision under section 109(d)(1) that revisions of the NAAQS for CO are not appropriate at this time.

ADDRESSES: A docket containing information relating to the EPA's review of the CO NAAQS (Docket No. A–93–05) is available for public inspection in the Air and Radiation Docket and Information Center of the U.S. Environmental Protection Agency, South Conference Center, Room 4, 401 M Street, SW., Washington, DC. The docket may be inspected between 8 a.m. and 4 p.m. on weekdays, and a reasonable fee may be charged for copying. The information in the docket constitutes the complete basis for the decision announced in this notice. For availability of related information, see **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Dr. David J. McKee, Air Quality Management Division (MD–12), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–5288.

SUPPLEMENTARY INFORMATION:

Availability of Related Information

Certain documents are available from: U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161. Available documents include: the revised criteria document, "Air Quality Criteria for Carbon Monoxide" (EPA/600/8–90–045F; NTIS # PB 93–167492, $77.00 paper copy and $27.00 microfiche), and the 1992 staff paper, "Review of the National Ambient Air Quality Standards for Carbon Monoxide: Assessment of Scientific and Technical Information-OAQPS Staff Paper" (EPA–452/R–92–004, August 1992; NTIS No. PB 93–157717, $19.50 paper copy and $9.00 microfiche). (Add $3.00 handling charge per order.) Other documents generated in connection with review of this standard (e.g., exposure analysis) are available in the EPA Docket No. A–93–05.

The contents of this document are listed in the following outline:

I. Background
- A. Legislative Requirements Affecting This Decision
  - 1. Primary and Secondary Standards
  - 2. Related Control Requirements
- B. Existing Primary Standards for Carbon Monoxide
- C. Review of Air Quality Criteria and Standards for Carbon Monoxide; Development of the Staff Paper
- D. Decision Docket

II. Scientific Basis for This Regulatory Decision
- A. Measuring and Assessing Carboxyhemoglobin Levels
- B. Health Effects Associated With Carbon Monoxide
  - 1. Mechanisms of Toxicity
  - 2. Cardiovascular Effects
  - 3. Effects on Exercise Capacity and Oxygen Uptake
  - 4. Central Nervous System Effects
  - 5. Developmental Toxicity Effects
  - 6. Environmental Factors, Drugs, and Other Pollutants
- C. Populations Potentially at Risk

III. Rationale for This Decision
- A. Carboxyhemoglobin Levels of Concern
- B. Margin of Safety
- C. Relationship Between CO Exposure and COHb Levels
- D. Estimating Population Exposure
- E. Decision on the Primary Standards

IV. Final Decision Not to Revise the Standards

V. Regulatory Impacts
- A. Regulatory Impact Analysis
- B. Impact on Small Entities

VI. Other Reviews

References

I. Background

A. Legislative Requirements Affecting This Decision

1. Primary and Secondary Standards

Two sections of the Act govern the establishment and revision of NAAQS. Section 108 (42 U.S.C. 7408) directs the Administrator to identify pollutants which may reasonably be anticipated to endanger public health and welfare and to issue air quality criteria for them. These air quality criteria are to accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air.

Section 109 (42 U.S.C. 7409) directs the Administrator to propose and promulgate "primary" and "secondary" NAAQS for pollutants identified under section 108. Section 109(b)(1) defines a primary standard as one the attainment and maintenance of which, in the judgment of the Administrator, based on the criteria and allowing an adequate "margin of safety," [is] requisite to protect the public health. A secondary standard, as defined in section 109(b)(2), must specify a level of air quality the attainment and maintenance of which, in the judgment of the Administrator, based on [the] criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air. Welfare effects as defined in section 302(h) [42 U.S.C. 7602(h)] include, but are not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

The U.S. Court of Appeals for the District of Columbia Circuit has held that the requirement for an adequate "margin of safety" for primary standards was intended to address uncertainties associated with inconclusive scientific and technical information available at the time of standard setting. It was also intended to provide a reasonable degree of protection against hazards that research has not yet identified. [*Lead Industries Association* v. *EPA*, 647 F.2d 1130, 1154 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 621 (1980); *American Petroleum Institute* v. *Costle*, 665 F.2d 1176, 1177 (D.C. Cir. 1981), *cert. denied*,

102 S. Ct. 1737 (1982)]. Both kinds of uncertainties are components of the risk associated with pollution at levels below those at which human health effects can be said to occur with reasonable scientific certainty. Thus, by selecting primary standards that provide an adequate "margin of safety," the Administrator is seeking not only to prevent pollution levels that have been demonstrated to be harmful but also to prevent lower pollutant levels that she finds may pose an unacceptable risk of harm, even if the risk is not precisely identified as to nature or degree.

In selecting a "margin of safety," the EPA considers such factors as the nature and severity of the health effects involved, the size of the sensitive population(s) at risk, and the kind and degree of the uncertainties that must be addressed. Given that the "margin of safety" requirement by definition only comes into play where no conclusive showing of adverse effects exists, such factors, which involve unknown or only partially quantified risks, have their inherent limits as guides to action. The selection of any particular approach to provide an adequate "margin of safety" is a policy choice left specifically to the Administrator's judgment. [*Lead Industries Association* v. *EPA*, supra, 647 F.2d at 1161–62].

Section 109(d)(1) of the Act requires that not later than December 31, 1980, and at 5-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 108 and the NAAQS and shall make such revisions in such criteria and standards as may be appropriate. Section 109(d)(2) (A) and (B) requires that a scientific review committee be appointed and provides that the committee shall complete a review of the criteria and the national primary and secondary ambient air quality standards and shall recommend to the Administrator any revisions of existing criteria and standards as may be appropriate. If the EPA decides to revise an existing standard, the rulemaking procedures of section 307(d) apply.[1]

The process by which the EPA has reviewed the existing air quality criteria and standards for CO under section 109(d) is described in a later section of this notice.

2. Related Control Requirements

States are primarily responsible for ensuring attainment and maintenance of ambient air quality standards once the EPA has established them. Under title I of the Act (42 U.S.C. 7410), States are to submit, for EPA approval, State implementation plans (SIP's) that provide for the attainment and maintenance of such standards through control programs directed to sources of the pollutants involved. The States, in conjunction with the EPA, also administer the prevention of significant deterioration program (42 U.S.C. 7470–7479) and the visibility protection program (42 U.S.C. 7491–7492) for these and other air pollutants. In addition, Federal programs provide for nationwide reductions in emissions of air pollutants through the Federal motor vehicle control program under title II of the Act (42 U.S.C. 7521–7574), which involves controls for automobile, truck, bus, motorcycle, and aircraft emissions; the new source performance standards under section 111 (42 U.S.C. 7411); and the national emission standards for hazardous air pollutants under section 112 (42 U.S.C. 7412).

B. Existing Primary Standards for Carbon Monoxide

On April 30, 1971, the EPA promulgated NAAQS for CO under section 109 of the Act (36 FR 8186). Identical primary and secondary NAAQS were set at 9 ppm as an 8-hour average and 35 ppm as a 1-hour average, neither to be exceeded more than once per year. Scientific and technical bases for these NAAQS are provided in the document, "Air Quality Criteria for Carbon Monoxide" (U.S. Dept. of Health, Education and Welfare, 1970). The NAAQS promulgated in 1971 were based largely upon research by Beard and Wertheim (1967) who reported that CO exposures which produced carboxyhemoglobin (COHb) levels of 2 to 3 percent were associated with central nervous system (CNS) effects such as impaired ability to discriminate time intervals.

A revised Air Quality Criteria for Carbon Monoxide (U.S. EPA, 1979a), prepared by the Environmental Criteria and Assessment Office (ECAO), and a Staff Paper (U.S. EPA, 1979b), prepared by the Office of Air Quality Planning and Standards (OAQPS), identified several major factors pertinent to subsequent action taken on the NAAQS for CO. The Clean Air Scientific Advisory Committee (CASAC) met on June 14–15, 1979 to review drafts of these documents and provide advice on the CO standards. As discussed in a notice of proposed rulemaking (45 FR 55066) published on August 18, 1980, although the Beard and Wertheim (1967) study no longer could serve as a basis for the CO NAAQS, other studies available in 1980 provided alternative evidence of decreased time to onset of angina attack at COHb levels as low as 2.7 to 3.0 percent. This as well as other scientific evidence served as the basis for the EPA to propose: (1) Retaining the 8-hour primary standard level of 9 ppm, (2) revising the 1-hour primary standard level from 35 ppm to 25 ppm, (3) revoking the existing secondary CO NAAQS due to a lack of evidence of adverse welfare effects at or near ambient CO levels, (4) changing the form of the standard from deterministic to statistical by stating allowable exceedances as expected values rather than as explicit values, and (5) adopting a daily interpretation for exceedances of the CO NAAQS so exceedances would be determined on the basis of days on which the 8- or 1-hour average concentrations were above the standard levels.

On June 18, 1982, the EPA announced (47 FR 26407) that a second public comment period was necessary to open discussion on several important issues and additional analyses. These issues included: (1) The role of the Aronow (1981) study in assessing CO effects; (2) consideration of a multiple exceedance 8-hour standard for CO; (3) technical adequacy of the revised draft sensitivity analysis (Biller and Richmond, 1982) on the Coburn, Forster, and Kane model predictions of COHb levels; and (4) technical adequacy of the revised exposure analysis (Johnson and Paul, 1983). The CASAC met on July 6, 1982 to discuss these issues and provide advice, a summary of which was sent to the Administrator on August 31, 1982 (Friedlander, 1982).

The 1980 proposal (45 FR 55066) was based in large part on studies by Dr. Wilbert Aronow (Aronow, 1978; Aronow, et al., 1972, 1973, 1974a, 1974b, 1977; Aronow and Isbell, 1973; Aronow and Cassidy, 1975), which provided the CASAC and the EPA staff

[1] The EPA has also chosen to follow rulemaking procedures in several NAAQS reviews that did not involve revision of existing standards. However, the EPA interprets section 307(d) as not requiring such procedures where the Administrator decides to retain an existing standard without change; i.e., to maintain the status quo. Although such a decision is subject to judicial review as a final action under section 307(b), neither the Act nor its legislative history evidences any intent to require rulemaking where the Administrator has not concluded that revision of an existing NAAQS is appropriate. The Agency's conclusion that rulemaking procedures are not required to retain an existing NAAQS without revision is not affected by the Court's brief reference to the use of rulemaking procedures in *Environmental Defense Fund* v. *Thomas*, 870 F.2d 892, 900 (2d Cir.), *cert. denied*, 110 S.Ct. 537 (1989). As a practical matter, even without the use of rulemaking procedures, the process by which the EPA reviews existing criteria and standards involves substantial opportunities for public and expert comment on both its assessment of relevant scientific and technical data and its proposed use of the data for decision making purposes.

with a basis for concluding that COHb levels of 2.7–3.0 percent posed a health risk of concern in individuals with angina and other types of cardiovascular disease. A subsequent disclosure in March 1983 by the Food and Drug Administration (FDA) concerning work conducted for the FDA by Dr. Aronow caused the EPA to question the scientific credibility of Dr. Aronow's research on CO. As a result, the EPA decided it would be prudent to conduct an independent review of his CO research prior to making a decision on the CO standards. A committee of experts was convened and chaired by Dr. Steven Horvath (University of California, Santa Barbara). Following meetings with Dr. Aronow and examination of limited data and records available from his CO studies, the committee concluded in its report (Horvath et al., 1983) that the EPA should not rely on Dr. Aronow's studies for a decision on levels of the CO NAAQS due to problems regarding data collection/analysis.

As a result of this finding, the ECAO prepared a draft Addendum to the 1979 Air Quality Criteria for Carbon Monoxide. Concurrently, the OAQPS prepared a draft Review of the NAAQS for Carbon Monoxide: Reassessment of Scientific and Technical Information. These documents were prepared to reevaluate the scientific and technical evidence on health effects of CO at or near ambient levels in consideration of the reduced usefulness of the Aronow studies. Both documents were reviewed by the CASAC at a public meeting on September 25, 1983. The CASAC sent a closure letter to the Administrator on May 17, 1984, which concluded that the draft Addendum and the draft Staff Paper Reassessment represented scientifically-balanced and defensible summaries of health effects literature for CO. On August 9, 1984, the EPA announced (49 FR 31923) availability of the final Addendum (1984b) and final Staff Reassessment (1984a), both of which had been revised to reflect the CASAC's and public comments. In the same notice, the EPA reviewed the basis for the 1980 proposal to revise the CO standards and solicited additional public comment. In a subsequent **Federal Register** notice (50 FR 37484) published on September 13, 1985, the EPA announced its final decision not to revise the existing primary standards and to revoke the secondary standards for CO. In doing so, the Administrator determined that the existing 1-hour and 8-hour primary NAAQS provided adequate protection from exposure to ambient CO.

C. Review of Air Quality Criteria and Standards for Carbon Monoxide; Development of the Staff Paper

On July 22, 1987, the ECAO published in the **Federal Register** (52 FR 27580) a call for information to assist in the development of a draft revised Air Quality Criteria for Carbon Monoxide (Criteria Document). Notice of availability of the external review draft Criteria Document was published in the **Federal Register** (55 FR 14858) on April 19, 1990. This draft Criteria Document included discussion of several new studies of effects of CO on angina patients, which had been initiated in light of the controversy discussed above. The CASAC reviewed the draft Criteria Document at a public meeting held on April 30, 1991. The EPA placed a transcript of the CASAC meeting in the docket (ECAO–CD–86–073). The EPA carefully considered comments received from the public and the CASAC members in preparing the final Criteria Document (U.S. EPA, 1991). On July 17, 1991, the CASAC sent to the Administrator a "closure letter" (McClellan, 1991) outlining key issues and recommendations and indicating that the document provides a scientifically-balanced and defensible summary of current knowledge of the effects of this pollutant and provides an adequate basis for the EPA to make a decision as to the appropriate primary NAAQS for CO.

Immediately following the CASAC meeting of April 30, 1991, the OAQPS began development of the revised draft Staff Paper. This document was released for public review in February 1992. The CASAC held a public meeting on March 5, 1992 to review the draft revised Staff Paper. A copy of the transcript of this meeting has been placed in the docket (A–93–05). Major issues discussed at the meeting included: interpretation of new scientific information, the definition of adverse health effects associated with CO exposure, populations at risk, COHb levels of concern, and estimates of population exposure. In response to comments made by the public and the CASAC members, minor revisions to the Staff Paper were made and briefly reviewed at a public meeting of the CASAC held on April 28, 1992 prior to preparation of the final Staff Paper (U.S. EPA, 1992). The CASAC came to closure on its review of the Staff Paper in a letter to the Administrator dated August 11, 1992. In that "closure letter" (McClellan, 1992) the CASAC states that "this document is consistent with all aspects of the scientific evidence presented in the criteria document for carbon monoxide. It has organized the relevant information in a logical fashion and the Committee believes that it provides a scientifically adequate basis for regulatory decisions on carbon monoxide. The staff paper concludes, and the CASAC concurs, that a standard of the present form and with a numerical value similar to that of the present standard would be supported by the present scientific data on health effects of exposure to carbon monoxide."

D. Decision Docket

On February 2, 1993, the EPA created a docket (Docket No. A–93–05) for this decision. The docket incorporated by reference a separate docket established in 1986 for criteria document revision (Docket No. ECAO–CD–86–073).

II. Scientific Basis for This Regulatory Decision

A. Measuring and Assessing COHb Levels

As concluded in the Staff Paper (U.S. EPA, 1992, p. 10), blood COHb level is not only the best indicator of CO exposure but also has been related to health effects of major concern for CO. In most CO health effects studies, the co-oximeter (CO–Ox) has been used to measure COHb at levels in the range of 0 to 5 percent COHb; however, concerns have been raised regarding accuracy of the CO–Ox.

While CO–Ox measurements are very precise (i.e., replicable), research has shown that the accuracy (i.e., ability to detect the actual level) of these optical instruments is not always sufficient to use alone at levels ≤ 5 percent COHb (Allred et al., 1989a,b, 1991). As indicated in the Criteria Document (U.S. EPA, 1991, pp. 8–72 to 8–73), the results from linear regression analyses of comparisons between CO–Ox instruments and various reference instruments [involving gas chromatography (GC)] show a fairly linear slope and a wide range of intercept values, thus suggesting good precision but poor accuracy for the CO–Ox. In the only health effects study that used both CO–Ox and GC methods to measure COHb levels in subjects with heart disease, researchers found that the spread of COHb values was much greater for the CO–Ox values than for the GC values (Allred et al., 1989a,b, 1991).

In order for optical instruments such as CO–Ox to be used to measure COHb levels accurately at low levels, they must be calibrated routinely with an alternative method (U.S. EPA, 1991, p. 8–64). When properly calibrated, CO–Ox instruments provide useful

information on mean COHb values; however, variation in individual oxyhemoglobin (O_2Hb) levels appears to influence COHb readings (Allred et al., 1989a,b) and, as noted above, CO–Ox instruments also give a broader range of COHb values when compared to GC measurements on the same samples (Allred et al., 1989a,b, 1991). Although the CASAC identified the GC as the method of choice (McClellan, 1992), the fact that most of the health effects literature for CO relies on CO–Ox measurements led to the decision that CO–Ox data would be used in establishing levels of concern.

B. Health Effects Associated With Carbon Monoxide

Health effects associated with exposure to CO include cardiovascular system effects, CNS effects, and developmental toxicity effects, as well as effects of combined exposure to CO and other pollutants, drugs, and environmental factors. Cardiovascular effects of CO are directly related to a reduced oxygen (O_2) content of the blood caused by combination of CO with hemoglobin (Hb) to form COHb and resulting in tissue hypoxia. Most healthy individuals have mechanisms (e.g., increased blood flow, blood vessel dilation) which compensate for this reduction in tissue O_2 levels, although the effect of reduced maximal exercise capacity has been reported in healthy persons even at low COHb levels. Compensatory mechanisms are less effective in elderly people, pregnant women, small children, and in certain people with anemia or pulmonary and cardiovascular diseases, thereby increasing their susceptibility to potential adverse effects of CO during exercise. Research studies considered most significant to the establishment of NAAQS for CO are summarized in Table 1 and are discussed below.

1. Mechanisms of Toxicity

The mechanism of toxicity principally associated with health effects of greatest concern from CO exposure is hypoxia induced by elevated COHb levels. The primary exchange route for CO to human tissues is through the lungs. Although CO is a naturally occurring chemical in blood being produced endogenously by normal catabolic processes, blood COHb levels do not often exceed 0.5 to 0.7 percent in normal individuals unless exogenous CO is breathed. Some individuals with high endogenous CO production can have COHb levels of 1.0 to 1.5 percent (e.g., anemics). Exogenous CO diffuses through the respiratory zone (alveoli) to the blood where it binds to Hb to form COHb. The chemical affinity of CO for Hb is 218 to 250 times greater than that of O_2 (Roughton, 1970; Wyman et al., 1982; Rodkey et al., 1969). This preferential binding of CO to Hb limits the availability of Hb for O_2 transport to tissues throughout the body. As COHb levels increase, the dissociation curve for normal human blood is shifted to the left resulting in more reduced delivery of O_2 to tissues and a greater of CO-induced hypoxia. It is this reduced O_2 delivery to heart muscle tissue which is of great concern for individuals with ischemic heart disease because their already compromised condition puts them at increased risk.

TABLE 1.—KEY HEALTH STUDIES FOR ESTABLISHING NAAQS FOR CARBON MONOXIDE

COHb concent. percent [a]	Health effects	References [b]
2.3–7.0	Decreased short-term maximal exercise duration in young healthy men.	Drinkwater et al. (1974), Ekblom and Huot (1972), Horvath et al. (1975), Raven et al. (1974a,b), Weiser et al. (1978).
2.9–5.9	Decreased exercise duration due to increased chest pain (angina) in patients with ischemic heart disease.	Adams et al. (1988), Allred et al. (1989a,b; 1991), Anderson et al. (1973), Kleinman et al. (1989), Sheps et al. (1987).
5.0–20.0	Decreased maximal oxygen consumption with short-term strenuous exercise in young healthy men.	Ekblom and Huot (1972), Klein et al. (1980), Pirnay et al. (1971), Stewart et al. (1978), Vogel and Gleser (1972), Weiser et al. (1978).
5.0–20.0	Equivocal effects on visual perception, audition, motor and sensorimotor performance, vigilance, and other measures of neurobehavioral performance.	Benignus et al. (1977, 1987, 1990a,b), Bunnell and Horvath (1988), Christensen et al. (1977), Gliner et al. (1983), Harbin et al. (1988), Hudnell and Benignus (1989), McFarland (1970, 1973), McFarland et al. (1944), Mihevic et al. (1983), O'Donnell et al. (1971), Putz et al. (1976) Putz (1979), Roche et al. (1981), Rummo and Sarlanis (1974), Seppannen et al. (1977), Von Post-Lingen (1964), Winneke (1974).

[a] Blood COHb levels determined by optical methods.
[b] References also found in U.S. EPA (1991) and U.S. EPA (1992).

Although several other mechanisms of toxicity are discussed in the Criteria Document (U.S. EPA, 1991), these are not considered to be as well understood as COHb hypoxia. Intracellular effects of CO (U.S. EPA, 1991, pp. 9–22 to 9–31) have been associated with CO toxicity. Preferential binding of CO to myoglobin, cytochrome P–450, and cytochrome c oxidase has been studied and could lead to impairment of intracellular oxygen transport to mitochondria. However, mechanisms of toxicity associated with CO-induced inhibition of these hemoproteins at relevant CO levels are not well understood at this time and will require further research.

Based on the review and conclusions drawn in the Criteria Document (U.S. EPA, 1991), COHb levels provide the most useful estimate of exogenous CO exposures and serve as the best biomarker of CO toxicity for ambient-level exposures to CO. Thus, COHb levels are used as the indicator of health effects and to identify the lowest effects level for CO.

2. Cardiovascular Effects

The best documented cardiovascular effects of CO in patients with chronic heart disease are decreased time to onset of chest pain and ST-segment depression during exercise stress. The commonly accepted criterion of exercise-induced myocardial ischemia is 1 mm or greater ST-segment depression. The ST segment is a portion of the electrocardiogram (ECG), depression of which is an indication of insufficient O_2 supply to heart muscle tissue.

Five key studies on cardiovascular effects of CO (Allred et al., 1989a,b, 1991; Kleinman et al., 1989; Adams et al., 1988; Sheps et al., 1987; Anderson et al., 1973) have provided evidence of the potential for CO to enhance development of exercise-induced

myocardial ischemia in patients who suffer from angina pectoris. (Angina pectoris is a spasmodic, strangling sensation or heavy chest pain, often radiating to the arms, especially the left, most often due to lack of O_2 to the heart muscle and precipitated by effort or excitement.) An early study by Anderson et al. (1973) reported decreased time to onset of angina pain for COHb levels as low as 2.9 (CO–Ox), representing a 1.6 percent increase in average COHb levels over baseline. Details of this study were reported at length in the Addendum (U.S. EPA, 1984b).

More recent controlled exposure studies of angina patients have provided substantial new evidence of decreased time to early onset of chest pain. (See discussion in U.S. EPA, 1991, pp. 10–21 to 10–35). A study which provides strong evidence of the health effects of CO is the multicenter study of Allred et al. (1989a,b, 1991). There are several reasons why this particular study is important to the CO NAAQS review: (1) Dose-response relationships are shown, (2) information on ST-segment depression of subjects is available, (3) COHb measurements were taken using both GC and CO–Ox, (4) a large number of subjects was used, and (5) it was conducted at multiple laboratories around the U.S. This study involved 63 males (41–75 years of age) with coronary artery disease living in three different U.S. cities. The objective was to assess the impact of exposure to CO on time to onset of significant ischemia during a standard treadmill test. Unusual care was taken to establish presence of coronary artery disease in all subjects prior to testing. The protocol for the study was quite similar to that used in the Aronow studies, i.e., two exercise tests were performed on the same day separated by a recovery period and a double-blind exposure period. Subjects were exposed to either clean air, 117 ppm CO, or 253 ppm CO for 50 to 70 minutes while performing symptom-limited exercise on a treadmill. Time to onset of angina and time to ST-segment depression were determined for each test following exposure to both CO levels and compared to clean air (<2 ppm CO) exposure. After exposure to 117 ppm and 253 ppm CO, COHb levels measured before the exercise stress test were 2.4 and 4.7 percent COHb (GC) and 3.2 and 5.6 percent COHb (CO–Ox), respectively. After the stress test COHb levels were 2.0 and 3.9 percent (GC) and 2.7 and 4.7 percent (CO–Ox). Using the objective measure of time to ST-segment depression, CO exposure which produced 3.2 percent COHb (CO–Ox, pretest) resulted in a 5.1 percent ($p=0.01$) decrease in time to the ST criterion, and 5.6 percent COHb (CO–Ox, pretest) decreased time to the ST criterion by 12.1 percent ($p<0.001$) relative to clean air exposure. Combining slopes for the 62 individuals yielded a significant ($p<0.005$) regression which indicates that there was a 3.9 percent decrease in time to ST criterion for every 1 percent increase in COHb. Time to onset of angina also was reduced in the same subjects, and regression analysis yielded a significant relationship ($p<0.025$). Both endpoints (time to angina and time to ST change) were highly correlated.

In another study (Sheps et al., 1987), 30 nonsmokers with ischemic heart disease (ages 38–75) were exercised during exposure to 100 ppm CO or air using a 3-day, randomized double blind protocol. Following CO exposure, average COHb levels were 4.1 percent (CO–Ox), representing a 2.2 percent COHb increase from the initial COHb level. In comparing results of air-exposed subjects to CO-exposed subjects as a group, no statistically significant differences were reported in time to onset of angina, maximal exercise time, maximal ST-segment depression, or time to significant ST-segment depression. Although the authors concluded that 4.1 percent COHb did not produce clinically significant effects in the paired subject group, 3 of 30 patients did experience angina on CO-exposure days but not on air-exposure days. Further analysis of the 30 person data base from Sheps et al. (1987) of time to onset of angina that included these three patients indicated a statistically-significant decrease for CO exposure compared to air exposure (Bissette et al., 1986). The same group of researchers (Adams et al., 1988) exposed 30 subjects with obstructive coronary artery disease to either air or sufficient CO to reach COHb levels of 5.9 percent (CO–Ox), representing an average increase of 4.2 percent COHb above initial COHb levels. As in the earlier study, several patients experienced angina on the CO-exposure day and not on the air-exposure day but never the reverse. Results of this study provide statistically significant evidence that exposure to CO induces earlier onset of angina and ventricular dysfunction as well as poorer exercise performance in patients with ischemic heart disease. Although the Sheps et al. (1987) and Adams et al. (1988) studies did not observe statistically-significant changes in time to onset of angina using conventional statistical procedures, results of these studies are not incompatible with the rest of the studies reporting an effect of CO (U.S. EPA, 1991, p. 10–32).

A separate study of effects of CO exposure was conducted with 26 nonsmoking male, angina patients (Kleinman and Whittenberger, 1985; Kleinman et al., 1989). One hour of exposure to 100 ppm CO raised COHb levels to 3.0 percent (CO–Ox), representing an average increase of 1.5 percent COHb over initial COHb level. For the group, CO exposure resulted in a decrease in time to onset of angina by 6.9 percent compared to clean air exposure (Kleinman and Whittenberger, 1985). This was a statistically-significant difference ($p=0.03$). Reanalysis, necessitated by dropping two subjects due to inconsistent medical records, resulted in an average decrease of 5.9 percent ($p=0.046$) in time to onset of angina for CO exposure compared to air exposure (Kleinman et al., 1989). For the eight patients who exhibited depression in the ST segment of ECG traces during exercise, there was a decrease of 10 percent ($p<0.036$) in time to onset of angina and a decrease of 19 percent ($p<0.044$) in time to onset of ST-segment depression.

Allred et al. (1989b, 1991) discuss possible reasons for some differences in results of the above-cited studies. These studies have different designs, types of exercise tests, inclusion criteria (e.g., patient populations), exposure conditions, and measurement methods for COHb. Of the studies, only two (Allred et al., 1989a,b, 1991; Anderson et al., 1973) investigate more than a single target level of COHb, and of those two, only Allred et al. (1989a,b, 1991) demonstrate a dose-response effect of COHb on time to onset of angina. Different measurement methodologies for COHb also may account for some of the discrepancies between studies. As discussed in Section V.C.1. of the Staff Paper (U.S. EPA, 1992) and in the Criteria Document (U.S. EPA, 1991, pp. 8–70 to 8–74), only Allred et al. (1989a,b, 1991) used both the GC and CO–Ox to measure COHb and found the spread of COHb values to be much greater for the CO–Ox than for the GC. Another difference in the studies was that Allred et al. (1989a,b, 1991) used more rigorous subject entry criteria. All subjects were male, were required to have stable exertional angina and reproducible exercise-induced ST-segment depression and angina, and were required to have either a previous myocardial infarction, angiographic disease or a positive thallium test.

The major conclusion which can be drawn regarding most of the studies

discussed above is that all show a decrease in time to onset of angina at postexposure COHb levels ranging from 2.9 to 5.9 percent (CO–Ox). This represents incremental increases of 1.5 to 4.4 percent COHb from preexposure baseline levels. Therefore, there are clearly demonstrable effects of low-level CO exposure in patients with ischemic heart disease (U.S. EPA, 1991, pp. 10–34 to 10–35). Across-study comparison is depicted in the Criteria Document (U.S. EPA, 1991, p. 10–33), presented as an adaptation from Allred et al. (1989b, 1991), and suggests reasonably good consistency. For purposes of comparison, only optical methods (CO–Ox) were used to avoid confusion.

The adverse nature of the effects described in the five key studies is uncertain due to the range of professional judgments on the clinical significance of small performance decrements produced by exercise and CO exposure. Although some physicians may not be greatly concerned about decrements in performance occurring around 3.0 percent COHb (CO–Ox), consistency across studies of response for both decrease in time to onset of angina and ST-segment depression suggest that the effect does occur and may limit the activity of persons with ischemic heart disease. Bassan (1990) indicates that 58 percent of cardiologists believe that recurrent exercise-induced angina attacks are associated with substantial risk of precipitating myocardial infarction, fatal arrhythmia, or slight but cumulative myocardial damage (U.S. EPA, 1991, p. 10–35). Based on discussions in the Criteria Document (U.S. EPA, 1991) and at the April 30, 1991 and March 5, 1992 CASAC meetings, staff recommended in the Staff Paper (U.S. EPA, 1992, p. 22) that 2.9 to 3.0 percent COHb (CO–Ox), representing an increase above initial COHb of 1.5 to 2.2 percent COHb, be considered a level of potential adversity for individuals at risk.

3. Effects on Exercise Capacity and Oxygen Uptake

Maximal oxygen uptake and maximal exercise capacity are direct measures of cardiovascular capacity and can provide insight into the impact of CO on the cardiovascular systems of healthy individuals. Although decreases in these attributes may not be very serious in healthy persons for CO exposures typically found in the ambient air, they can be indicative of the extent to which an individual's ability to function normally may be affected while engaging in activities which require high levels of sustained exercise.

Numerous researchers have studied the effects of CO on oxygen uptake and exercise performance in healthy individuals. Several investigators (Klein et al., 1980; Stewart et al., 1978; Weiser et al., 1978; Ekblom and Huot, 1972; Vogel and Gleser, 1972; Pirnay et al., 1971) found statistically-significant decreases (3 to 23 percent) in maximal oxygen uptake under conditions of short-term maximal exercise at COHb levels ranging from 5 to 20 percent (CO–Ox). Horvath et al. (1975) found that the lowest level at which COHb marginally influenced maximal oxygen uptake ($p<0.10$) was about 4.3 percent (CO–Ox); COHb levels of 3.3 percent and 4.3 percent (CO–Ox) reduced work time to exhaustion by 4.9 percent and 7 percent, respectively. Similar results were found following exhaustive treadmill exercise at 5 percent COHb (CO–Ox) (Stewart et al., 1978; Klein et al., 1980). Short-term maximal exercise duration has been shown to be reduced by 3 to 38 percent at COHb levels ranging from 2.3 to 7 percent (CO–Ox) (Horvath et al., 1975; Drinkwater et al., 1974; Raven et al., 1974a,b; Weiser et al., 1978; Ekblom and Huot, 1972). Since CO has not been shown to impair submaximal work capacity, changes in short-term maximal exercise should be of concern mainly for competing athletes (U.S. EPA, 1991, p. 10–73).

4. Central Nervous System Effects

A variety of CNS effects has been found to be associated with CO exposures which result in COHb levels of 5 to 20 percent (CO–Ox). These effects include changes in visual perception, hearing, motor performance, sensorimotor performance, vigilance, and other measures of neurobehavioral performance.

Of the behaviors studied, the most sensitive to disruption by COHb are those that require sustained attention or sustained performance. For example, the group of studies on motor and sensorimotor performance, which have used a variety of measures (e.g., fine motor skills, reaction time, and tracking), offer the most consistent evidence for effects occurring at COHb levels as low as 5 percent. Although Winneke (1974) found some effects on steadiness and precision at 10 percent COHb (CO–Ox), several other investigators (Mihevic et al., 1983; O'Donnell, 1971; Seppanen et al., 1977) reported no CO effect at COHb levels ranging from 5.5 to 12.7 percent (CO–Ox). Reaction time was unaffected by COHb levels of 7 and 10 percent (CO–Ox) (Rummo and Sarlanis, 1974; Winneke, 1974), and the pervasive finding is that COHb elevation does not affect reaction time for COHb levels as high as 20 percent (CO–Ox) (U.S. EPA, 1991, p. 10–118). Compensatory tracking was not significantly affected by COHb levels of 5.8 percent (CO–Ox) (Gliner et al., 1983) or by levels of 12 to 13 percent (CO–Ox) (O'Donnell et al., 1971); however, tracking tasks were significantly affected by COHb levels of 5 percent (CO–Ox) (Putz et al., 1976; Putz, 1979). Results of the Putz et al. (1976) study were confirmed by Benignus et al. (1987) but not by Benignus et al. (1990a) when attempting to demonstrate a dose-effect relationship using the same experimental design. Benignus et al. (1990b) discusses possible reasons for high variability between studies, and the Criteria Document (U.S. EPA, 1991, p. 10–121) concludes that COHb elevation produces small decrements in tracking that are sometimes statistically significant. Numerous other studies (Benignus et al., 1977; Bunnell and Horvath, 1988; Christensen et al., 1977; Harbin et al., 1988; Hudnell and Benignus, 1989; McFarland, 1970, 1973; McFarland et al., 1944; Roche et al., 1981; von Post-Lingen, 1964) provide additional support for neurobehavioral effects associated with COHb levels above 5 percent.

Even though new information regarding neurobehavioral effects of COHb levels in the range of 5–20 percent (CO–Ox) has been published during the past decade, conditions under which these effects occur are poorly understood (U.S. EPA, 1991, p. 10–143). Because neurobehavioral effects have not yet been demonstrated at COHb levels below 5 percent (CO–Ox), the Staff Paper (U.S. EPA, 1992, p. 24) recommended focussing on the cardiovascular effects which have been reported at lower COHb levels. Standards which protect sensitive populations from adverse cardiovascular effects also should provide adequate protection against adverse neurobehavioral effects of CO occurring in the exposed population.

5. Developmental Toxicity Effects

Developmental toxicity covers a variety of effects in the developing organism including fetal death, structural abnormalities, altered growth and functional deficits. The fetus may be particularly vulnerable to the toxic effects of CO exposure because fetal development often occurs at or near critical tissue oxygenation levels (Longo, 1977). The COHb levels tend to be naturally elevated in the fetus due to differences in uptake and elimination of CO from fetal hemoglobin.

Human data on developmental toxicity of CO are very limited for obvious ethical reasons. Maternal smoking, however, has been associated with a number of adverse health effects, many of which can be attributed to very high CO exposures (500–1000 ppm) from cigarette smoke. These effects include spontaneous abortion and subsequent fetal death due to depressed birth weight, increased number of hospital admissions during the first 5 years of life, and poorer than predicted school performance during the first 11 years of life. These and other effects of smoking are reviewed in a report to the U.S. Surgeon General (National Institute of Child Health and Human Development, 1979). Data (Hoppenbrouwers et al., 1981) supporting a link between environmental CO exposure and sudden infant death syndrome (SIDS) are suggestive, but further study is needed before any causal relationship can be inferred.

Finally, animal studies have provided evidence of fetal mortality, teratogenicity, reduced body weight, morphological changes, altered cardiovascular development, and neurochemical changes. However, these studies are often conducted at CO levels much greater than those found in the ambient air, and extrapolation to human health effects at ambient CO exposures remains very difficult.

6. Environmental Factors, Drugs, and Other Pollutants

Several additional factors have been investigated for potential interactions with CO that may alter health effects. Among the more important are altitude, drugs, coexposure to other pollutants, and heat stress. Altitude is a matter of concern because of the large populations exposed to CO while living in cities above 1500 meters. While there are some data to support the possibility that effects of inhaling CO and effects of high altitude may be additive (Cooper et al., 1985; McDonagh et al., 1986), several studies even at 2,000 m to 4,500 m show little or no additivity (McGrath, 1988; Horvath, 1988; Horvath and Bedi, 1989). Most other studies have been conducted at CO levels which are too high to be of regulatory use.

There is evidence that interactions of drug effects with CO toxicity can occur in both directions, i.e., CO toxicity may be enhanced by drug use, and toxic or other effects of drugs may be altered by CO exposure. A recent study (Knisely et al., 1989) reported a large interaction of CO exposure and alcohol in mice, demonstrating that alcohol doubled the acute toxicity of CO. In the same study, CO exposure in combination with administration of barbiturates and other psychoactive drugs produced additive but not synergistic effects. Combined exposures of CO and other pollutants have been investigated primarily using animal subjects with only a few human studies being published. No interaction was observed in humans for CO in combination with common ambient air pollutants such as nitrogen dioxide, ozone, and peroxyacetyl nitrate (Raven et al., 1974a,b; Drinkwater et al., 1974; Gliner et al., 1975), although a greater decrement in exercise performance was reported in these studies when heat stress was combined with 50 ppm CO.

The Staff Paper (U.S. EPA, 1992, p. 26) recommended that information on CO in combination with other pollutant exposures and environmental stresses be treated as a margin of safety consideration.

C. Populations Potentially at Risk

In the Administrator's judgment, the available health effects data identify individuals with angina (e.g., history of heart disease) as the group at greatest risk from low-level, ambient air exposures to CO. Based on 1989 data of the American Heart Association (AHA, 1989) and 1990 information from the Department of Health and Human Services (DHHS, 1990), individuals with both diagnosed and undiagnosed ischemic heart disease total approximately 10 to 11 million or about 4.5 percent of the U.S. population. As discussed earlier, concern for these individuals is due to the fact that their condition is due to an insufficient supply of oxygen to cardiac tissue. Further reduction in oxygen reserve capacity by exposure to CO increases the probability of adverse health effects occurring.

Several other groups have been identified in the Criteria Document (U.S. EPA, 1991) and Staff Paper (U.S. EPA, 1992) as being potentially at risk of being sensitive to CO exposure. These groups include: (1) Persons with cerebrovascular disease, (2) those individuals with anemia or chronic obstructive lung disease, and (3) fetuses and young infants. In addition, visitors to high altitude locations may be more susceptible due to lower oxygen content in the air, and those persons using drugs or alcohol may be at greater risk due to the interactive health effects of CO with these substances. For a complete list of probable risk groups, see the Criteria Document (U.S. EPA, 1991, p. 12–1).

For many of the groups identified above, there is little or no experimental evidence to demonstrate that they are at increased risk of CO-induced health effects. However, it is reasonable to expect that individuals with preexisting illness (e.g., congestive heart failure, peripheral vascular or cerebrovascular disease, sickle-cell anemia, hematological disease, chronic obstructive lung disease) which limit oxygen absorption or oxygen transport to body tissues would be somewhat more susceptible to hypoxic (i.e., oxygen starvation) effects of CO (pp. 12–1 and 12–2, U.S. EPA, 1991). Since no human experimental evidence exists which identifies CO effects levels for these other groups, the Administrator is considering the possible effects of CO on these groups only in the determination of what constitutes an adequate margin of safety.

III. Rationale for This Decision

This decision completes the EPA's review of health effects of CO assembled over a 5-year period and contained in the Criteria Document (U.S. EPA, 1991).[2] This review includes the evaluation of key studies published through 1990 incorporated in the Criteria Document (U.S. EPA, 1991), the Staff Paper (U.S. EPA, 1992) assessment of most relevant information contained in the Criteria Document (U.S. EPA, 1991), and the advice and recommendations of the CASAC as presented both in the discussion of these documents at public meetings and in the CASAC's 1991 (McClellan, 1991) and 1992 (McClellan, 1992) "closure letters."

A. Carboxyhemoglobin Levels of Concern

In selecting the appropriate level(s) and averaging time(s) for the primary NAAQS for CO, the Administrator must first determine the COHb levels of concern taking into account a large and diverse health effects data base. The scientific quality and strength of health data are assessed in the Criteria Document (U.S. EPA, 1991) and in the Staff Paper (U.S. EPA, 1992). Based on these assessments, judgments are made here to identify those studies that are most useful in establishing a range of COHb levels to be considered in standard setting. In addition, the more uncertain or less quantifiable evidence is reviewed to determine the lower end of the range that would provide an adequate margin of safety from effects of clear concern. Those judgments relevant to the establishment of an appropriate

[2] As previously noted, the EPA believes that section 307(d) does not require rulemaking procedures where the Administrator concludes that revision of an existing NAAQS is not appropriate.

range of COHb levels are summarized in the discussion below.

The Administrator judges that cardiovascular effects, as measured by decreased time to onset of angina pain and by decreased time to onset of significant ECG ST-segment depression, are the health effects of greatest concern, which clearly have been associated with CO exposures at levels observed in the ambient air. Decrease in time to onset of exercise-induced angina pain is well documented in studies of angina patients whose postexposure COHb levels have been raised to 2.9–5.9 percent (CO–Ox), which represents incremental increases of 1.5 to 4.4 percent COHb from baseline levels (Allred et al., 1989a,b, 1991; Kleinman et al., 1989; Adams et al., 1988; Sheps et al., 1987; Anderson et al., 1973). Time to onset of significant ECG ST-segment change, which is indicative of myocardial ischemia in patients with documented coronary artery disease and a more objective indicator of ischemia than angina pain, provides supportive evidence of health effects occurring as low as 2.9–3.0 percent COHb (CO–Ox). In light of the above data and discussions of adverse health consequences in the Criteria Document (U.S. EPA, 1991, p. 10–35) and Staff Paper (U.S. EPA, 1992, p. 29), at the April 30, 1991 and March 5, 1992 CASAC meetings, and in the July 17, 1991 letter to the Administrator from the CASAC Chairman (McClellan, 1991), the Administrator concludes that CO exposures resulting in COHb levels of 2.9–3.0 percent (CO–Ox) or higher in persons with heart disease have the potential to increase the risk of decreased time to onset of angina pain and ST-segment depression. As stated by McClellan (1991), "Among health professionals there is a range of views as to the clinical significance of these changes with the dominant view being that the changes should be considered as adverse or a harbinger of adverse effects." It is important that standards be set to appropriately reduce the risk of ambient exposures which produce COHb levels that could induce such potentially adverse effects.

Clinical importance of cardiovascular effects associated with exposures to CO resulting in COHb levels of 2 to 3 percent remains less certain. One recent study (Allred et al., 1989a,b) provides evidence of a 5.1 percent decrease in time to ST-segment depression at 2.0 percent COHb when using the GC to measure COHb levels. Although it is possible that there is no threshold for these effects even at lower COHb levels, the health significance of such small changes in ST-segment depression appears to be relatively trivial. The Administrator, therefore, concludes that results suggesting cardiovascular effects in angina patients when COHb levels are between 2.0 and 2.9 percent only be considered in evaluating whether the current CO standards provide an adequate margin of safety.

B. Margin of Safety

There are several factors which the Administrator believes should be considered in evaluating the adequacy of the current CO NAAQS: (a) short-term reduction in maximal work capacity has been measured in trained athletes exposed to CO sufficient to produce COHb levels as low as 2.3 to 7 percent; (b) the wide range of human susceptibility to CO exposures and ethical considerations in selecting subjects for experimental purposes together suggest that the most sensitive individuals have not been studied; (c) animal studies of developmental toxicity and human studies of the effects of maternal smoking provide evidence that exposure to high concentrations of CO can be detrimental to fetal development, although very little is known about the effects of ambient CO exposures on the developing fetus; (d) though little is known about effects of CO on potentially sensitive populations other than those with ischemic heart disease, there is reason for concern about visitors to high altitudes, individuals with anemia or respiratory disease, and the elderly; (e) impairment of visual perception, sensorimotor performance, vigilance or other CNS effects has not been demonstrated to be caused by CO concentrations commonly found in the ambient air; however, short-term peak CO exposures may be responsible for impairments which could be a matter of concern for complex activities such as driving a car; (f) limited evidence suggests concern for individuals exposed to CO concurrently with drug use (e.g., alcohol) during heat stress, or coexposure to other pollutants; (g) large uncertainties remain regarding modelling COHb formation and estimating human exposure to CO which could lead to overestimation or underestimation of COHb levels in the population associated with attainment of a given CO NAAQS; and (h) COHb measurements made using the CO–Ox may not reflect COHb levels in angina patients studied, thereby creating uncertainty in establishing a lowest effects level for CO.

In summary, the Administrator concludes that the lowest COHb level at which adverse effects have been demonstrated in persons with angina is around 2.9–3.0 percent, representing an increase of 1.5 percent above baseline when using the CO–Ox to measure COHb. These data serve to establish the upper end of the range of COHb levels of concern. Taking into account uncertainties in the data, the less significant health endpoints, and less quantifiable data on other potentially sensitive groups, staff recommends that the lower end of the range be established at 2.0 percent COHb. Below this level, the potential for public health risk appears to be small. The Administrator, therefore, concludes that results suggesting cardiovascular effects in angina patients when COHb levels are between 2.0 and 2.9 percent only be considered in evaluating whether the current CO standards provide an adequate margin of safety.

C. Relationship Between CO Exposure and COHb Levels

In order to set ambient CO standards based on an assessment of health effects at various COHb levels, it is necessary to estimate the ambient CO concentrations that are likely to result in COHb levels of concern. The Criteria Document (U.S. EPA, 1991, p. 9–21) concludes that the best all around model for predicting COHb levels is the Coburn, Forster, Kane (CFK) differential equation (Coburn et al., 1965). The CFK model estimates COHb levels resulting from exposure to CO concentrations as a function of time and various physiological and environmental factors (e.g., blood volume, endogenous CO production rate, ventilation rate, altitude).

Over the last 20 years, modelers have developed and evaluated both linear and nonlinear solutions to the CFK model. The linear CFK model assumes that O_2Hb is constant and does not vary with COHb level. The nonlinear CFK model incorporates the interdependence between O_2Hb and COHb. At COHb levels below 6 percent, both approaches give estimates that are within 0.5 percent COHb (Smith, 1990). While the linear CFK model is easier to solve and gives approximately the same COHb estimate in the range of interest (i.e., 1 to 5 percent COHb), the nonlinear solution tends to be more accurate physiologically (U.S. EPA, 1992, p. 12). With the assumption of a linear relationship between O2Hb and COHb, there is an analytical solution to the nonlinear CFK equation (Muller and Barton, 1987).

The Staff Paper (U.S. EPA, 1992, p. 13) provides baseline estimates (i.e., typical physiological parameters are used) of COHb levels expected to be reached by nonsmokers exposed to various constant concentrations of CO

for either 1 or 8 hours based on the CFK model. (Smokers are not included because they have voluntarily exposed themselves to high CO levels.) There are, however, two major uncertainties involved in estimating COHb levels resulting from exposure to CO concentrations. First, among the population with cardiovascular disease, or any other group of interest, there is a distribution for each of the physiological parameters used in the CFK model. Past work (Biller and Richmond, 1982) has shown that these variations are sufficient to produce noticeable deviations from the COHb levels. Second, predictions based on exposure to constant CO concentrations can underestimate or overestimate response of individuals exposed to widely fluctuating CO levels that typically occur in the ambient environment (Biller and Richmond, 1992).

D. Estimating Population Exposure

The Agency's review includes an analysis of CO exposures expected to be experienced by residents of Denver, Colorado, under air quality scenarios related to the current situation when the 8-hour CO NAAQS is just attained. (The 8-hour CO NAAQS is modeled because it is the "controlling standard" in Denver and in every other U.S. nonattainment area for CO.) The analysis includes passive smoking and gas stove CO emissions as indoor sources of CO pollution. However, it does not include other less-common CO sources (e.g., wood stoves, fireplaces, and faulty furnaces). Although these sources of exposure may be of concern for such high risk groups as individuals with cardiovascular disease, pregnant women, and their unborn children, the contribution of indoor sources cannot be effectively mitigated by ambient air quality standards. The exposure analysis is abstracted in the Staff Paper (U.S. EPA, 1992) and reported in more complete form in Johnson et al. (1992).

The analysis indicates that if the current 8-hour standard is attained, the proportion of the nonsmoking population with cardiovascular disease experiencing exposures at or above 35 ppm for 1 hour and 9 ppm for 8 hours decreases by an order of magnitude or more, down to less than 1 percent of the total person-days in that population. Likewise, attaining the current 8-hour standard reduces the proportion of the nonsmoking cardiovascular-disease population person days at or above COHb levels of concern by an order of magnitude or more. At the 8-hour standard, the EPA estimates that fewer than 0.1 percent of the nonsmoking cardiovascular-disease population would experience a COHb level ≥ 2.1 percent (U.S. EPA, 1992, p. 40). A smaller population is estimated to exceed higher COHb percentages.

E. Decision on the Primary Standards

Based on this assessment, and considering the 1985 review of similar CO effects and effects levels, the Administrator concludes that the evaluation of adequacy of the current CO standards should focus on reducing the number of individuals with cardiovascular disease from being exposed to CO levels in the ambient air that would result in COHb levels of 2.1 percent or greater. Standards that protect against COHb levels at the lower end of the range should provide an adequate margin of safety against effects of uncertain occurrence, as well as those of clear concern that have been associated with COHb levels in the upper-end of the range.

Based on the exposure analysis results described above, the Administrator concludes that relatively few people of the cardiovascular sensitive population group analyzed will experience COHb levels ≥ 2.1 percent when exposed to CO levels in the absence of indoor sources when the current ambient standards are attained. The analysis also indicates, however, that certain indoor sources (e.g., passive smoking, gas stove usage) contribute to total CO exposure. In addition, other indoor CO sources such as wood stoves and fireplaces also contribute to total CO exposure, but they were not explicitly modeled. Although these sources of exposure may be of concern for such high risk groups as individuals with cardiovascular disease, pregnant women, and their unborn children, the contribution of indoor sources cannot be effectively mitigated by ambient air quality standards.

When the EPA promulgated CO primary NAAQS on April 30, 1971 (36 FR 8186), two averaging times—1-hr and 8-hr—were selected. The 8-hr standard was chosen because most individuals, even at rest, appear to approach equilibrium levels of COHb after 8 hours of exposure. In addition the 8-hr period approximates blocks of time for which people are often exposed in a particular location or activity (e.g., sleeping, working) and provides a good indicator for tracking continuous exposures that occur during any 24-hr period. The 1-hr standard was chosen because a 1-hr averaging period provides a better indicator of short-term health effects of CO. The 1-hr standard provides reasonable protection from effects which might be encountered from very short duration peak (bolus) exposures in the urban environment. Review of current scientific information in the Criteria Document (U.S. EPA, 1991) indicates that these reasons for choosing averaging times for the CO standards remain valid and there are no compelling arguments for selecting new or different averaging times. The Administrator also considered and concurs with the staff recommendations contained in the Staff Paper (U.S. EPA, 1992) that both averaging times be retained for primary CO standards.

For the above reasons, the Administrator determines under section 109(d)(1) that revisions of the current 1-hr (35 ppm) and 8-hr (9 ppm) primary standards for CO are not appropriate at this time. As discussed more fully above, this determination is based on and completes the EPA's review of the health effects information contained in the final Criteria Document (U.S. EPA, 1991), the assessment in the final Staff Paper (U.S. EPA, 1992), and comments made by the CASAC (McClellan, 1991, 1992).

IV. Final Decision Not To Revise the Standards

The EPA has completed its review and revision of the air quality criteria document concerning the national primary and secondary air quality standards for CO and has made a final decision pursuant to CAA section 109(d)(1) that no revision of the standards for CO is appropriate. This decision is a final Agency action based on a determination of nationwide scope and effect. It is, therefore, subject to judicial review under CAA section 307(b) exclusively in the U.S. Court of Appeals for the District of Columbia Circuit. Any petition for judicial review of this final action must be filed within sixty days after August 1, 1994.

V. Regulatory Impacts

A. Regulatory Impact Analysis

Under Executive Order 12866 [58 FR 51,735 (October 4, 1993)], the Agency must determine whether the regulatory action is "significant" and, therefore, subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as 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, or loan programs or the rights and obligations or 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 the Executive Order."

Pursuant to the terms of Executive Order 12866, the OMB has notified the EPA that this action is a "significant regulatory action" within the meaning of the Executive Order. For this reason, this action was submitted to the OMB for review. Changes made in response to the OMB suggestions or recommendations will be documented in the public record.

B. Impact on Small Entities

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., the EPA must prepare initial and final regulatory flexibility analyses assessing the impact of certain decisions on small entities. These requirements are inapplicable to rules or other actions for which the EPA is not required by the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., or other law to publish a notice of proposed rulemaking [(5 U.S.C. 603(a), 604(a)]. Under section 307(d) of the Act, as the EPA interprets it, neither the APA nor the Act requires rulemaking procedures where the Agency decides to retain existing NAAQS without change. Accordingly, the EPA has determined that the impact assessment requirements of the RFA are inapplicable to this final decision.

VI. Other Reviews

This decision was submitted to the OMB for review. Comments from the OMB and the EPA's responses to these comments are available for public inspection at the EPA's Air and Radiation Docket Information Center (Docket No. A-93-05), South Conference Center, Room 4, Waterside Mall, 401 M Street, S.W., Washington, DC.

List of Subjects in 40 CFR Part 50

Environmental protection, Air pollution control, Carbon monoxide, Ozone, Sulfur oxides, Particulate matter, Nitrogen dioxide, Lead.

Dated: July 15, 1994.

Carol M. Browner,

Administrator.

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BILLING CODE 6560-50-P

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40 CFR Part 799

[OPPTS-42168; FRL 4642-3]

Testing Consent Order For Bisphenol A Diglycidyl Ether

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Consent Agreement and Order; Final rule.

SUMMARY: EPA has issued a Testing Consent Order that incorporates an Enforceable Consent Agreement (ECA) pursuant to the Toxic Substances Control Act (TSCA), with the Dow Chemical Company, Shell Oil Company, and Ciba-Geigy Corporation, (the Companies) who have agreed to perform certain health effects tests and an exposure evaluation test with bisphenol A diglycidyl ether (DGEBPA; CAS No. 1675-543). This document summarizes the ECA, amends 40 CFR 799.5000 by adding DGEBPA to the list of chemical substances and mixtures subject to ECAs and deletes DGEBPA from the proposed test rule for the category glycidol and its derivatives. Accordingly, the export notification requirements of 40 CFR part 707 apply to DGEBPA.

EFFECTIVE DATE: August 1, 1994.

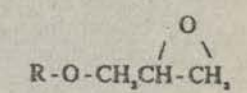
FOR FURTHER INFORMATION CONTACT: Susan Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Rm. E-543B, 401 M St., SW., Washington, DC 20460, (202) 554-1404, TDD (202) 554-0551.

SUPPLEMENTARY INFORMATION: This document amends 40 CFR 799.5000 by adding DGEBPA to the list of chemical substances and mixtures subject to ECAs and export notification requirements.

I. Regulatory History

A. ITC Designation

In its Third Report to the Administrator of the Environmental Protection Agency, published in the **Federal Register** on October 30, 1978 (43 FR 50630), the Interagency Testing Committee (ITC) designated the category of "glycidol and its derivatives" for priority consideration for health effects testing in the following areas: mutagenicity, carcinogenicity, and other adverse health effects, with particular emphasis on the reproductive system. Epidemiology studies were also recommended. The rationale for the original designation is discussed in the **Federal Register** of October 30, 1978 (43 FR 50630). This chemical category was defined by the ITC as all substances of the general formula:



where R is a hydrogen atom or any alkyl, aryl, or acyl group. R is unrestricted as to the number and type of substitutes it may carry.

In evaluating the testing needs for glycidyls, EPA considered all relevant information, including the following: information presented in the ITC's report; information regarding production volume, use, exposure, and release reported by manufacturers of glycidyls under the TSCA section 8(a) Preliminary Assessment Information Rule (40 CFR part 712); health and safety studies submitted under TSCA section 8(d) Health and Safety Reporting Rule (40 CFR part 716) for glycidyls; and published and unpublished information available to EPA. On December 30, 1983, EPA published an advanced notice of proposed rulemaking (ANPR) in the **Federal Register** (48 FR 57562) to require testing glycidyls under section 4(a) of TSCA.

EPA evaluated and responded to public comments on the ANPR in a document (Ref. 1), entitled "Support Document for Glycidol and its Derivatives: Responses to Public Comments on the Advance Notice of Proposed Rulemaking" (December, 1989).

In addition, EPA developed a technical support document for glycidol and its derivatives (Ref. 2). This document includes data on the identity and chemical/physical properties of the substances contained in this chemical category, as well as information on the production, uses, chemical fate, human exposure, and health effects for these substances. Subsequently, EPA

summarized the information in this technical support document, as well as more recent information from other sources, in an additional support document for glycidyls (Ref. 3) outlining the data supporting EPA's findings under section 4(a)(1) of TSCA for certain substances contained in the category.

A meeting was held on May 17, 1984, between representatives from the Epoxy Resins Program Panel of the Chemical Manufacturers Association (CMA) and EPA personnel concerning this chemical category. Meetings were also held on January 25, 1989, and May 17, 1989, between EPA and representatives of various working units of the Society of the Plastics Industry, Inc. (SPI). An Epoxides Workshop was held on April 25, 1990, at which EPA personnel and representatives of SPI were scheduled to discuss, among other topics, the glycidyls testing category as it relates to the broader issues concerning epoxides in general. Copies of the overhead slides, which were supplied in advance to SPI, have been placed in the record for the proposed rulemaking, along with summaries of the meetings held and copies of all support documents.

B. Proposed Test Rule

EPA published a proposed test rule for the category glycidol and its derivatives (56 FR 57144, November 7, 1991). EPA proposed health effects testing which included testing for subchronic toxicity, developmental toxicity, reproductive toxicity, neurotoxicity, mutagenicity, and oncogenicity.

EPA evaluated the public comments submitted after the test rule was proposed and responded to these comments in a document entitled "Support Document for Glycidol and its Derivatives: Responses to Public Comments on the Proposed Rulemaking; DGEBPA" (July, 1993) (Ref. 4).

C. Enforceable Consent Agreement Negotiations

On July 17, 1992, EPA published a **Federal Register** notice (57 FR 31714) announcing an "open season." The "open season" was a period during which manufacturers could submit to EPA proposals for testing chemical substances which had been proposed for testing by EPA but had not been subject to a final test rule. In that notice, EPA indicated that it would review the submissions and select candidates for negotiation of ECAs pursuant to 40 CFR part 790. EPA also indicated that it would later publish a **Federal Register** notice soliciting persons interested in participating in or monitoring negotiations for the development of ECAs on the chemicals selected.

On March 30, 1993, EPA published a **Federal Register** notice (58 FR 16669) announcing candidates selected for ECA negotiations and requesting that interested parties identify themselves to EPA. One of the glycidyls, DGEBPA, was selected. The notice established EPA's priority for initiating negotiations on the chemicals selected, and DGEBPA was among the chemicals assigned a high priority. The notice announced tentative dates for starting negotiations on DGEBPA and the other high-priority chemicals.

The Dow Chemical Company, Shell Oil Company, and Ciba-Geigy Corporation identified themselves through their agent, SPI, as interested parties. On May 18, 1993, EPA held a public meeting attended by representatives of interested parties. At the public meeting, SPI, on behalf of its member companies, presented a proposed testing plan and provided test protocols (Ref. 5) which would characterize the potential of DGEBPA for oncogenicity, neurotoxicity, male reproductive toxicity, and mutagenicity. In addition, SPI offered to undertake a glove permeability study and to implement a product stewardship program as a means of assessing and reducing worker exposure to DGEBPA. EPA also made available its draft proposal for testing on DGEBPA.

On June 1, 1993, EPA requested additional information from SPI to be used in conjunction with evaluating the testing plan (Ref. 6). In response to EPA's request, SPI submitted information (Refs. 7 through 15) and requested an opportunity to meet with EPA again.

On June 29, 1993, EPA convened a second public meeting attended by representatives of interested parties. At the public meeting, SPI, on behalf of its member companies, presented a testing proposal and test protocols (Ref. 16). Protocols were presented for a 2-year bioassay, a subchronic study (with satellite studies for testing for reproductive toxicity, neurotoxicity, and mutagenicity); all studies would be conducted via the dermal route of exposure. In addition, SPI reiterated its offer to perform a glove permeability study and implement a product stewardship program for DGEBPA.

EPA proposed that all testing of DGEBPA be conducted via the oral route of administration. After consideration of SPI's proposed testing plan and review of new information (Refs. 17, 18 and 19) submitted to EPA by SPI, EPA has determined that testing via the dermal route of exposure is consistent with DGEBPA's physical properties and the typical route of human exposure to DGEBPA, that significant systemic absorption occurs when DGEBPA is applied dermally, and that a higher percentage of parent compound will be absorbed if administered dermally than if given orally and extensively hydrolyzed at acid pH of the stomach. For these reasons, testing via the dermal route of exposure is appropriate.

EPA proposed testing DGEBPA for developmental toxicity. After considering new information presented to EPA by SPI (Refs. 20, 21 and 22), EPA has determined that sufficient information already exists to evaluate the potential for developmental toxicity from exposure to DGEBPA. For this reason, further tests are not needed at this time.

EPA proposed testing DGEBPA for mutagenicity[1]. After consideration of SPI's proposed testing plan and new information presented to EPA by SPI (Ref. 7), EPA has determined that for many of the tests proposed, information has already been developed; thus these tests are no longer necessary.

The Companies have agreed to perform testing for oncogenicity, subchronic toxicity, reproductive toxicity, and neurotoxicity, and glove permeability by specified dates according to test standards described below. In addition, the Companies are voluntarily developing and implementing a DGEBPA product stewardship program (PSP) that includes the following primary elements: application and communication of health and safety data; new data development; pollution prevention, waste minimization, and other exposure reduction actions; and continuous improvement in measurement and reporting activities. EPA believes that this PSP makes significant progress toward reducing the potential risk of injury to health and the environment posed by exposure to DGEBPA. The results of the testing program in the DGEBPA ECA are expected to aid in the periodic EPA and industry evaluation of the PSP to determine its adequacy and effectiveness.

[1]Specifically, EPA proposed the *salmonella typhimurium*, reverse mutation assay, detection of gene mutations in somatic cells in culture, sex linked recessive lethal test in *drosophila melanogaster*, a mouse specific-locus assay or mouse biochemical specific assay, *in vitro* mammalian cytogenetics assay, *in vivo* mammalian cytogenetics assay, rodent dominant lethal assay, and a rodent heritable translocation assay for DGEBPA.

II. Production, Use, and Exposure

DGEBPA and other glycidyl derivatives are produced by reacting epichlorohydrin with a compound having one or more active hydrogen atoms, followed by dehydrohalogenation (Ref. 23). On the basis of the Inventory Update Rule (40 CFR part 710, subpart B) or from other sources, EPA estimates annual production volume for DGEBPA to be approximately 400 million pounds (Ref. 5). The production volume of DGEBPA, represents greater than 95 percent of the total volume of production for the entire category of glycidol and its derivatives.

The uses for all glycidyls are listed in the technical support document developed after the ANPR was published (Ref. 2). Primarily, DGEBPA is the principal component in epoxy resins. Other glycidyl compounds are used as reactive diluents. Resins which are then reacted with curing agents to yield high performance thermosetting plastics, used in a large variety of application such as strong adhesives or coatings.

Glycidol and its esters and ethers are produced within "closed systems" (Refs. 24 and 25); however, EPA believes that some worker exposure may occur during this production process, due to intermittent high-level exposures during maintenance operations, or resulting from spills or leaks from the "closed systems."

In addition, workers may be exposed by the dermal and inhalation routes to glycidyl derivatives during the processing of glycidyl ethers and esters for various uses, particularly since these processes are generally conducted in an open system (Ref. 24). The National Institute for Occupational Safety and Health (NIOSH) has estimated the number of workers potentially exposed to glycidol and its derivatives, and these estimates appear in an exposure support document prepared for the proposed rulemaking (Ref. 24). NIOSH has estimated that 36,697 workers in the United States are potentially exposed to glycidol, that 52,838 workers may be exposed to glycidyl ethers, and that 42,469 workers may be exposed to glycidyl esters. Furthermore, recent estimates suggest that up to 3 million people in the United States may be exposed to DGEBPA through the consumer and commercial use of epoxy resins (Ref. 25).

III. Testing Program

The Companies have agreed to complete the following testing:

TABLE 1.—TESTING REQUIRED FOR DGEBPA

Description of Tests	Test Standard (40 CFR citation)	Deadline for Final Reports Months[1]	Final Report Date[2]
2-year Bioassay	798.3320 as amended (Appendix I)	53	8
Subchronic Toxicity Study	798.2250 as amended (Appendix II)	21	3
Functional Observation Battery: subchronic	798.6050 as amended (Appendix III)	21	3
Motor Activity Test: subchronic	798.6200 as amended (Appendix III)	21	3
Neuropathology: subchronic	798.6400 as amended (Appendix III)	21	3
Functional Observation Battery: acute[3]	798.6050 as amended (Appendix IV)	12[4]	1
Motor Activity Test: acute[5]	798.6200 as amended (Appendix IV)	12[6]	1
Neuropathology Test: acute[7]	798.6400 as amended (Appendix IV)	12[8]	1
Reproductive Toxicity Test	798.4700 as amended (Appendix V)	21	3
Glove Permeability Test	ASTM as amended (Appendix VI)	12	1

[1] Number of months after the effective date of the Consent Order.
[2] Interim reports are required every 6 months from the effective date until the final report is submitted. This column shows the number of interim reports required for each test.
[3] If the Agency determines that the results of the subchronic study are not negative, then this required testing must be performed.
[4] Figure indicates that reporting deadline, in months, calculated from the date of notification of the test sponsor by certified letter or FEDERAL REGISTER notice, that the Agency has determined that this required testing must be performed.
[5] If the Agency determines that the results of the subchronic study are not negative, then this required testing must be performed.
[6] Figure indicates that reporting deadline, in months, calculated from the date of notification of the test sponsor by certified letter or FEDERAL REGISTER notice, that the Agency has determined that this required testing must be performed.
[7] If the Agency determines that the results of the subchronic study are not negative, then this required testing must be performed.
[8] Figure indicates that reporting deadline, in months, calculated from the date of notification of the test sponsor by certified letter or FEDERAL REGISTER notice, that the Agency has determined that this required testing must be performed.

IV. Export Notification

The issuance of the ECA and Order subjects any persons who export or intend to export the chemical substance, DGEBPA (CAS No. 1675-54-3), of any purity, to the export notification requirements of section 12(b) of TSCA and the regulations promulgated pursuant to it at 40 CFR part 707. The listing of the chemical substance or mixture at 40 CFR 799.5000 serves as a notification to persons who intend to export such chemical substance or mixture that the substance or mixture is the subject of an ECA and Order and 40 CFR part 707 applies.

V. Deletion from Proposed Rule

EPA and the Companies have agreed that the DGEBPA testing requirements in the proposed rule will be met by implementing the ECA and Order, and the issuance of the ECA and Order by EPA constitutes final EPA action for purposes of 5 U.S.C. 704. Therefore, the proposed testing rule of DGEBPA, in the proposed test rule for the category glycidol and its derivatives, published at 56 FR 57144, November 7, 1991, will not be adopted as final.

VI. Public Record

A. Supporting Documentation

EPA has established a record for this ECA and Order, under docket number OPPTS-42168, which is available for inspection Monday through Friday, excluding legal holidays, in the TSCA Nonconfidential Information Center, NE B607 401 M St., SW., Washington, DC., 20460, from 1 p.m. to 4 p.m. Information claimed as Confidential Business Information (CBI) while a part of the record, is not available for public review. This record contains the basic information considered in developing this ECA and Order and includes the following information:

(1) Testing Consent Order for DGEBPA, with incorporated Enforceable Consent Agreement and associated testing protocols attached as appendices.

(2) **Federal Register** notices pertaining to this notice and the Testing Consent

Order incorporating the ECA consisting of:

(a) Notice of Proposed Rulemaking for Glycidol and its Derivatives, (November 7, 1991, 56 FR 57144).

(b) Notice announcing opportunity to initiate negotiations for TSCA section 4 testing consent agreements (July 17, 1992, 57 FR 31714).

(3) Communications consisting of:

(a) Written letters.

(b) Contact reports of telephone summaries.

(c) Meeting summaries.

(4) Reports - published and unpublished factual materials.

B. References

(1) USEPA, U.S. Environmental Protection Agency. Test Rules Development Branch. "Support Document for Glycidol and its Derivatives: Responses to Comments on the Advance Notice of Proposed Rulemaking." (December, 1989).

(2) Syracuse Research Corporation. "Draft Final Technical Support Document: Glycidol and its Derivatives." (November 11, 1986).

(3) USEPA. U.S. Environmental Protection Agency. Test Rules Development Branch. "Support Document for Glycidol and its Derivatives: Review of Available Health Effects Data." (October, 1987).

(4) USEPA. U.S. Environmental Protection Agency. Chemical Testing and Information Branch. "Support Document for Glycidol and its Derivatives: Responses to Comments on the Proposed Rulemaking; Bisphenol A diglycidyl ether." (September, 1993).

(5) The Society of the Plastics Industry, Inc. "DGEBPA Enforceable Consent Agreement Presentation." (May 18, 1993).

(6) USEPA. U.S. Environmental Protection Agency. "Diglycidyl ether of Bisphenol A, Review of Testing Proposal," letter from Keith J. Cronin to Lynn R. Harris (Society of the Plastics Industry Inc.). (June, 1993).

(7) Pullin, Terry, G. Report to the Dow Chemical Company entitled: "Integrated Mutagenicity Testing Program on Several Epoxy Compounds." (December 28, 1977).

(8) Bently, et al., "Hydrolysis of bisphenol A diglycidyl ether by epoxide hydrolases in cytosolic and microsomal fractions of mouse liver and skin: inhibition by bis epoxycyclopentylether and the effects upon the covalent binding to mouse skin DNA." *Carcinogenesis*, vol. 10, no. 2 pp. 321–327, 1989.

(9) Magdalou, J., and Hammock, B. "1,2 Epoxycycloalkanes: Substrates and Inhibitors of Microsomal and Cytosolic Epoxide Hydrolases in Mouse Liver." *Biochemical Pharmacology*, vol. 37, no. 14, pp. 2717–2722, 1988.

(10) DiGiovanni, J. "Multistage Carcinogenesis in Mouse Skin." *Pharmacology Therapeutics*, vol. 54, pp. 63–128, 1992

(11) Li, D., and Randerath, K. "Strain differences of I-compounds in relation to organ sites of spontaneous tumorigenesis and non-neoplastic renal diseases in mice." *Carcinogenesis*, vol. 11, no. 2 pp. 251–255, 1990.

(12) Rao, et al. "Mouse Strains for Chemical Carcinogenicity Studies: Overview of Workshop." *Fundamental and Applied Toxicology*, vol. 10, pp. 385–394, 1988.

(13) USEPA. U.S. Environmental Protection Agency. Summary of: "Workshop on Carcinogenesis Bioassay via the Dermal Route." (April 29, 1987).

(14) USEPA. U.S. Environmental Protection Agency. Summary of: "Second EPA Workshop on Carcinogenesis via the Dermal Route." (May 18, 1988).

(15) USEPA. U.S. Environmental Protection Agency. Office of Pesticides and Toxic Substances. Atlas of Dermal Lesions (August, 1990).

(16) The Society of the Plastics Industry, Inc. "DGEBPA Enforceable Consent Agreement Presentation." (June 29, 1993).

(17) Nolan, R., and Unger, L. Report to the Dow Chemical Company entitled: "Diglycidyl Ether of Bisphenol A (DGEBPA): Fate in Male Fischer 344 Rats (Probe)." (December 15, 1981).

(18) Climie, et al. "Metabolism of the epoxy resin component 2,2-bis[4-(2,3-epoxypropoxy)phenyl]propane, the diglycidyl ether of bisphenol A (DGEBPA) in the mouse." Part I "A comparison of the fate of a single oral dose of 14C-DGEBPA." *Xenobiotica*, vol. 11, no.6, pps 391–300, 1981.

(19) Climie, et al. "Metabolism of the epoxy resin component 2,2-bis[4-(2,3-epoxypropoxy)phenyl]propane, the diglycidyl ether of bisphenol A (DGEBPA) in the mouse." Part II - "Identification of metabolites in urine and faeces following a single oral dose of 14C-DGEBPA." Xenobiotica, vol.11, no.6, pps 401–424, 1981.

(20) Smith, et al. Report to Ciba-Geigy Ltd., entitled: "A Study of the Effect of TK 10490 on the Pregnancy of the Rat." (July 19, 1988).

(21) Smith, et al. Report to Ciba-Geigy Ltd., entitled: "A Study of the Effect of TK 10490 on the Pregnancy of the Rabbit." (July 19, 1988).

(22) Smith, et al. Report to Ciba-Geigy Ltd., entitled: "A Study of the Effect of TK 10490 on Reproductive Function of One Generation in the Rat." (February 2, 1989).

(23) Lee, H., and Neville, K. "Epoxy Resins." In: *Encyclopedia of Polymer Science and Technology*, vol. 6. N.M. Bikales, and J. Conrad, eds. New York, NY: Interscience Publishers, pp. 209–271. (1967).

(24) JRB Associates. "TSCA Section 4 Human Exposure Assessment: Glycidol and its Derivatives (Final Report)." (February 4, 1982).

(25) Versar, Inc. "Consumer Exposure to the Glycidols (Draft Final Report)." (December 1, 1983).

VII. Regulatory Assessment Requirements

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this Consent Order under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., and has assigned OMB control number 2070–0033.

Public reporting burden for this collection of information is estimated to average 586 hours per response. The estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing the collection of information.

List of Subjects in 40 CFR Part 799

Chemicals, Chemical export, Environmental protection, Hazardous substances, Health effects, Laboratories, Reporting and recordkeeping requirements, and Testing.

Dated: July 8, 1994.

Susan H. Wayland,

Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances.

Therefore, 40 CFR chapter I, subchapter R, part 799 is amended as follows:

PART 799—[AMENDED]

1. The authority citation continues to read as follows:

Authority: 15 U.S.C. 2603, 2611, 2625.

2. Section 799.5000 is amended by revising the section heading to read as set forth below and by adding bisphenol A diglycidyl ether to the table in CAS Number order, to read as follows:

§799.5000 Testing Consent Orders for Substances and Mixtures with Chemical Abstract Service Registry Numbers.

* * * * *

CAS Number	Substance or Mixture name	Testing	FR Publication date
*	*	*	*
4675–54–3	Bisphenol A diglycidyl ether	Health effects Exposure evaluation	August 1, 1994
*	*	*	*

[FR Doc. 94–18560 Filed 7–29–94; 8:45 am]
BILLING CODE 6560–50–F

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA–7600]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, FEMA.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are suspended on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will be withdrawn by publication in the **Federal Register**.

EFFECTIVE DATES: The effective date of each community's suspension is the third date ("Susp.") listed in the third column of the following tables.

ADDRESSES: If you wish to determine whether a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

FOR FURTHER INFORMATION CONTACT: Robert F. Shea, Division Director, Program Implementation Division, Mitigation Directorate, 500 C Street SW., room 417, Washington, DC 20472, (202) 646–3619.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the National Flood Insurance Program, 42 U.S.C. 4001 et seq., unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59 et seq. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, the Federal Emergency Management Agency has identified the special flood hazard areas in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP and identified for more than a year, on the Federal Emergency Management Agency's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column.

The Deputy Associate Director finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives a 6-month, 90-day, and 30-day notification addressed to the Chief Executive Officer that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications have been made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Deputy Associate Director has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless they take remedial action.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

Executive Order 12612, Federalism. This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, October 26, 1987, 3 CFR, 1987 Comp., p. 252.

Executive Order 12778, Civil Justice Reform. This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778, October 25, 1991, 56 FR 55195, 3 CFR, 1991 Comp., p. 309.

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

§ 64.6 [Amended]

2. The tables published under the authority of § 64.6 are amended as follows:

State/location	Community No.	Effective date of authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in special flood hazard areas
Region II				
New York: Turin, town of, Lewis County	360376	September 12, 1975, Emerg.; July 30, 1984, Reg.; August 2, 1994, Susp.	8-2-94	Aug. 2, 1994.
Region III				
Pennsylvania: Union, township of, Huntingdon County.	421704	July 21, 1982, Emerg.; March 2, 1989, Reg.; August 2, 1994. Susp.	8-2-94	Do.
Virginia:				
Bluefield, town of, Tazewell County	510161	July 30, 1973, Emerg.; July 17, 1978, Reg. August 2, 1994 Susp.	8-2-94	Do.
Tazewell County, unincorporated areas	510160	May 13, 1975, Emerg.; September 1, 1983, Reg.; August 2, 1994 Susp.	8-2-94	Do.
Wise County, unincorporated areas	510174	October 30, 1974. Emerg.; August 17, 1981. Reg.; August 2, 1994, Susp.	8-2-94	Do.
Region II				
New York: Trenton, town of, Oneida County	360556	April 21, 1975, Emerg.; May 1, 1985, Reg.; August 16, 1994, Susp.	8-16-94	Aug. 16, 1994.
Region III				
Maryland:				
Deer Park, town of, Garrett County	240102	February 7, 1982, Emerg.; August 16, 1994, Reg.; August 16, 1994, Susp.	8-16-94	Do.
Garrett County, unincorporated areas	240034	February 7, 1982, Emerg.; June 5, 1985. Reg.; August 16, 1994, Susp.	8-16-94	Do.
Loch Lynn Heights, town of, Garrett County	240034	May 23, 1975, Emerg.; August 15, 1979, Reg.; August 16, 1994, Susp.	8-16-94	Do.
Mountain Lake Park, town of, Garrett County.	240038	May 6, 1975, Emerg.; October 16, 1984, Reg.; August 16, 1994, Susp.	8-16-94	Do.
Region V				
Minnesota: Paynesville, city of, Stearns County	270452	June 3, 1974, Emerg.; August 16, 1994, Reg.; August 16, 1994, Susp.	8-16-94	Do.
Ohio:				
Amsterdam, village of, Jefferson County	390296	March 19, 1976, Emerg.; December 1, 1983, Reg.; August 16, 1994, Susp.	12-1-83	Do.
Higginsport, village of, Brown County	390677	January 29, 1976, Emerg.; September 15, 1983, Reg.; August 16, 1994, Susp.	9-15-83	Do.
Sebring, village of, Mahoning County	390371	November 26, 1976, Emerg.; August 11, 1978, Reg.; August 16, 1994, Susp.	1-25-80	Do.
Wisconsin: Winneconne, village of, Winnebago County.	550512	August 15, 1975, Emerg.; August 1, 1980, Reg.; August 16, 1994, Susp.	8-16-94	Do.
Region VIII				
Utah:				
Farmington, city of, Davis County	490044	May 13, 1975, Emerg.; August 17, 1981, Reg.; August 16, 1994, Susp.	8-16-94	Do.
Davis County, unincorporated areas	490038	April 22, 1975, Emerg.; March 1, 1982, Reg.; August 16, 1994, Susp.	8-16-94	Do.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Rein.—Reinstatement; Susp.—Suspension.

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Issued: July 26, 1994.

Robert H. Volland,

Deputy Associate Director, Mitigation Directorate.

[FR Doc. 94-18653 Filed 7-29-94; 8:45 am]

BILLING CODE 6718-21-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 64 and 69

[CC Docket No. 91-141, FCC 94-190]

Expanded Interconnection With Local Telephone Company Facilities

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The FCC reaffirmed its commitment to its expanded interconnection policy, which creates new opportunities for competitive provision of access services that the local telephone companies traditionally have provided on a monopoly basis. The Commission acted in response to the June 10, 1994 decision of the U.S. Court of Appeals for the D.C. Circuit in *Bell Atlantic Telephone Companies* v. *FCC.* In that case, the court said it would vacate in part, and otherwise remand, the first two of the Commission's expanded interconnection orders, on the grounds that the agency lacked authority to require the telephone companies to provide expanded interconnection for special access through physical collocation. The

Commission directed the local telephone companies to provide expanded interconnection through virtual collocation. The Commission concluded that, although its earlier orders found that physical collocation would be the optimal means to achieve the public interest benefits of expanded interconnection, virtual collocation also produces these benefits. The Commission found that it had legal authority to require virtual collocation. The FCC exempted telephone companies from the mandatory virtual collocation requirement at central offices in which they choose to offer physical collocation subject to non-streamline regulation by the Commission as a communications common carrier service. By acting expeditiously before the court issues its mandate, the FCC said that it sought to avoid the disruption to competition that might result if its expanded interconnection policy lapsed. This quick response to the court's decision should give affected parties clear guidance on their rights and obligations and preserve the public interest benefits of expanded interconnection.

DATES: *Effective Date:* December 15, 1994.

Compliance Date: September 1, 1994, the carriers subject to these rules must file tariffs and notifications with respect to physical collocation offerings under exemption from the virtual collocation requirement.

FOR FURTHER INFORMATION CONTACT: David L. Sieradzki, (202) 418–1576, or Suzanne M. Tetreault, (202) 418–1596, Policy and Program Planning Division, Common Carrier Bureau.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Memorandum Opinion and Order in CC Docket No. 91–141, adopted July 14, 1994, and released July 25, 1994. The complete text of this Memorandum Opinion and Order is available for inspection and copying during normal business hours in the FCC Reference Center, 1919 M St., NW., Room 239, Washington, DC 20554.

The Federal Communications Commission has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980, 44 U.S.C. 3507. Persons wishing to comment on this information should contact Timothy Fain, Office of Management and Budget, Room 10236, New Executive Office Building, Washington, DC 20503, (202) 395–3561. For further information contact Judy Boley, Federal Communications Commission, (202) 418–0214.

Please note: The Commission has requested expedited review of this collection by August 1, 1994, under the provisions of 5 CFR 1320.18.

Title: Expanded Interconnection with Local Telephone Company Facilities.

Respondents: Business or other for-profit.

Frequency of Response: One-time collection.

Estimated Annual Burden: 16 respondents; 1 response per respondent; 390 hours per response; 6240 hours total annual burden.

Needs and Uses: The information required is necessary to ensure the provision of expanded interconnection services in a manner consistent with the requirements of the Communications Act of 1934, as amended, particularly 47 U.S.C. 201, 202, and 203, as well as other requirements established herein. Public reporting burden for this one-time collection of information is estimated as follows: for tariff filings, including supporting information, average 390 hours per response. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Federal Communications Commission, Office of Managing Director, Paperwork Reduction Project, Washington, DC 20554 and to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503.

Synopsis of Memorandum Opinion and Order

1. Expanded interconnection is a local exchange carrier (LEC) offering that enables parties, by interconnecting their circuits with those of the LEC at a LEC central office through either physical collocation or virtual collocation, to compete on a facilities basis with certain LEC access services. Physical collocation, as defined by the Commission in this proceeding, is an offering that enables an interconnector to locate its own transmission equipment in a segregated portion of a LEC central office. The interconnector pays a tariffed charge to the LEC for the use of that central office space, and may enter the central office to install, maintain, and repair the collocated equipment. Virtual collocation is defined as an offering in which the LEC owns (or may lease) and exercises exclusive physical control over the transmission equipment, located in the central office, that terminates the interconnector's circuits. The LEC dedicates this equipment to the exclusive use of the interconnector, and provides installation, maintenance, and repair services on a non-discriminatory basis. Under our virtual collocation policy, the interconnector has the right to designate its choice of central office equipment, and to monitor and control the equipment remotely. The LEC connects this equipment to the interconnector's circuit outside the central office, with an interconnection point between LEC-owned facilities and interconnector-owned facilities as close as possible to the office. The standards governing physical collocation and virtual collocation arrangements are discussed in detail below.

2. In response to the court's decision in *Bell Atlantic Telephone Companies* v. *FCC*, No. 92–1619 (D.C. Cir., June 10, 1994), we first reaffirm our analysis and conclusion in the *Special Access Expanded Interconnection Order*, 57 FR 54323 (November 18, 1992) and the *Switched Transport Expanded Interconnection Order*, 58 FR 48756 (September 17, 1993) that expanded interconnection for special access and switched transport is in the public interest. We reaffirm that the benefits of expanded interconnection outweigh any disadvantages of the policy. We next conclude that, although expanded interconnection through physical collocation is the optimal means to realize these benefits, expanded interconnection through virtual collocation also produces these benefits and is in the public interest. We reaffirm that we have authority, pursuant to Section 1, 4(i), 201, 202, 205, 214(d), and 218 of the Communications Act, to mandate expanded interconnection and impose the related requirements specified in this order.

I. Interconnection Architecture

3. *Remand and New Mandatory Virtual Collocation Policy.* In light of the D.C. Circuit's *Bell Atlantic* v. *FCC* decision and in anticipation of remand, we are adopting a new expanded interconnection policy that will facilitate the continued, uninterrupted provision of expanded interconnection and will reduce the practical problems that could arise in the wake of the court's decision. We will require, as of September 1, 1994, that Tier 1 LECs (other than NECA pool members) file generally available tariffs offering expanded interconnection through virtual collocation. LECs will be exempted from this requirement in

central offices where they opt to provide physical collocation subject to the standard described in detail below.

4. *Physical Collocation Exemption.* A LEC will be exempted from our mandatory virtual collocation requirement at any specific central office or offices for which the LEC opts to offer under tariff expanded interconnection through physical collocation, subject to full regulation by the Commission as a communications common carrier service, including the standards we adopt below for such offerings. A LEC's physical collocation offering will exempt it from the general requirement to offer virtual collocation under tariff *only* if the LEC explicitly consents to offer physical collocation as a communications common carrier offering under non-streamlined Title II regulation.

5. A LEC will qualify for an exemption from the mandatory virtual collocation requirement only if it voluntarily provides physical collocation subject to all the rules relating to physical collocation that are set forth in this order. As part of that regulation, a LEC that has chosen to provide physical collocation at particular central offices will not be permitted to withdraw its physical collocation offering for customers' existing physical collocation nodes at those offices, for either current or new circuits, without Commission certification pursuant to Section 214 of the Communications Act that such a discontinuation of service will not adversely affect the present or future public convenience and necessity. The exemption from the virtual collocation requirement will apply as long as the LEC offers physical collocation. If a LEC has offered physical collocation pursuant to this exemption, and subsequently withdraws its physical collocation offering for new customers at a given location, it will no longer qualify for the exemption, and will be required to offer virtual collocation on a generally available, tariffed basis at that location. Similarly, if a LEC has offered virtual collocation on a generally available, tariffed basis, and later wants to withdraw that offering in a particular central office because it qualifies for the physical collocation exemption in that office, it may withdraw the offering for new interconnectors. In such a case, however, the LEC must continue to make virtual collocation available for existing and new circuits of interconnectors that are already using virtual collocation in that office, unless it obtains Commission certification that such a discontinuation of service will not adversely affect the present or future public convenience and necessity.

6. *Alternative Interconnection Offerings.* We remain open to alternative interconnection arrangements that telephone companies may propose in waiver petitions, if those proposals satisfy the public interest objectives achieved by our virtual collocation requirements. Moreover, LECs are free to tariff alternative virtual collocation, physical collocation, or other arrangements that interconnectors may want to take in addition to the baseline arrangements satisfying the LECs' basic obligations under the rules adopted herein. Such alternatives may be negotiated between the parties, although such negotiated arrangements must be filed as tariffs to enable other interconnectors desiring the same arrangement in the same central office to obtain them.

7. *Implementation.* The LECs subject to expanded interconnection requirements shall file tariffs offering virtual collocation as defined herein on September 1, 1994, to be effective on December 15, 1994. LECs must amend their initial tariff filings by October 3, 1994 if they are required to tariff rates for services using additional interconnector-specified circuit terminating equipment. Petitions to reject or suspend and investigate any of these tariffs should be filed by October 14, 1994; replies will be due on October 31, 1994. LECs that wish to be exempted from the virtual collocation requirement must, on September 1, 1994, file any necessary tariff revisions to implement physical collocation in accordance with the rules set forth in this order, or notify the Chief, Tariff Division, Common Carrier Bureau, in writing that no such revisions are necessary and explain the basis for that conclusion. We are not requiring LECs to obtain our advance approval before making use of the physical collocation exemption from the virtual collocation requirement. LECs will, however, be held to the rules set forth herein concerning physical collocation offerings made in lieu of the mandatory virtual collocation requirement.

8. We also emphasize that the mandatory physical collocation requirement adopted in our earlier orders, which the *Bell Atlantic* v. *FCC* court has stated it would vacate with respect to special access expanded interconnection, remains in effect until the court issues the mandate in that case, and the LECs may not propose to withdraw, suspend, or otherwise abrogate their current special access physical collocation offerings until then. Assuming the mandate does not issue before December 15, 1994, our rules requiring that LECs offer both special access and switched transport expanded interconnection through physical collocation will remain in effect until December 15, 1994.

9. *Locations Where Expanded Interconnection Must Be Made Available.* For purposes of implementing our mandatory virtual collocation regime, we require, as we did in the First Reconsideration Order, 57 FR 62481 (December 31, 1992), that LECs provide expanded interconnection in a subset of their central offices in their initial tariffs. In this instance, LECs should initially tariff expanded interconnection in all offices in which it is currently tariffed. If a LEC receives a *bona fide* request to make expanded interconnection available in additional central offices, the LEC must file tariff revisions offering virtual collocation (or, if it qualifies for an exemption, physical collocation) in such offices within 45 days of receipt of such a request. Such tariff revisions shall be effective on 45 days notice or less. We also reaffirm that, under the policies adopted in this order, LECs must provide: (1) Both special access and switched transport expanded interconnection at central offices that are classified as end offices and service wire centers, (2) special access expanded interconnection at remote nodes that are rating points for special access; and (3) switched transport expanded interconnection on a *bona fide* request at "stand-alone tandems" and at remote nodes that serve as rating points for switched transport and have the necessary space and technical capabilities to originate and terminate switched traffic.

II. Standards

10. *Overview.* Except for the policy changes described below, we conclude on the basis of the record previously compiled that the virtual collocation standards adopted in earlier orders in this proceeding should continue to apply under the new mandatory virtual collocation requirement. We also find that the standards we adopted as part of our mandatory physical collocation requirement remain appropriate in the context of physical collocation provided voluntarily under the new rules.

A. Standards Governing Virtual Collocation

1. In General

11. We here adopt rules governing mandatory virtual collocation that are similar to the rules we adopted in earlier orders in this proceeding to govern virtual collocation. Under these

rules, LECs will be required to dedicate to interconnectors' use in terminating the interconnectors' circuits any kind of central office basic transmission equipment reasonably specified by the interconnector. LECs will be required to install, maintain, and repair this equipment, at a minimum, under the same time intervals and with the same failure rates that apply to comparable LEC equipment not dedicated to interconnectors. Interconnectors will be entitled to monitor and control this equipment remotely. LECs will be exempt from the virtual collocation requirement if they provide physical collocation offerings that satisfy our requirements. Tariffing, rate structure, and pricing requirements will ensure that virtual collocation is generally available on a nondiscriminatory basis and fulfills our public interest objectives.

12. In the unlikely event a court were to hold that we lack authority to require that interconnectors be able to specify the virtually collocated equipment dedicated to their use, we intend that, instead, LECs and interconnectors would negotiate the range of equipment available for virtual collocation. If a court were to hold that we lack authority to impose even that approach, we intend that an approach under which the LEC specifies the equipment that the interconnector could select be used as a replacement. Moreover, if a court were to hold that we lack authority to impose any of the other specific requirements included in the standards described in the preceding paragraph, we intend that the offending provision be removed. We find that these approaches would be acceptable, although substantially less desirable, options.

2. Equipment Designation

13. We reaffirm that under our virtual collocation policy, interconnectors have the right to select the type of central office equipment dedicated to their use. In addition to our requirement that LECs offer virtual collocation of any type of transmission equipment reasonably requested by interconnectors, we also require that LECs offer virtual collocation through generally available tariffs. We are specifying tariffing procedures for the LECs' service offerings involving collocation equipment to ensure that both these requirements are satisfied.

14. Prospective users of virtual collocation may request that LECs include specific types of equipment that they are likely to use initially, and would like to have included in the tariffs. If they submit such requests to the LECs by August 1, 1994, the LECs are required to include specific rates for the requested equipment in their virtual collocation tariffs filed on September 1, 1994. Prospective users of virtual collection may continue to give the LECs requests for tariffing specific equipment through September 1, 1994. By October 3, 1994, LECs must amend their initial tariff filings to include specific prices for all of the equipment identified by interconnectors by September 1. During the period from September 1 to December 15, interconnectors may continue to submit equipment requests, although in order to facilitate an orderly tariffing process, we will permit LECs to treat those requests as if they were received on the day after the tariffs become effective, subject to the procedure outlined in the next paragraph.

15. After the initial tariffs become effective, interconnectors will continue to have the right to specify additional types of virtual collocation equipment. An interconnector may request that a LEC modify its virtual collocation tariffs to offer additional types of transmission equipment. The LEC will be required to modify its tariff accordingly within 30 days of receiving such a request. Such tariff changes should be scheduled to become effective on 30 days notice. We reaffirm that, under our new expanded interconnection policy, LECs may proscribe the use of interconnector-designated equipment of practices that represent a significant and demonstrable technical threat to the LEC network.

3. Installation, Maintenance, and Repair

16. In our vital collocation regime, the LECs are responsible for installing, maintaining, and repairing the central office equipment that they own and dedicate to the use of interconnectors. In general, we reaffirm our conclusion in earlier orders that LECs must provide these services, at a minimum, under the same time intervals, and with the same failure rates, that apply to the performance of similar functions for comparable LEC equipment. Failure to provide these functions on equipment dedicated to interconnectors in a manner that is at least as timely and efficient as the service the LECs provide themselves for services that compete with interconnectors' offerings constitutes an unreasonable practice under Section 201(b) of the Communications Act.

17. If an interconnector designates equipment that a LEC currently uses in a given central office, the LEC will not need to provide training to its employees and therefore will not be permitted to charge the interconnector for training LEC personnel to service that equipment. Evidence in the record shows that many LECs have procedures for certifying or approving equipment manufacturers and independent contractor personnel to install electronic equipment, and in some cases, to maintain and repair such equipment. LECs that permit outside service representatives to enter their central offices to install, maintain, or repair LEC equipment must permit outside representatives to provide these services for the equipment dedicated to interconnectors' use under virtual collocation. If LECs can choose from a range of levels of service quality offered by outside service representatives (*e.g.*, repair times), the LECs must offer the same range of service options to virtual collocation customers in their tariffs. LECs may impose conditions, including certification and bonding requirements, on the contractors that provide service for equipment dedicated to interconnectors, but these requirements must be the same as the requirements that apply to contractors that provide service for other LEC equipment. If LECs use outside contractors to install, maintain, or repair equipment, they must reasonably consider both price and service quality in selecting contractors to provide these services.

18. If an interconnector meets the LEC's standards for outside service representatives, then the interconnector should be certified as a possible outside contractor. Although LECs are generally required to consider cost in selecting a contractor, a LEC will not be required to choose an interconnector to perform installation, maintenance, and repair on this basis alone. LECs that do not permit outside contractors to enter their central offices are not required to permit such contractors to provide service for equipment dedicated to interconnectors' use, although they are permitted to do so, and may find it the most advantageous way of implementing virtual collocation.

19. We require the LECs to report on the timing and failure rates for providing such services for comparable LEC and interconnector-dedicated equipment and circuits. We increase the frequency of these required reports from annually, as currently required, to quarterly. We delegate authority to the Chief, Common Carrier Bureau, to specify the format and timing of these reports. LECs are not subject to this reporting requirement if they are exempt from the virtual collocation requirement because they provide physical collocation in all central offices in which they provide expanded interconnection. We decline to require

the LECs to install, maintain, and repair interconnectors' virtual collocation equipment to meet the interconnectors' time intervals.

4. Other Requirements for Virtual Collocation

20. Except as stated elsewhere in this order, we reaffirm our existing rules on the tariffing of virtual collocation offerings, for the reasons stated in our original orders. We reaffirm that the cross-connect element must be tariffed at a study-area-wide averaged rate that is the same for both virtual collocation and physical collocation for LECs that choose to offer physical collocation. In addition, we require that LECs' rates for particular types of equipment offered to interconnectors may not vary within a study area. We also reaffirm, in the context of our mandatory virtual collocation policy, that rates for elements of virtual collocation other than the cross-connect element and elements recovering the cost of central office equipment may reasonably vary in different locations corresponding to cost differences.

21. In unusual circumstances, space may be so limited in particular central offices that even virtual collocation is infeasible in those locations. As noted in our earlier orders, we will entertain requests for waiver of the requirement that virtual collocation be made available in such offices.

22. We clarify that LECs need not set aside segregated space, which they could not then use for their own purposes, in anticipation of virtual collocation requests. Virtual collocation arrangements do not involve the reservation of segregated central office space for the use of interconnectors. LECs must consider the needs of virtual collocation customers, just as they consider the demand for other services in planning space usage. We will not tolerate any discrimination against interconnectors *vis-a-vis* other customers, however.

B. Standards Governing Physical Collocation

23. LECs that are providing physical collocation on a voluntary basis and have been exempted from the virtual collocation requirements may exhaust the space available for interconnection in a central office. In that case, just as under the original rules, upon Commission approval of a showing that space is unavailable, the LEC will be required to provide generally available, tariffed virtual collocation to subsequent interconnectors. The same standards and procedures will apply to such requests based on space limitations that apply to such requests under our existing rules.

24. For LECs that choose to offer physical collocation pursuant to the terms of this order, a first-come, first-served process appears to be the most equitable manner to allocate space. LECs that qualify for exemptions to provide physical collocation in lieu of virtual collocation need not expand their facilities or relinquish space reasonably reserved for their future use, for the same reasons stated in the Special Access Expanded Interconnection Order, 57 FR 54323 (November 11, 1992). LEC tariffs may reasonably include provisions prohibiting interconnectors from warehousing central office space.

25. In earlier orders in this proceeding, we held that the cross-connect element should be tariffed at a study-area-wide averaged rate under both virtual collocation and physical collocation. We concluded that cost differences among central offices may justify different charges for central office space, power, environmental conditioning, and labor and materials charges for installing physical collocation arrangements, but charges should be uniform for all interconnectors in each individual central office. The same tariffing requirements should apply to physical collocation provided pursuant to exemption from the virtual collocation requirement.

C. Standards that Apply to Both Virtual Collocation and Physical Collocation

1. State Expanded Interconnection Policies

26. The state policy exemption from the mandatory physical collocation requirement does not apply under our mandatory virtual collocation policy. If a LEC offers both interstate and intrastate expanded interconnection, it should do so in a manner that satisfies both federal and state requirements to the extent possible, and should provide mechanisms to avoid double payment for facilities used for both interstate and intrastate collocation.

2. Reporting Requirements

27. We conclude that a broader information collection program is necessary to gather empirical data that will better enable us to monitor the development of competition in interstate access markets. We delegate authority to the Chief, Common Carrier Bureau, to formulate the detailed elements of this reporting program, decide which carriers must provide information, and specify the format and timing of these reports.

3. Dispute Resolution

28. We delegate to the Chief, Common Carrier Bureau, authority to develop special dispute resolution mechanisms, possibly including the designation of a Commission representative to work personally with the parties to mediate disputes and ensure that they are settled expeditiously, fairly, and consistently.

4. Interconnection to LEC Facilities

29. *Microwave.* Microwave interconnection must be so tailored to specific interconnectors and to particular central offices that it does not readily lend itself to uniform tariff arrangements. We therefore modify our requirements to specify that the LECs must tariff microwave interconnection on a central office-specific, individual case basis, in response to *bona fide* requests. Such tariffed arrangements must be made available to other similarly situated parties at the same central office on non-discriminatory terms, and must be offered under general tariff at a given central office if the LECs gain sufficient experience to do so and if such arrangements can reasonably be standardized. Microwave interconnection should be offered through virtual collocation (using microwave transmission equipment that is owned by the LEC and dedicated to the interconnector's exclusive use) or, if the LEC wishes to qualify for an exemption, through physical collocation.

30. *Copper or Coaxial Cable.* Interconnection of copper or coaxial cable facilities will be permitted in specific cases only upon approval by the Common Carrier Bureau. The restriction on interconnecting copper or coaxial cable refers to the interconnector's facilities, and does not restrict the type of LEC services to which interconnectors are entitled to connect.

31. *DS0 and Other Special Access Services.* The LECs must provide interconnection to DS0 and all other special access services within 45 days of receiving a *bona fide* request for such a service. Our expanded interconnection policies do not require a LEC to connect interconnectors' facilities with any given LEC service (*e.g.*, DS3 service) at a particular central office if the LEC does not offer that service at that central office.

5. Other Standards Issues

32. *Equipment in LEC Central Offices.* In our earlier orders, we required LECs to permit interconnectors to place, or designate for placement, in LEC central

offices only equipment needed to terminate basic transmission facilities, including optical line terminating equipment and multiplexers. We concluded that the placement or dedication of other types of equipment, such as enhanced service equipment, in LEC central offices was unnecessary to foster competition in the provision of special access and switched transport services, and consequently we did not require the LECs to permit the collocation of such equipment in their central offices. We conclude that the same principles should apply under the mandatory virtual collocation and physical collocation exemption policies we adopt in this order, for the reasons stated in our previous orders. Only central office equipment needed to terminate basic transmission facilities must be collocated pursuant to this order.

33. *Points of Entry.* The LECs must offer interconnectors at least two separate points of entry to each central office if they have at least two entry points for their own cable, but this requirement applies only when there is space available for new facilities at each of two points entering the central office. LECs are not required to construct new entry points or reroute their own facilities to accommodate interconnectors.

34. *Network Reliability Council.* We decline to delay expanded interconnection pending action by the Network Reliability Council. We reaffirm our conclusion that LECs are permitted to proscribe use of interconnector equipment or operating practices that would constitute a significant and demonstrable technical threat to LEC networks.

35. *Insurance.* We reaffirm our conclusion that resolution of insurance issues is best addressed when we examine the reasonableness of specific LEC physical collocation tariff provisions. We add, however, that unless a LEC makes a compelling case to the contrary, in generally no liability insurance requirements should be imposed in connection with virtual collocation offerings.

36. *Customer Proprietary Network Information (CPNI).* We conclude that no special CPNI protection rules are necessary in the context of our new expanded interconnection regime.

37. *Billing.* The LECs should bill the transport interconnection charge to the customer of record, whether that party is a CAP or an IXC, even in cases where a CAP aggregates the traffic of several IXCs and the CAP is the customer of record. The LEC, of course, must be able to bill for the services it provides to its customers, and we will consider granting waivers in circumstances meeting the normal waiver standard.

38. *Percentage of Interstate Use (PIU) Reporting.* In cases in which IXCs are able to report end users' PIU data, LECs may, in their tariffs, require them to do so. LECs may use the same PIU verification procedures for end user access customers that they now use for IXC customers.

39. *Collocation of Data-Over-Voice (DOV) Equipment.* Because DOV equipment is basic transmission equipment, expanded interconnection customers have a right to virtual collocation of DOV equipment in LEC central offices (or physical collocation for LECs that qualify for exemptions from the virtual collocation requirement).

III. Availability of Expanded Interconnection

40. Section 201(a) of the Act already requires CAPs and other common carriers to provide interconnections with other common carriers upon request. We conclude that this general requirement is sufficient with respect to parties other than LECs, and that our detailed mandatory virtual collocation rules should apply only to the Tier 1 LECs other than NECA pool members.

41. We reaffirm that AT&T may use expanded interconnection, and that if it does so, it must deploy the same facilities and pay the same charges as any other interconnector. We also reaffirm that all parties, including non-common carriers, may use expanded interconnection offerings.

IV. Expanded Interconnection Rate Structure and Pricing

A. Connection Charge Rate Structure

42. We reaffirm and expand our requirements regarding the rate structure of connection charges. We do not at this time impose a detailed rate structure for connection charges under our mandatory virtual collocation regime. We do, however, set forth additional requirements to guide the LECs' choice of expanded interconnection rate structures.

43. First, we reaffirm for our new regime the rate structure principles adopted in the Second Reconsideration Order, 58 FR 48752 (September 17, 1993), and the Switched Transport Expanded Interconnection Order, 58 FR 48756 (September 17, 1993) which require the LECs to establish reasonable, disaggregated subelements for connection charges pursuant to rate structures that (1) reflect cost-causation principles, (2) are unbundled to ensure that interconnectors are not forced to pay for services that they do not need, and (3) establish a cross-connect element that applies uniformly to both physical and virtual collocation.

44. In addition, the LECs' rate structures must be clear and easy to understand. Regardless of a LEC's individual choice of rate structure, the facilities and services provided under each rate element should be clear on the face of the tariff, and the tariff support information should identify the specific costs that are recovered by each rate element. In addition, each rate element should logically relate to the service function provided under that rate element.

45. Finally, we will require the LECs to provide cost support data for their September 1, 1994 virtual collocation tariff filings pursuant to a uniform Tariff Review Plan (TRP) format established by the Common Carrier Bureau. The TRP will disaggregate expanded interconnection service into broad categories, or "functions." We delegate authority to the Chief, Common Carrier Bureau, to promulgate detailed requirements regarding the TRP format in a separate order.

B. Connection Charge Pricing

46. We continue to believe that the LECs must cost-justify the rate levels for connection charges, and that these rate levels must receive careful scrutiny by Commission staff. The same scrutiny will be required for both initial rate levels and subsequent rate changes in connection charges assessed both by price cap LECs and by rate-of-return LECs. We also reaffirm that expanded interconnection services covered by connection charges will be excluded from the LECs' price cap baskets indefinitely and are subject to non-streamlined tariff review.

47. *Direct Costs.* We reaffirm that price cap LECs must derive the direct costs of expanded interconnection offerings as provided under the price cap new services test. Rate of returns LECs that provide expanded interconnection should provide the cost information required for new services under the applicable sections of our rules. Thus, under our new mandatory virtual collocation policy, the LECs must justify the direct costs related to all services covered by connection charges (including those related to physical collocation provided pursuant to an exemption), for both the initial level of these charges and subsequent changes. Specifically, we require the price cap LECs to derive the direct cos. of providing similar types of new offerings, including expanded

interconnection services covered by the connection charge rate elements, based on consistent methodologies, unless they can justify different methodologies. This requirement reflects our policy for the pricing of new services adopted in the LEC Price Cap proceeding. As noted in our earlier expanded interconnection orders, however, certain aspects of the new services test, such as risk premiums, are not applicable to expanded interconnection services.

48. We require the LECs to include in their September 1 tariff filings a description of the methodology they use to compute their rates for services that require the use of optical line terminating multiplexers (OLTMs), and other equipment used to terminate, multiplex, and demultiplex circuits, based on the purchase prices of the equipment. The LECs' methodologies must be consistent with all the rate structure and pricing rules set forth in this order. In addition, the LECs must specify in their tariffs the actual charges for the equipment, calculated using the general methodology.

49. LECs must base the direct costs of providing OLTMs and other equipment with similar functions used in virtual collocation arrangements on the lowest purchase price reasonably available to them to serve an interconnector. In applying this standard, we would find probative the price at which an interconnector may offer to sell the desired equipment to the LEC. Any costs incurred above the lowest reasonably available price are not prudently incurred, and thus should not be reflected in the LECs' rates. The LECs, however, are not required to purchase the equipment from interconnectors.

50. LECs may reasonably charge different rates to different customers if they incur different costs to serve those customers. To be sure, even virtual collocation offerings designed to meet the needs of individual interconnectors must be made generally available to all similarly situated interconnectors, and the actual rate levels (as well as the general methodology) must be specified in the tariffs. The LEC must use the same basic methodology specified in its tariff to compute all customers' rates.

51. LECs may, if they wish, offer to purchase virtual collocation equipment from interconnectors for a nominal amount (*e.g.*, $1) and make it available for resale to the interconnectors for the same amount. We decline, however, to adopt the CAPs' recommendation that we require the LECs to offer such an arrangement.

52. *Overhead Costs.* LECs incur overhead costs in providing expanded interconnection services, and should be allowed to charge reasonable amounts to recover these costs in their rates for these services. The LECs may include no more than uniform overhead loadings in their rates for expanded interconnection services, or must justify any deviations from uniform loadings. In other words, LECs may not recover a greater share of overheads in rates for expanded interconnection services than they recover in rates for comparable services, absent justification. The LECs have the burden of demonstrating that their connection charges meet this overhead loading standard, and are otherwise just, reasonable, and not unreasonably discriminatory. The price cap LECs may be required to submit additional information to enable us to verify that the overhead loadings on the expanded interconnection connection charges do not unreasonably differ from the overhead loadings on other services, for which price cap LECs generally do not provide cost justification.

53. *Other Pricing Issues.* We decline to require the LECs to set connection charges to ensure that interconnectors using virtual and physical collocation arrangements pay the same total prices, or to require that virtual collocation be priced using physical collocation rates as a starting point and deducting the cost savings from using a virtual arrangement. We reaffirm our decision to require the LECs to provide cost justification for any connection charges that would vary on a per circuit basis because of the number or type of interconnected circuits ordered. We also reaffirm our conclusion that the LECs may not charge different rates for special access and switched interconnection rate elements, or for interconnection rate elements in different types of central offices (i.e., end offices, serving wire centers, tandem offices, etc.), unless costs differ.

C. Contribution Charge

54. We reaffirm the principle that interconnectors, as well as LECs, should provide contributions to support any specifically identified regulatory subsidy mechanisms that are embedded in LEC rates for services subject to competition. Our rule on contribution charges for special access and expanded interconnection, 47 CFR 69.122, will advance this policy principle. Without evidence of other regulatory support flows within interstate special access rates, we decline to modify for our new regulatory regime the policy principle, the rule, or our procedures regarding contribution charges. As to switched transport, we find no reason to alter our conclusion that the transport interconnection charge obviates the need for any separate contribution charge.

D. Separations

55. We reaffirm our earlier conclusions concerning the possible need for separations changes in response to the adoption of expanded interconnection requirements for special access and switched transport. Thus, while we find no reason to delay implementation of the requirements set forth in this order, we leave in place our current referrals to the Joint Board concerning whether separations changes are needed to ensure a reasonable jurisdictional allocation of expanded interconnection costs and revenues. We decline to broaden the scope of our referral to the Joint Board, or to modify our separations procedures.

V. LEC Pricing Flexibility

A. In General

56. We deny Teleport's petition requesting that that Commission eliminate the additional pricing flexibility granted to the LECs in the Special Access Expanded Interconnection Order, 57 FR 54323 (November 18, 1992), unless those LECs voluntarily provide physical collocation for special and switched access expanded interconnection, except that we slightly modify the threshold standard by changing the definition of when expanded interconnection is "operational," as set forth below. We generally reaffirm our decisions in the expanded interconnection orders regarding LEC pricing flexibility

B. Density Zone Pricing

1. Threshold Required for Implementation

57. We reaffirm the LECs with "operational" expanded interconnection offerings for special access in a study area should be allowed to implement density zone pricing of special access in that study area, and similarly, that "operational" switched expanded interconnection should enable LECs to implement density zone pricing of switched transport. We modify our definition of when expanded interconnection offerings are "operational," and define expanded interconnection offerings as "operational" when and if an interconnector has taken a cross-connect element in connection with a tariffed expanded interconnection offering *after* our new mandatory virtual collocation policy becomes effective.

58. Thus, an offering will be considered "operational" under our

new regime in the following circumstances: (1) An interconnector has taken a cross-connect pursuant to a generally tariffed virtual collocation offering pursuant to our new rules; or (2) an interconnector has taken a cross-connect pursuant to a physical collocation offering subject to the terms of this order. In this second case, the interconnector need not have started taking the cross-connect after our new regime becomes effective, so long as it continues to take the cross-connect under the new rules. In study areas where a LEC has implemented density zone pricing, we will require the LEC to file, sixty days after the effective date of the LEC's new expanded interconnection offering, tariff revisions effective on 15 days notice that reestablish averaged rates throughout the study area pursuant to § 69.3(e)(7) of our rules if no interconnector has taken a cross-connect under our new regime.

59. We reject proposals to delay any competitive rate changes by the LECs for an arbitrary time period (such as the 12 months proposed by MFS) or until after they have lost a specified proportion of market share. We also reject the CAPs' suggestion that LECs be permitted to reduce rates in high-density areas but not to increase rates in low-density areas, where they may be below cost due to past geographic rate averaging. Finally, making density zone pricing for price cap LECs conditional on cost-justification of special access volume discounts would be inconsistent with price cap regulation.

2. Price Cap Structure

60. We find no need to amend the price cap rules for density zone pricing under our mandatory virtual collocation regime. Moreover, we reaffirm our decisions regarding the price cap structure for density zone pricing under the pre-existing rules, including the +5%/−10% pricing bands that apply to the zone subindexes, the retention of the overall DS1 and DS3 pricing bands, and the existing tariff procedures for above-band rate changes. We also decline to adopt MFS's reconsideration proposal to require the LECs to demonstrate that the ratio of revenues to average variable cost in the highest-density zone is no less than that ratio in the lowest-density zone.

3. Definition of Zones

61. We reaffirm our decision to assign interoffice facilities between different zones to the higher-price, lower-density zone, and find no reason to apply a different rule under our mandatory virtual collocation policy. We decline to create separate zone systems for interoffice facilities and entrance facilities, or to impose substantially higher burdens of proof than those we already imposed if LECs propose zone plans with more than three zones.

C. Volume and Term Discounts

62. We reaffirm our decision to permit LECs to offer volume and term discounts on switched transport services after the specified threshold has been reached, and find no reason for a different rule under our mandatory virtual collocation policy. We generally reaffirm that LECs may begin offering switched transport with volume and term discounts in any particular study area only after one of the following conditions is met: (1) 100 DS1-equivalent switched cross-connects are operational in the Zone 1 offices in the study area; or (2) an average of 25 DS1-equivalent switched cross-connects per Zone 1 office are operational. (Zone 1 refers to the LEC's density pricing zone with the greatest traffic density.) In study areas with no Zone 1 offices, the LECs may implement volume and term discounts once five DS1-equivalent switched cross-connects have been taken in the study area. LECs that have not implemented density zone pricing may implement volume and term discounts in a study area after customers have subscribed to 100 DS1-equivalent switched cross-connects in the study area. We adopt the definition of "operational" cross-connects that we adopted in the context of density zone pricing. We decline to set a threshold based on the market penetration of LEC competitiors. We delegate authority to the Chief, Common Carrier Bureau, to modify the threshold point for zone density pricing in unusual circumstances where a change in the strict requirements would advance the Commission's objectives.

63. We retain for our mandatory virtual collocation regime the rule regarding cost showings for discounted switched transport offerings, which qualify as new services under the price cap rules. We reject the proposals of MFS and Sprint to require LECs to demonstrate that discounted services recover the same proportion of overheads as non-discounted services, or to require that the ratio of revenues to average variable cost of discounted offerings be no less than that ratio for non-discounted services. We are not persuaded that any change is necessary to the 120-day notice period for these tariff filings.

D. Other Forms of Pricing Flexibility

64. We do not grant the LECs authority for broader pricing flexibility at present.

E. Fresh Look

65. We reaffirm our "fresh look" policy, limiting the charges a LEC may impose on certain customers who want to terminate long-term LEC special access arrangements to an amount that would place both the LEC and the customer in the same position they would have been had the customer chosen a shorter term arrangement from the beginning of the term.

66. USTA's proposal to allow LECs to file monthly transmittals including all new collocations that become operational within that month appears to be reasonable. We modify our fresh look policy, which currently requires LECs to file tariff transmittals giving public notice of the fresh look opportunity for each central office no later than five business days after the first special access expanded interconnection arrangement becomes operational in the central office. Instead, we will require the LECs to file tariff transmittals no later than five business days after the end of each calendar month giving public notice of the fresh look opportunity for each central office in which the first expanded interconnection arrangement became operational during that month. The fresh look period runs from the actual date that the first expanded interconnection arrangement becomes operational until 180 days following the filing date of the tariff providing notice of the beginning of the fresh look period. The same procedures will apply to fresh look periods triggered by switched transport expanded interconnection. In addition, we clarify that LECs need not file any tariff transmittals if their termination liabilities are less than or equal to the maximum liabilities specified by our fresh look policy. Accordingly, we dismiss GTE's petition for waiver as moot. Finally, we conclude that no additional fresh look periods are necessary under our mandatory virtual collocation rules.

F. Non-Recurring Reconfiguration Charges

67. We reaffirm that all non-recurring charges applicable to customers shifting to an interconnector's services are to be set no higher than cost-based levels. We also reaffirm that the presumption of reasonableness in the price cap rules should not apply to these charges. In addition, we reaffirm that any difference

between the charges applicable when a customer shifts to an interconnector's services and those applicable when a customer reconfigures its service with the LEC must be cost-based.

VI. Other Matters

68. We delegate authority to the Chief, Common Carrier Bureau, to address certain transition issues raised by the CAPs. With respect to any other issues addressed in our previous expanded interconnection orders that are not specifically addressed in this order, we reaffirm our earlier conclusions for our new virtual collocation regime, based on the reasons stated in the earlier orders.

VII. Ordering Clauses

69. Accordingly, *it is ordered*, pursuant to authority contained in Sections 1, 4, 201–205, 214, and 218 of the Communications Act of 1934, as amended, 47 USC 151, 154, 201–205, 214, and 218, that Parts 64 and 69 of the Commission's Rules ARE AMENDED as set forth below.

70. *It is further ordered* That the policies, rules, and requirements adopted in this Order shall be effective on December 15, 1994, except the requirements regarding the filing of tariffs and regarding notifications with respect to exempt physical collocation offerings, which shall be effective on September 1, 1994.

71. *It is further ordered* That Teleport's Petition for Declaratory Ruling is denied except to the extent specified in this order.

72. *It is further ordered* That GTE's Petition for Limited Waiver of the "Fresh Look" Policy is dismissed as moot.

73. *It is further ordered* That authority is delegated to the Chief, Common Carrier Bureau, as set forth herein.

List of Subjects in 47 CFR Parts 64 and 69

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Amendatory Text

Parts 64 and 69 of title 47 of the Code of Federal Regulations are amended as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 continues to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225, unless otherwise noted.

2. Section 64.1401 is amended by revising paragraph (c), removing paragraphs (d) and (e), redesignating paragraphs (f) through (i) as paragraphs (d) through (g), respectively, and revising newly redesignated paragraph (f)(2), to read as follows:

§ 64.1401 Expanded interconnection.

* * * * *

(c) The local exchange carriers specified in paragraph (a) of this section shall offer expanded interconnection for interstate special access and switched transport services through virtual collocation, except that they may offer physical collocation, instead of virtual collocation, in specific central offices, as a service subject to non-streamlined communications common carrier regulation under Title II of the Communications Act (47 U.S.C. 201–228).

* * * * *

(f) * * *

(2) At least two such interconnection points at any local exchange carrier location at which there are at least two entry points for the local exchange carrier's cable facilities, and space is available for new facilities in at least two of those entry points.

* * * * *

PART 69—ACCESS CHARGES

1. The authority citation for part 69 continues to read as follows:

Authority. Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended; 47 USC 154, 201, 202, 203, 205, 218, 403.

2. Section 69.121 is amended by revising paragraph (a)(2) to read as follows:

§ 69.121 Connection charges for expanded interconnection.

(a) * * *

(2) Charges for subelements associated with physical collocation or virtual collocation, other than the subelement described in paragraph (a)(1) of this section and subelements recovering the cost of the virtual collocation equipment described in § 64.1401(e)(1) of this chapter, may reasonably differ in different central offices, notwithstanding § 69.3(e)(7).

* * * * *

[FR Doc. 94–18589 Filed 7–29–94; 8:45 am]

BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 89–535; RM–6980]

Radio Broadcasting Services; Chesapeake, Virginia, and Elizabeth City, NC

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document reallots Channel 229C from Elizabeth City, North Carolina, to Chesapeake, Virginia, and modifies the license of Benchmark Radio Acquisition Fund IV Limited Partnership for Station WKOC(FM) accordingly, as requested, pursuant to the provisions of Section 1.420(i) of the Commission's Rules. See 54 FR 50004, December 4, 1989, and 57 FR 49055, October 29, 1992. The allotment of Channel 229C to Chesapeake would provide a third local transmission service to Chesapeake (population 151,976) while removing a local transmission service from Elizabeth City (population 14,292). A counterproposal filed by Goya Communications is dismissed. With this action, the proceeding is terminated.

EFFECTIVE DATE: August 10, 1994.

FOR FURTHER INFORMATION CONTACT:

Sloan Gregory, Pamela Blumenthal, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 89–535, adopted July 19, 1994 and released July 27, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's 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 contractors, International Transcription Services, Inc., located at 1919 M Street NW., Room 246, or 2100 M Street NW., Suite 140, Washington, DC 20037, (202) 857–3800.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

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

PART 73—[AMENDED]

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under North Carolina, is

amended by removing Channel 229C at Elizabeth City.

3. Section 73.202(b), the Table of FM allotments under Virginia, is amended by adding Channel 229C at Chesapeake.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 94–18644 Filed 7–29–94; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF DEFENSE

48 CFR Parts 225 and 252

Defense Federal Acquisition Regulation Supplement: Aircraft Fuel Cells

AGENCY: Department of Defense (DoD).

ACTION: Correction to interim regulation.

SUMMARY: This document corrects an interim rule, which was published on Monday, March 14, 1994 (59 FR 11729). The interim rule related to the acquisition of aircraft fuel cells.

EFFECTIVE DATE: March 7, 1994.

FOR FURTHER INFORMATION CONTACT: Mrs. Alyce Sullivan, (703) 604–5929.

Claudia L. Naugle,

Deputy Director, Defense Acquisition Regulations Council.

Accordingly, FR Doc. 94–5817 published March 14, 1994 (59 FR 11729) is corrected as follows:

225.7021–1 [Corrected]

1. On page 11729, in the middle column, Section 225.7021–1 is corrected by adding, at the end of the sentence, the words "by a domestic-operated entity" after "manufactured in the United States" and before the period.

252.225–7038 [Corrected]

2. On page 11729, in the third column, Section 252.225–7038 is corrected by adding, at the end of the sentence, the words "by a domestic-operated entity" after "manufactured in the United States" and before the period.

[FR Doc. 94–18648 Filed 7–29–94; 8:45 am]

BILLING CODE 5000–04–M

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 519 and 552

[APD 2800.12A, CHGE 55]

RIN 3090–AF06

General Services Administration Acquisition Regulation; Small Business Subcontracting Program

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Final rule.

SUMMARY: The General Services Administration Acquisition Regulation (GSAR) is amended to revise Subpart 519.7 of the General Services Administration Acquisition Regulation. The revision incorporates a class deviation from the FAR clause at 52.219–9, Small Business and Small Disadvantaged Business Subcontracting Plan, and at 52.219–16, Liquidated Damages—Small Business Subcontracting Plan. The General Services Administration (GSA) has made a determination to deviate from the FAR clause at 52.219–9 on a class basis by adding a requirement that a goal be established for women-owned small business concerns when an individual contract plan is involved, and by referring to women-owned small business as well as small and small disadvantaged business concerns throughout the clause. The class deviation to FAR 52.219–16 makes minor wording changes to make the language conform to the clause as modified by the class deviation and to limit the provisions for calculating the amount of damages to the goals for small and small disadvantaged businesses as provided in the Small Business Act. The revision also expresses GSA's expectation that offerors under GSA procurements, in submitting required subcontracting plans, will do more than merely restate minimum plan requirements. Subcontracting plans should demonstrate creativity and innovation in small, small disadvantaged, and women-owned small business concerns in subcontracting opportunities and an understanding of the requirement that these concerns be afforded the maximum practicable opportunity to perform as subcontractors in the offeror's procurements. In certain negotiated solicitations, the subcontracting plan will be negotiated with price and any technical and management proposal required by the solicitation. In sealed bid solicitations, target goals may be stated by GSA in the solicitation. The revision also deletes various sections in Subpart 519.7 because they concern nonregulatory material, makes editorial changes in Subpart 519.8, and incorporates the class deviations in Subpart 570.2.

EFFECTIVE DATE: August 1, 1994.

FOR FURTHER INFORMATION CONTACT: Paul Linfield, Office of GSA Acquisition Policy, (202) 501–1224.

SUPPLEMENTARY INFORMATION:

A. Public Comments

A notice of proposed rulemaking was published in the **Federal Register** on January 14, 1994 (59 FR 2345). Fifteen public comments and comments received from GSA activities were considered in formulating this final rule. Fourteen of the public comments viewed the proposed rule favorably; three expressed concerns that demonstrated a need for further clarification. The significant issues and concerns raised during the comment period are summarized below.

Thirteen organizations recommended that offerors be required to submit a detailed written summary of the projects on which the offeror was responsible for meeting or exceeding minority/women business enterprise subcontracting goals and that the contracting officer's evaluation of the offeror's proposal be weighted based on the offeror's subcontracting plan. Neither recommendation is incorporated in the regulation issued today.

The provisions at GSAR 552.219–73 and 552.219–74 require a description of the offeror's subcontracting strategies and significant achievements. This requirement permits an offeror to describe occasions where it met or exceeded subcontracting goals without any presumption that only when the goals are met or exceeded is the achievement significant. Subcontracting goals may not be achieved for reasons that often are beyond the control of the offeror; e.g., changes in the economy or excessive pricing. For this reason GSA believes "significant achievements" should consider more than whether subcontracting goals were met.

The final rule also leaves to the discretion of the contracting officer the determination of whether or not to use the subcontracting plan as a weighted evaluation factor or subfactor. The type of procurement and the number of large versus small business concerns anticipated to compete for the award may influence that decision.

One comment suggested that for each project the GSA should set aside an amount to aid the large business in offsetting the additional cost in assisting

small, small disadvantaged, and women-owned small business concerns. This suggestion is not addressed in this regulation; GSA is examining alternatives for future implementation that may involve the use of incentives, however.

One organization stated that use of the subcontracting plan as an evaluation factor or subfactor "should not be weighted greater than any other evaluation factor and should not be used to eliminate, by itself, a contractor from a negotiated procurement." This concern is not addressed in this regulation. However, contemporaneous with the development of this regulation, the GSA developed internal guidance for its contracting officers to assist them in carrying out their responsibilities. This internal guidance will advise the contracting officer to be flexible and not establish arbitrary criteria.

The same organization also raised concerns with the use of the term, "aggressive," in GSAR 552.219–72, the phrase, "consistent with efficient contract performance," used in GSAR 552.219–73, and the types of information the contracting officer will review and/or consider in determining the acceptability of a subcontracting plan (par. (c) of GSAR 552.219–73 and 552.219–74). The GSA agrees that the term, "aggressive," may be interpreted inappropriately, and has substituted the more appropriate phrase, "creative and innovative," in the final rule.

Additionally, the commenting organization believes the regulation should contain examples of what constitutes "consistent with efficient contract performance." The GSA believes further clarification is unnecessary as its regulation is consistent with policies and expectations in Federal Acquisition Regulation (FAR) clauses 52.219–8, Utilization of Small Business Concerns and Small Disadvantaged Business Concerns, and 52.219–13, Utilization of Women-Owned Small Businesses. Also, Pub. L. 95–507 does not require that prime contractors subcontract a portion of the work, but instead expresses the policy and expectation that small and small disadvantaged businesses are afforded the maximum practicable opportunity to perform that portion of the work that is subcontracted. Another statute expresses similar policy and expectations for women-owned small businesses. These policies are reflected in the FAR clauses 52.219–8 and 52.219–13 that use the phrase, "consistent with efficient contract performance." This phrase, used in GSAR 552.219–73, has the same meaning as in the established FAR clauses. The provision merely reinforces current policies and expectations and is intended to assure that contractors give serious consideration to small, small disadvantaged, and women-owned small business concerns for the portion of work that is subcontracted.

Three other issues raised by this organization were: (1) "previous goals and achievements of contractors in the same industry" (GSAR 552.219–73(c)(2) and 552.219–74(c)(2)) do not take geographical differences into consideration; (2) consideration of information solely from "local preference programs and other advocacy groups" (GSAR 552.219–73(c)(3) and 552.219–74(c)(3)) will increase goals to unrealistic and unobtainable levels; and (3) contracting officers, in reviewing a contractor's description of its strategies and historical performance in placing subcontracts (GSAR 552.219–73(c)(4) and 552.219–74(c)(4)) may penalize a contractor that has not focused on subcontracting programs in the past. The GSA agrees that geographical differences are an important factor to consider. In its internal guidance, previously alluded to, it recognizes geographical diversity and the availability and location of potential contractors as a factor that may be considered in establishing target goals or developing a negotiation strategy.

The GSA agrees that reliance solely on "local preference programs and other advocacy groups" would be inappropriate. Both the regulation and the GSA internal guidance clearly establish that the contracting officer's determination as to the acceptability of a subcontracting plan requires the evaluation of multiple sources of information and not the arbitrary application of specific factors or formulas.

The GSA also does not believe it is unreasonable to reward a contractor who has focused on its subcontracting program in the past. This regulation provides a basis to recognize their contributions in furthering national policy. Two changes were made to subparagraph (c)(4) in both GSAR 552.219–73 and 552.219–74; the phrase, "when applicable," was deleted. A sentence also was added to clarify that an offeror could describe its strategies and historical performance in terms of its commercial as well as its previous Government contracts. This sentence was added to ensure that contractors that may not have previously held a Government contract requiring a subcontracting plan were not evaluated adversely.

One company submitted comments disagreeing with the proposed regulation because the changes "do not seem practical for Commercial Products producers. . . ." Specifically, this company stated that it did not have the ability to source specific components of a particular final product for a particular contracted item and, consequently, would be unable to negotiate a subcontracting plan covering any particular item that would be sold on that contract. A better approach, this company suggests, "would be to maintain or increase percentage goals based on total company (offeror's) purchases from all suppliers."

Commercial products subcontracting plans were developed to address the issues this company raises. As contrasted with an individual contract plan developed for a specific contract that has goals based on a company's planned subcontracting and purchasing to support performance of that specific contract, a commercial products subcontracting plan describes subcontracting that relates to the company's production generally; i.e., for both its commercial and non-commercial products; rather than solely to the item purchased under the Government contract.

The regulation issued today does not affect the ability of a company to offer a commercial products plan, nor does it direct offerors to particular sources for subcontracting. The GSA understands that contractors may have long established sources for specific components and the regulation does not suggest that these be altered. To clarify this matter, a sentence was added to paragraph (a) in both GSAR 552.219–73 and 552.219–74 that states that an offeror can satisfy the GSA's expectations with a commercial products plan where the offeror's commitment to providing maximum practicable subcontracting opportunities to small, small disadvantaged, and women-owned small business concerns is demonstrated through the subcontracting relating to its production generally; i.e., for both its commercial and Government business.

The company also suggested that subparagraph (c)(3) in GSAR 552.219–74 be removed. It believes that the plan and goals stated should be the responsibility of the U.S. Small Business Administration (SBA), be evaluated by the SBA, and not be evaluated by outside advocacy groups. This suggestion was not adopted. While the SBA is afforded an opportunity to review the subcontracting plan, determining its acceptability remains a responsibility of the contracting officer. Subparagraph (c)(3) merely informs potential offerors that the contracting

officer will consider, among other types of information, information and potential sources obtained from the SBA and other advocacy groups in determining whether the subcontracting plan is reasonable and the goals realistic.

The SBA submitted comments supporting the proposed rule. It offered several suggestions that were not incorporated in this final rule. The SBA stated that it supported GSAR 552.219–74. It interpreted this provision to require the subcontracting plan at the time of bid submittal in sealed bidding. This interpretation is incorrect. The requirement for the subcontracting plan with the initial offer applies only in certain GSA negotiated procurements (GSAR 519.705–2). In sealed bidding, the traditional practice of requiring the subcontracting plan only from the apparent low bidder is continued.

The SBA also suggested adding a subparagraph (c)(5) to both GSAR 552.219–73 and 552.219–74 that would provide for obtaining comments and recommendations from the SBA procurement center representative (SBA PCR) prior to approval of the subcontracting plan. The GSA internal guidance already provides procedures for obtaining the comments and recommendations of the SBA PCR. The GSA does not believe adding the suggested paragraph (c)(5) provides any benefit to potential offerors.

The SBA also expressed concern with the exception provided in GSAR 519.705–2 for not requiring the subcontracting plan with the initial offer for those acquisitions offering minimal subcontracting opportunities. It suggested substituting the word "no" for "minimal." The GSA again believes the SBA has misinterpreted the regulation. The GSA believes it would be unnecessarily burdensome to require subcontracting plans from all offerors when the contracting officer can determine from the nature of the procurement that subcontracting opportunities will be minimal. Under such a circumstance, using the subcontracting plan as a discriminating factor or subfactor in evaluating proposals would not be beneficial. The regulation cannot change the statutory requirement for the apparently successful offeror to submit an acceptable subcontracting plan prior to award.

B. Executive Order 12866

This rule was not submitted to the Office of Management and Budget (OMB) for review because the rule is not a significant regulatory action as defined in Executive Order 12866, Regulatory Planning and Review, and, therefore, was not required to be submitted.

C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the GSA certifies that the proposed rule will not have significant impact on a substantial number of small entities, since the revised subcontracting plan requirements in the regulation do not apply to small business concerns. Accordingly, a regulatory flexibility analysis was not prepared.

D. Paperwork Reduction Act

The clause at 552.219–9, Small Business Subcontracting Plan, contains an information collection requirement. The clause incorporates into the GSAR an approved deviation to the FAR clause at 52.219–9 which has been approved by OMB under Section 3504(h) of the Paperwork Reduction Act and assigned OMB Control Number 9000–0006. The GSA deviation which adds women-owned small business does not add to the information collection requirements already provided for in the FAR. FAR clause 52.219–13, Utilization of Women-Owned Small Businesses, already encourages use of women-owned small businesses in subcontracting and the Standard Form 295, Summary Subcontract Report, already provides a vehicle for reporting on subcontracting with women-owned small business.

The provision at 552.219–73 contains an information collection requirement that has been approved by OMB under Section 3504(h) of the Paperwork Reduction Act and assigned OMB Control Number 3090–0252. The title of the information collection is "GSAR 552.219–73 Preparation, Submission, and Negotiation of Subcontracting Plans." The provision requires all offerors, other than small business concerns, responding to a negotiated solicitation to submit a subcontracting plan with their respective offers so that a plan can be negotiated concurrently with other parts of the proposal. The respondents are potential GSA contractors. The contracting officer will use the information to evaluate whether GSA's expectation that subcontracting opportunities exist for small, small disadvantaged and women-owned small business is reasonable under the circumstances; negotiate goals consistent with statutory requirements and acquisition objectives; and expedite the award process. The estimated annual burden for this additional collection is 14,690 hours. This is based on an estimated burden per response of 11.3 hours, a proposed frequency of one response per respondent, and an estimated number of likely respondents of 1,300.

Any comments concerning the accuracy of the burden may be directed to the Director, Office of GSA Acquisition Policy (VP), 18th & F Sts., NW., Room 4006, Washington, DC 20405 and to the Office of Information and Regulatory Affairs of OMB, Attention Desk Officer for GSA, Washington, DC 20503.

List of Subjects in 48 CFR Parts 519 and 552

Government procurement.

Accordingly, 48 CFR Parts 519 and 552 are amended to read as follows:

1. The authority citation for 48 CFR Parts 519 and 552 continues to read as follows:

Authority: 40 U.S.C. 486(c).

PART 519—SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS

519.701, 519.702, 519.704 [Removed]

2. Sections 519.701, 519.702, and 519.704 are removed.

3. Section 519.705–2 is revised to read as follows:

519.705–2 Determining the need for a subcontracting plan.

The requirement at FAR 19.702(a)(1) for submission of a subcontracting plan by only the apparently successful offeror does not apply to GSA negotiated solicitations when the contract is expected to exceed $500,000 ($1,000,000 for construction) and the contract will be awarded on the basis of an evaluation of technical and/or management proposals and cost or price proposals using source selection procedures. Except for acquisitions—

(1) Of leasehold interests in real property using expedited procedures,

(2) Of commercial products, or

(3) Offering minimal subcontracting opportunities

such acquisitions shall require submission of a subcontracting plan with the initial offer by all offerors that are not small business concerns.

519.705–4, 519.705–5, 519.705–6, 519.706, 519.706–70 [Removed]

4. Sections 519.705–4, 519.705–5, 519.705–6, 519.706, and 519.706–70 are removed.

5. Section 519.708 is revised to read as follows:

519.708 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 552.219–9, Small Business

Subcontracting Plan, or its Alternate I in solicitations and contracts instead of the FAR clause at 52.219–9 or its alternate.

(b) The contracting officer shall insert the clause at 552.219–16, Liquidated Damages—Small Business Subcontracting Plan, in solicitations and contracts instead of the FAR clause at 52.219–16.

(c) The contracting officer shall insert the provision at 552.219–72, Notice to Offerors of Subcontracting Plan Requirements, on the cover page of the solicitation if the solicitation includes the clause at 552.219–9, Small Business Subcontracting Plan. The provision does not apply to acquisitions of leasehold interests in real property using expedited procedures.

(d) The contracting officer shall insert the provision at 552.219–73, Preparation, Submission, and Negotiation of Subcontracting Plans, in negotiated solicitations if the solicitation includes the clause at 552.219–9, Small Business Subcontracting Plan, and the contract will be awarded on the basis of an evaluation of technical and/or management proposals and cost or price proposals using source selection procedures. The provision does not apply to:

(1) Acquisitions of leasehold interests in real property using expedited procedures,

(2) Solicitations for commercial products, or

(3) Solicitations where, in the judgment of the contracting officer, subcontracting opportunities are minimal.

(e) The contracting officer shall insert the provision at 552.219–74, Goals for Subcontracting Plan, in sealed bid solicitations if the solicitation includes the clause at 552.219–9, Small Business Subcontracting Plan. The basic provision should be used when the contracting officer is able to realistically establish target goals. Alternate I should be used in sealed bid solicitations when the contracting officer cannot establish realistic target goals and in negotiated solicitations that include the clause at 552.219–9 but do not include the provision at 552.219–73.

519.770, 519.770–1, 519.770–3 [Removed]

6. Sections 519.770, 519.770–1, and 519.770–3 are removed.

7. Section 519.803–70 is revised to read as follows:

519.803–70 Contracting officer evaluation of recommendations for 8(a) set-asides.

If the Director of Small and Disadvantaged Business Utilization (AU) or the SBTA recommends that a procurement be set aside for award under the 8(a) program and the contracting officer disagrees, the contracting officer shall discuss the matter with the official that made the recommendation before making a decision. If the contracting officer decides not to award the contract under the 8(a) program as recommended, the reasons for the decision must be documented for the record as required by FAR 19.202 and a copy of the documentation must be forwarded to AU within 10 working days of the contracting officer's decision.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Sections 552.219–9 and 552.219–16 are added to read as follows:

552.219–9 Small business subcontracting plan.

As prescribed in 519.708(a), insert the following clause

SMALL BUSINESS SUBCONTRACTING PLAN (JUNE 1994)

(DEVIATION FAR 52.219–9)

(a) This clause does not apply to small business concerns.

(b) *Commercial product*, as used in this clause, means a product in regular production that is sold in substantial quantities to the general public and/or industry at established catalog or market prices. It also means a product which, in the opinion of the Contracting Officer, differs only insignificantly from the Contractor's commercial product.

Subcontract, as used in this clause, means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

(c) The offeror, upon request by the Contracting Officer, shall submit and negotiate a subcontracting plan, where applicable, which separately addresses subcontracting with small business concerns, with small disadvantaged business concerns, and with women-owned small business concerns. If the offeror is submitting an individual contact plan, the plan must separately address subcontracting with small business concerns, with small disadvantaged business concerns, and with women-owned small business concerns with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be negotiated within the time specified by the Contracting Officer. Failure to submit and negotiate the subcontracting plan shall make the offeror ineligible for award of a contract.

(d) The offeror's subcontracting plan shall include the following:

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns, small disadvantaged business concerns and, if an individual contract plan is involved, women-owned small business concerns as subcontractors. The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(2) A statement of—

(i) Total dollars planned to be subcontracted;

(ii) Total dollars planned to be subcontracted to small business concerns;

(iii) Total dollars planned to be subcontracted to small disadvantaged business concerns; and

(iv) Total dollars planned to be subcontracted to women-owned small business concerns, if an individual contract plan is involved.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to (i) small business concerns, (ii) small disadvantaged business concerns, and (iii) women-owned small business concerns.

(4) A description of the method used to develop the subcontracting goals in (1) above.

(5) A description of the method used to identify potential sources for solicitation purposes (e.g., existing company source lists, the Procurement Automated Source System (PASS) of the Small Business Administration, the National Minority Purchasing Council Vendor Information Service, the Research and Information Division of the Minority Business Development Agency in the Department of Commerce, or small, small disadvantaged, and women-owned small business concerns trade associations).

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with (i) small business concerns, (ii) small disadvantaged business concerns, and if an individual contract plan is involved, (iii) women-owned small business concerns.

(7) The name of the individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual.

(8) A description of the efforts the offeror will make to assure that small business concerns, small disadvantaged business concerns, and women-owned small business concerns have an equitable opportunity to compete for subcontracts.

(9) Assurances that the offeror will include the clause in this contract entitled Utilization of Small Business Concerns and Small Disadvantaged Business Concerns in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontracts (except small business concerns) who receive subcontracts in excess of $500,000 ($1,000,000 for construction of any public facility), to adopt a plan similar to the plan agreed to by the offeror.

(10) Assurances that the offeror will (i) cooperate in any studies or surveys as may

be required, (ii) submit periodic reports in order to allow the Government to determine the extent of compliance by the offeror with the subcontracting plan, (iii) submit Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, in accordance with the instructions on the forms, and (iv) ensure that its subcontractors agree to submit Standard Forms 294 and 295.

(11) A recitation of the types of records the offeror will maintain to demonstrate procedures that have been adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of its efforts to locate small, small disadvantaged, and women-owned small business concerns and award subcontracts to them. The records shall include at least the following (on a plant-wide or company-wide basis, unless otherwise indicated):

(i) Source lists, guides, and other data that identify small, small disadvantaged, or women-owned small business concerns.

(ii) Organizations contacted in an attempt to locate sources that are small, small disadvantaged, or women-owned small business concerns.

(iii) Records on each subcontract solicitation resulting in an award of more than $100,000, indicating (A) whether small business concerns were solicited and if not, why not, (B) whether small disadvantaged business concerns were solicited and if not, why not, (C) whether women-owned small business concerns were solicited and if not, why not, and (D) if applicable, the reason award was not made to a small business concern.

(iv) Records of any outreach efforts to contact (A) trade associations, (B) business development organizations, and (C) conferences and trade fairs to locate small, small disadvantaged, and women-owned small business sources.

(v) Records of internal guidance and encouragement provided to buyers through (A) workshops, seminars, training, etc., and (B) monitoring performance to evaluate compliance with the program's requirements.

(vi) On a contract-by-contract basis, records to support award data submitted by the offeror to the Government, including the name, address, and business size of each subcontractor. Contractors having company or division-wide annual plans need not comply with this requirement.

(e) In order to effectively implement this plan to the extent consistent with efficient contract performance, the Contractor shall perform the following functions:

(1) Assist small, small disadvantaged, and women-owned small business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Contractor's lists of potential small, small disadvantaged, and women-owned small business subcontractors are excessively long, reasonable efforts shall be made to give all such small business concerns an opportunity to compete over a period of time.

(2) Provide adequate and timely consideration of the potentialities of small, small disadvantaged business, and women-owned small business concerns in all "make-or-buy" decisions.

(3) Counsel and discuss subcontracting opportunities with representatives of small, small disadvantaged, and women-owned small business firms.

(4) Provide notice to subcontractors concerning penalties and remedies for misrepresentations of business status as small business or small disadvantaged business for the purpose of obtaining a subcontract that is to be included as part or all of a goal contained in the Contractor's subcontracting plan.

(f) A master subcontracting plan on a plant or division-wide basis which contains all the elements required by (d) above, except goals, may be incorporated by reference as a part of the subcontracting plan required of the offeror by this clause; provided, (1) the master plan has been approved, (2) the offeror provides copies of the approved master plan and evidence of its approval to the Contracting Officer, and (3) goals and any deviations from the master plan deemed necessary by the Contracting Officer to satisfy the requirements of this contract are set forth in the individual subcontracting plan.

(g) (1) If a commercial product is offered, the subcontracting plan required by this clause may relate to the offeror's production generally, for both commercial and noncommercial products, rather than solely to the Government contract. In these cases, the offeror shall, with the concurrence of the Contracting Officer, submit one company-wide or division-wide annual plan.

(2) The annual plan shall be reviewed for approval by the agency awarding the offeror its first prime contract requiring a subcontracting plan during the fiscal year, or by an agency satisfactory to the Contracting Officer.

(3) The approved plan shall remain in effect during the offeror's fiscal year for all of the offeror's commercial products.

(h) Prior compliance of the offeror with other such subcontracting plans under previous contracts will be considered by the Contracting Officer in determining the responsibility of the offeror for award of the contract.

(i) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled Utilization of Small Business Concerns and Small Disadvantaged Business Concerns, or (2) an approved plan required by this clause, shall be a material breach of the contract.

(End Clause)

Alternate I (JUNE 1994)

When contracting by sealed bidding rather than negotiation, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, which separately addresses subcontracting with small business concerns, with small disadvantaged business concerns, and with women-owned small business concerns. If the bidder is submitting an individual contract plan, the plan must separately address subcontracting with small business concerns, with small disadvantaged business concerns, and with women-owned small business with a separate part for the basic contract and separate parts for each option (if any). The plan shall be included in and made a part of the resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.

552.119 Liquidated damages—small business subcontracting plan.

As prescribed in 519.708(b), insert the following clause:

LIQUIDATED DAMAGES—SMALL BUSINESS SUBCONTRACTING PLAN (JUNE 1994)

(DEVIATION FAR 52.219–16)

(a) *Failure to make a good faith effort to comply with the subcontracting plan*, as used in this clause, means a willful or intentional failure to perform in accordance with the requirements of the subcontracting plan approved under the clause in this contract entitled Small Business Subcontracting Plan, or willful or intentional action to frustrate the plan.

(b) If, at contract completion, or in the case of a commercial products plan, at the close of the fiscal year for which the plan is applicable, the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides in accordance with paragraph (c) of this clause that the Contractor failed to make a good faith effort to comply with its subcontracting plan, established in accordance with the clause in this contract entitled Small Business Subcontracting Plan, the Contractor shall pay the Government liquidated damages in an amount stated. The amount of probable damages attributable to the Contractor's failure to comply, shall be an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontracting goal for small business and/or small disadvantaged business or, in the case of a commercial products plan, that portion of the dollar amount allocable to Government contracts by which the Contractor failed to achieve each subcontract goal.

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If, after consideration of all the pertinent data, the Contracting Officer finds that the Contractor failed to make a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to commercial products plans; i.e., company-wide or division-wide subcontracting plans approved under paragraph (g) of the clause in this contract

entitled Small Business Subcontracting Plan, the Contracting Officer of the agency that originally approved the plan will exercise the functions of the Contracting Officer under this clause on behalf of all agencies that awarded contracts covered by that commercial products plan.

(e) The Contractor shall have the right of appeal, under the clause in this contract entitled Disputes, from any final decision of the Contracting Officer.

(f) Liquidated damages shall be in addition to any other remedies that the Government may have.

(End of Clause)

9. Section 552.219–72 is revised to read as follows:

552.219–72 Notice to offerors of subcontracting plan requirements.

As prescribed in 519.708(c), insert the following provision:

NOTICE TO OFFERORS OF SUBCONTRACTING PLAN REQUIREMENTS (JUNE 1994)

The General Services Administration (GSA) is committed to assuring that maximum practicable opportunity is provided to small, small disadvantaged, and women-owned small business concerns to participate in the performance of this contract consistent with its efficient performance. GSA expects any subcontracting plan submitted pursuant to 552.219–9, Small Business Subcontracting Plan, to reflect this commitment. Consequently, an offeror, other than a small business concern, before being awarded a contract exceeding $500,000 ($1,000,000 for construction) will be required to demonstrate that its subcontracting plan represents a creative and innovative program for involving small, small disadvantaged, and women-owned small business concerns as subcontractors in the performance of this contract.

(End of Provision)

10. Section 552.219–73 is revised to read as follows:

552.219–73 Preparation, submission, and negotiation of subcontracting plans.

As prescribed in 519.708(d), insert the following provision:

PREPARATION, SUBMISSION, AND NEGOTIATION OF SUBCONTRACTING PLANS (JUNE 1994)

(a) An offeror, other than a small business concern, submitting an offer that exceeds $500,000 ($1,000,000 for construction) shall submit a subcontracting plan with its initial offer. The subcontracting plan will be negotiated concurrently with price and any required technical and management proposals, unless the offeror submits a previously-approved commercial products plan. Maximum practicable utilization of small, small disadvantaged, and women-owned small business concerns as subcontractors is a matter of national interest with both social and economic benefits. It is the General Services Administration's (GSA's) expectation that an offeror's subcontracting plan will reflect a commitment to assuring that small, small disadvantaged, and women-owned small business concerns are provided the maximum practicable opportunity, consistent with efficient contract performance, to participate as subcontractors in the performance of the resulting contract. An offeror submitting a commercial products plan can reflect this commitment through subcontracting opportunities it provides that relate to the offeror's production generally; i.e., for both its commercial and Government business.

(b) GSA believes that this potential contract provides significant opportunities for the use of small, small disadvantaged, and women-owned small business concerns as subcontractors. Consequently, in addressing the eleven elements described in 552.219–9(d) of the clause in this contract entitled Small Business Subcontracting Plan, the offeror shall demonstrate that its subcontracting plan represents a creative and innovative program for involving small, small disadvantaged, and women-owned small business concerns in performing the contract. The subcontracting plan shall include a description of the offeror's subcontracting strategies used in any previous contracts, significant achievements, and how this plan will build upon those earlier achievements. Additionally, the offeror shall demonstrate through its plan that it understands the small business subcontracting program's objectives, GSA's expectations, and is committed to taking those actions necessary to meet these goals or objectives.

(c) In determining the acceptability of any subcontracting plan, the Contracting Officer will—

(1) Review the plan to verify that the offeror has demonstrated an understanding of the small business subcontracting program's objectives and GSA's expectations with respect to the program and has included all the information, goals, and assurances required by 552.219–9;

(2) Consider previous goals and achievements of contractors in the same industry;

(3) Consider information and potential sources obtained from agencies administering national and local preference programs and other advocacy groups in evaluating whether the goals stated in the plan adequately reflect the anticipated potential for subcontracting to small, small disadvantaged, and women-owned small business concerns; and

(4) Review the offeror's description of its strategies, historical performance and significant achievements in placing subcontracts for the same or similar products or services with small, small disadvantaged, and women-owned small business concerns. the offeror's description can apply to commercial as well as previous Government contracts.

(d) Failure to submit an acceptable subcontracting plan and/or correct deficiencies in a plan within the time specified by the Contracting Officer shall make the offeror ineligible for award.

(End of Provision)

11. Section 552.219–74 is added to read as follows:

552.219–74 Goals for Subcontracting Plan.

As prescribed in 519.708(e), insert the following provision:

GOALS FOR SUBCONTRACTING PLAN (JUNE 1994)

(a) Maximum practicable utilization of small, small disadvantaged, and women-owned small business concerns as subcontractors is a matter of national interest with both social and economic benefits.

(1) The General Services Administration's (GSA's) commitment to ensuring that maximum practicable opportunity is provided to small, small disadvantaged, and women-owned small business concerns to participate as subcontractors in the performance of this contract, consistent with its efficient performance, must be reflected in the offeror's subcontracting plan submitted pursuant to the clause of this contract at 552.219–9, Small Business Subcontracting Plan.

(2) In addressing the eleven elements described at 552.219–9(d), the offeror shall demonstrate that its subcontracting plan represents a creative and innovative program for involving small, small disadvantaged, and women-owned small business concerns in performing this contract. An offeror submitting a commercial products plan can demonstrate its commitment in providing maximum practicable opportunities through subcontracting opportunities it provides to small, small disadvantaged, and women-owned small business concerns that relate to the offeror's production generally; i.e., for both its commercial and Government business.

(3) The subcontracting plan shall include a description of the offeror's subcontracting strategies used in previous contracts and significant achievements, with an explanation of how this plan will build upon those earlier achievements. Additionally, the offeror shall demonstrate through its plan that it understands the small business subcontracting program's objectives, GSA's expectations, and is committed to taking those actions necessary to meet these goals or objectives.

(b) GSA believes that this contract provides significant opportunities for the use of small, small disadvantaged, and women-owned small business concerns as subcontractors. Accordingly, it is anticipated that an acceptable subcontracting plan will contain at least the following goals:

Small Business_____percent
Small Disadvantaged Business
_____percent
Women-Owned Small Business
_____percent

Note: Target goals are expressed as a percentage of planned subcontracting dollars.

(c) In determining the acceptability of any subcontracting plan, the Contracting Officer will—

(1) Review the plan to verify that the offeror has demonstrated an understanding of the small business subcontracting program's

objectives and GSA's expectations with respect to the programs and has included all the information, goals, and assurances required by 552.219–9;

(2) Consider previous goals and achievements of contractors in the same industry;

(3) Consider information and potential sources obtained from agencies administering national and local preference programs and other advocacy groups in evaluating whether the goals stated in the plan adequately reflect the anticipated potential for subcontracting to small, small disadvantaged, and women-owned small business concerns; and

(4) Review the offeror's description of its strategies, historical performance and significant achievements in placing subcontracts for the same or similar products or services with small, small disadvantaged, and women-owned small business concerns. The offeror's description can apply to commercial as well as previous Government contracts.

(d) Failure to submit an acceptable subcontracting plan and/or contract deficiencies in a plan within the time specified by the Contracting Officer shall make the offeror ineligible for award.

(End of Provision)

Alternate I (JUNE 1994)

The Contracting Officer, as prescribed in 519.708(e), shall delete paragraph (b) of the basic provision and redesignate paragraphs (c) and (d) as paragraphs (b) and (c).

PART 570—ACQUISITION OF LEASEHOLD INTERESTS IN REAL PROPERTY

12. Section 570.203 is amended by revising paragraph (a)(8)(vi) to read as follows:

570.203 Solicitation for offers (SFO).

(a) * * *

(8) * * *

(vi) All solicitations and contracts which exceed $500,000 must include the deviations to FAR clauses 52.219–9, Small Business and Small Disadvantaged Business Subcontracting Plan, and 52.219–16, Liquidated Damages—Small Business Subcontracting Plan (see 519.708 (a) and (b)).

* * * * *

Dated: July 19, 1994.

Arthur E. Ronkovich,

Acting Associate Administrator for Acquisition Policy.

[FR Doc. 94–18401 Filed 7–29–94; 8:45 am]

BILLING CODE 6820–61–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1845 and 1852

NASA Federal Acquisition Regulation (FAR) Supplement, Government-Owned/Contractor-Held Property; Reporting Period and Due Date

AGENCY: Office of Procurement, Procurement Policy Division, National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: NASA has revised the NASA FAR Supplement to change the reporting period and due date for reports of Government-Owned/Contractor-Held property from June 30 and July 31, respectively, to September 30 and October 31, respectively. This regulation is issued as an interim rule to avoid unnecessary work by contractors to comply with the present reporting requirements and to ensure that new awards reflect the revised requirements.

DATES: Effective Date: This interim rule is effective August 1, 1994. Comments: Comments are due on or before September 30, 1994.

ADDRESSES: Comments should be addressed to Tom O'Toole, NASA Headquarters, Office of Procurement, Procurement Policy Division (Code HP), Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Tom O'Toole, telephone: (202) 358–0478.

SUPPLEMENTARY INFORMATION:

Background

The NASA FAR Supplement currently requires contractors to submit an annual report on Government-Owned/Contractor-Held property. The reporting period and report due date, however, are not on a fiscal year basis, thereby creating an inconsistency with other financial data reported on a fiscal year basis. This FR notice changes the inventory report and due date to a fiscal year basis.

Availability of NASA FAR Supplement

The NASA FAR Supplement, of which this regulation will become a part, is codified in 48 CFR, chapter 18, and is available in its entirety on a subscription basis for the superintendent of Documents, Government Printing Office, Washington, DC 20402, (202) 783–3238. Cite GPO Subscription Stock Number 933–003–00000–1. It is not distributed to the public, whether in whole or in part, directly by NASA.

Impact

NASA certifies that this interim rule will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The reporting or recordkeeping requirements subject to the Paperwork Reduction Act are approved under OMB control number 2700–0017 through October 31, 1996.

List of Subjects in 48 CFR Parts 1845 and 1852

Government procurement.

Tom Luedtke,

Deputy Associate Administrator for Procurement.

Accordingly, 48 CFR parts 1845 and 1852 are amended as follows.

1. The authority citation for 48 CFR parts 1845 and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1845—GOVERNMENT PROPERTY

2. In section 1845.7101–3, paragraph (b) is revised to read as follows:

1845.7101–3 Submission of reports.

* * * * *

(b) The contractor shall submit the original and three copies of NASA Form 1018 for the period ending September 30 in accordance with the clause not later than October 31 of each year, when reporting is required annually. The original report shall be submitted directly to the installation Financial Management Officer and three copies shall be sent concurrently to the cognizant property administrator. When more frequent reporting is required, the due date shall not be later than the last day of the month following the period being reported. The reporting requirement shall not be less frequently than annually; in all cases a report shall be required as of September 30.

* * * * *

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. In section 1852.245–73, the reference "(MAR 1989)" after the clause title only is revised to read "(July 1994)", and paragraphs (b) and (c) are revised to read:

1852.245–73 Financial reporting of government-owned/contractor-held property.

* * * * *

(b) If administration of this contract has been delegated to the Department of

Defense, the original of NASA Form 1018 shall be submitted to the NASA installation Financial Management Officer and three copies shall be sent concurrently through the DOD Property Administrator to the NASA office identified below. If the contract is administered by NASA, the original of N.F. 1018 shall be submitted to the installation Financial Management Officer, and three copies shall be sent concurrently to the following NASA office:

(Insert the address and office code of the organization within the installation responsible for control and distribution of the NF 1018.)

(c) The annual reporting period shall be from October 1 of each year to September 30 of the following year. The report shall be submitted by October 31.

* * * * *

[FR Doc. 94–18536 Filed 7–29–94; 8:45 am]

BILLING CODE 7510–01–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 571 and 575

[Docket No. 93–81, Notice 02]

RIN No. 2127–AE70

Federal Motor Vehicle Safety Standards, New Pneumatic Tires; Consumer Information Regulations Uniform Tire Quality Grading Standards

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This rule amends Federal Motor Vehicle Safety Standard No. 109, *New Pneumatic Tires*, and the Uniform Tire Quality Grading Standards, to permit the manufacture and sale of tires having a maximum tire inflation pressure of 350 kiloPascals (kPa) (51 pounds per square inch (psi)). Tires having a maximum tire inflation pressure of 350 kPa have reduced rolling resistance, which can increase the energy efficiency of vehicles. Today's rule permits the manufacture and sale of 350 kPa tires for use on all passenger cars, including electric and other energy-efficient vehicles. This amendment responds to a petition for rulemaking submitted by the Rubber Manufacturers Association.

DATES: The amendment promulgated by this final rule will become effective on August 31, 1994.

Any petitions for reconsideration must be received by NHTSA not later than August 31, 1994.

ADDRESSES: Any petitions for reconsideration should refer to the docket and notice numbers of this notice as shown above and be submitted to: Docket Section, National Highway Traffic Safety Administration, 400 Seventh Street, SW, room 5109, Washington, DC 20590. Docket room hours are from 9:30 a.m. to 4:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Cook, Office of Vehicle Safety Standards, National Highway Traffic Safety Administration, 400 Seventh Street, SW, Room 5307, Washington, DC 20590. Telephone (202) 366–4803.

SUPPLEMENTARY INFORMATION:

Introduction

This rule amends Federal Motor Vehicle Safety Standard No. 109, *New Pneumatic Tires*, 49 CFR § 571.109, and the Uniform Tire Quality Grading Standards (UTQGS), 49 CFR § 575.104, to permit the manufacture and sale of tires that have a maximum tire inflation pressure of 350 kiloPascals (kPa) (51 pounds per square inch (psi)). This rule follows a notice of proposed rulemaking (NPRM) published on November 8, 1993 (58 FR 59226). The amendments adopted today are substantially similar to those proposed in the NPRM, except that the NPRM would have limited the 350 kPa maximum tire pressure only to tires for use on energy efficient vehicles. This rule does not adopt that limitation.

Background

Safety Standard No. 109 specifies requirements for passenger car tires for strength, endurance, high speed performance, and bead unseating resistance. In addition, the standard defines tire load ratings and specifies dimensions, maximum inflation pressures, and labeling requirements.

Pertinent to maximum tire inflation pressures, S4.2.1(b) of the standard provides that for other than CT tires,[1] tires must have one of the following maximum inflation pressures: 240, 280, 290, 300, 330, or 340 kPa or 32, 36, 40, or 60 psi. The effect of S4.2.1(b) is to proscribe maximum inflation pressures other than the ones listed. Also, a manufacturer's selection of a maximum inflation pressure for a given tire has the effect of determining the pressure at which that tire will be tested for compliance. For each permissible maximum pressure, Table II of Standard No. 109 specifies pressures at which compliance tests will be conducted. NHTSA believes that limiting the permissible maximum pressures to the ones listed reduces the likelihood that tires of the same size and with one maximum load value but with two different maximum permissible inflation pressures will be installed on the same vehicle. Such "intermixing" of tires of different maximum inflation pressures can result in significant vehicle handling and stability problems.

The UTQGS require motor vehicle and tire manufacturers and tire brand name owners to label passenger car tires with information about the relative performance of the tires in the areas of treadwear, traction, and temperature resistance. Table I of the UTQGS specifies maximum permissible inflation pressures for treadwear and temperature resistance testing, while Table 2 sets forth the multipliers corresponding to the tire's maximum inflation pressure for treadwear and traction testing. Both tables provide for a maximum inflation pressure of 350 kPa, but for CT tires only.

The Rubber Manufacturers Association (RMA) submitted a petition for rulemaking to amend Standard No. 109 and the UTQGS to permit a maximum inflation pressure of 350 kPa (51 psi). RMA stated that the additional inflation pressure of 350 kPa would contribute to the development of electric and other energy-efficient vehicles because of the lower rolling resistance of tires with higher inflation pressures. RMA stated that domestic evaluation of 350 kPa tires, as well as experience with such tires in Europe where this inflation level has been standard practice, alleviated any concern about tire intermix, that is, mixing tires inflated to 350 kPa with tires of lower inflation pressure on the same vehicle.

NHTSA granted the RMA petition and issued a notice of proposed rulemaking (NPRM) on November 8, 1993 (58 FR 59226). While RMA did not suggest limiting the 350 kPa inflation pressure to energy-efficient vehicles, the agency proposed to add 350 kPa to the maximum permissible inflation pressures specified in Standard No. 109 and the UTQGS only for tires for use on electric and other energy-efficient vehicles. The basis for that limitation was information known by NHTSA relating to an earlier petition from Goodyear Tire and Rubber Company (Goodyear).

In that petition, Goodyear asked NHTSA to increase the maximum

[1] CT tires are pneumatic tires with an inverted flange tire and rim system in which the rim flanges point radially inward and the tire beads fit on the underside of the rim such that the rim flanges are inside the air cavity of the tire.

permissible inflation pressure of tires to 450 kPa (65 psi). At that time, Goodyear, in cooperation with General Motors and the Tire and Rim Association, was developing an "E-metric" tire designed specifically for use on energy-efficient alternative fuel vehicles. Goodyear asserted that the higher inflation pressure was necessary to enable E-metric vehicles to achieve maximum fuel efficiency by reducing rolling resistance. During development, however, test data indicated vehicle handling and stability problems when E-metric and conventional tires were intermixed on the same vehicle, especially on conventional vehicles. Goodyear subsequently withdrew its petition.

Because of Goodyear's experience with the E-metric tire, the agency expressed continuing concern in the NPRM about the tire intermix problem and observed that energy-efficient vehicles are still in the developmental stage, as are the tires designed for use on them. NHTSA further stated that such tires will require designs different than conventional tires already in use, such as ultra-low rolling resistance accomplished by higher inflation pressures, lower tire/wheel system mass, and reduced tire deflection. The agency expressed concern that the Goodyear tests showed handling and stability problems when E-metric tires were intermixed with conventional tires on energy-efficient and other vehicles. Thus, the agency proposed to permit 350 kPa as a maximum inflation pressure, but only for electric and other energy-efficient vehicles.

To permit 350 kPa tires for electric and other energy-efficient vehicles, NHTSA proposed amending the portions of Standard No. 109 and the UTQGS that directly or indirectly limited the maximum permissible inflation pressure of 350 kPa to CT tires. NHTSA proposed amending Standard No. 109's general performance requirements (S4.2.1) to include 350 kPa as a maximum permissible inflation pressure, and the standard's Table I-C and Table II of Appendix A. Table I-C specifies minimum "breaking energy" for radial ply tires (i.e., the resistance of the tire to bruise or damage due to impact of the tire with road hazards). Table II specifies the inflation pressure that NHTSA will use to test a particular tire to the various performance requirements of Standard No. 109. Tables I-C and Table II currently specify values for 350 kPa CT tires. NHTSA proposed to use those same values for 350 kPa tires for electric and other energy-efficient vehicles.[2]

Similarly, NHTSA proposed to amend Table 1 and Table 2 of the UTQGS (49 CFR § 575.104) to specify values for test inflation pressures (Table 1) and for the multiplier used for treadwear and traction testing (Table 2) for 350 kPa tires for electric and other energy-efficient vehicles. The proposed values were the ones currently used to test 350 kPa CT tires.

NHTSA received comments to the NPRM from petitioner RMA, Chrysler Corporation and General Motors Corporation. All the commenters were generally supportive of the proposal. RMA and GM opposed permitting 350 kPa tires only for electric and other energy-efficient vehicles, while Chrysler said it could not comment on the issue.

Amendments

NHTSA has decided to permit the addition of 350 kPa to the tables of Standard No. 109 and the UTQGS without limitation as to types of vehicles or tires to which it may apply.

In its comment opposing the proposal to limit the 350 kPa inflation rate to tires for electric or other energy-efficient vehicles, RMA argued that the agency's concerns about tire intermix problems and the design modifications required for energy-efficient vehicles were all based on the development of 450 kPa (65 psi) tires and not on 350 kPa tires. RMA acknowledged that test data showed some handling and stability problems when 450 kPa (65 psi) tires were intermixed with 240 kPa (35 psi) tires, but asserted that there were as many cases where the handling and stability of vehicles with such intermix were satisfactory. RMA argued that design modifications have routinely been made through the years to advance the state of the art, particularly in the areas of treadwear, traction, and temperature resistance, and asserted that conventional tires with conventional designs and compound characteristics are suitable for use at 350 kPa. RMA further stated that a large majority of the countries of the world have allowed 350 kPa maximum inflation pressure, and that 350 kPa tires may also use low rolling resistance compounds. That is so common, in fact, that low rolling resistance compounds can be considered as conventional compounds.

RMA submitted with its comments certain test data obtained from running a slalom course with tires from 3 different tire manufacturers using inflation pressures varying from 240 kPa (35 psi) to 350 kPa. RMA also attached test data from a test in which tires from 3 different manufacturers were tested in 18 different combinations of pressure and brand intermixing. RMA asserted that both tests showed that the intermixing of the different inflation pressures had less effect on the vehicles' handling and stability than changing from one brand of tires to another. In all combinations, however, vehicle handling and stability were considered satisfactory. RMA emphasized that the only test data that indicates any possibility of intermix problems involves 450 kPa (65 psi) tires, and that there were no test data indicating any intermix problems involving 350 kPa tires.

GM questioned the proposal to limit the addition of 350 kPa maximum inflation pressure to Standard No. 109 and the UTQGS to energy-efficient vehicles. GM stated that the NPRM did not define "energy-efficient" and stated that GM did not know how such a limitation could be applied without one. GM suggested, however, that reduced rolling resistance tires could offer fuel economy improvements to vehicles that are not normally considered energy-efficient. Thus, such a limitation might not be in the interest of increasing fuel economy in the nation's motor vehicle fleet. GM did not address the intermix issue with which NHTSA was concerned because of the lack of the necessary data.

Based on the submissions of the commenters, NHTSA has decided to permit the addition of 350 kPa to the tables of Standard No. 109 and the UTQGS without limitation as to types of vehicles or tires to which it may apply.

The agency was persuaded by the comments of RMA that the problems with handling and stability of vehicles due to the intermixing of high inflation pressure tires and conventional tires were based on the intermix of 450 kPa (65 psi) tires and not 350 kPa tires. RMA acknowledged that Goodyear encountered such problems when developing 450 kPa tires, but correctly pointed out that there is no existing data tending to show any intermix problems involving 350 kPa tires and conventional tires. Indeed, the test data submitted by RMA with its petition indicates that no problem with the intermix of 350 kPa tires with conventional tires was experienced during the conduct of those tests. Rather, the tests showed relatively greater handling and stability problems with intermix of tire brands than with intermix of inflation pressures.

[2] The NPRM also proposed to amend S4.2.2.2(b) of Standard No. 109, to provide a metric conversion for an English unit used in that paragraph.

Based on the RMA comments, NHTSA is satisfied that intermix of 350 kPa tires with other conventional tires would pose no significant problem with vehicle handling and stability. Thus, there is not a sufficient basis for limiting the 350 kPa maximum tire inflation pressure to electric or other energy-efficient vehicles. Accordingly, this final rule approves the addition of a maximum inflation pressure of 350 kPa to Standard No. 109 and the UTQGS, without restriction as to vehicle or tire types to which it may apply. The proposed values for testing these tires are also adopted.

The unrestricted approval of a 350 kPa maximum tire inflation pressure for Standard No. 109 and the UTQGS is consistent with another NHTSA initiative. The agency issued a Request for Comments, published in the **Federal Register** on April 25, 1994 (59 FR 19686), to explore ways to amend the UTQGS to make the UTQGS more meaningful to the tire-buying public. One of the primary goals in that effort is the creation of a new category for rating tire rolling resistance in aftermarket tires.

In addition, the President's *Climate Change Action Plan*, issued October 19, 1993, requires DOT, through NHTSA, to issue rules requiring manufacturers to test and label tires relative to their impacts on fuel economy through improvements in rolling resistance. The agency believes that that mandate can be implemented by a combination of tire compounds and increased inflation pressures in reducing rolling resistance, especially of aftermarket tires. NHTSA believes, therefore, that adding a 350 kPa maximum inflation pressure to Standard No. 109 and the UTQGS will be a step toward realizing the goal of improved rolling resistance and the corresponding conservation of the nation's natural resources.

Effective Date

49 U.S.C. 30111(d) provides that each order prescribing a federal motor vehicle safety standard may not become effective before the 180th day after the standard is prescribed unless, for good cause shown, a different effective date is in the public interest. Since the amendments effected by this final rule provide tire manufacturers an additional option, and therefore greater flexibility, in meeting the requirements of Standard No. 109 and the UTQGS, NHTSA believes that the public interest would be served by not delaying the addition of a 350 kPa maximum tire inflation pressure to Standard No. 109 and the UTQGS. Accordingly, NHTSA has determined that there is good cause to establish an effective 30 days after publication of this final rule in the **Federal Register**.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

This rulemaking document was not reviewed under E.O. 12866, "Regulatory Planning and Review." The agency has considered the impact of this rulemaking action under the Department of Transportation's regulatory policies and procedures, and has determined that it is not "significant" under them.

This rulemaking action simply provides an additional maximum tire inflation pressure to Standard No. 109 and the UTQGS. The additional costs to manufacturers should be minuscule, if any, since these amendments merely provide manufacturers another voluntary option in meeting the requirements of Standard 109 and the UTQGS. Accordingly, a full regulatory evaluation is not required.

Regulatory Flexibility Act

NHTSA has considered the effects of this regulatory action under the Regulatory Flexibility Act. I hereby certify that the amendments promulgated by this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the agency has not prepared a regulatory flexibility analysis.

The agency believes that few, if any, tire manufacturers qualify as small businesses. Further, since no additional costs or price changes should be associated with this action, small businesses, small organizations and small government entities will not be affected in their respective capacities as purchasers of new tires.

Executive Order 12612 (Federalism)

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

National Environmental Policy Act

NHTSA has analyzed this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, P.L. 96–511, the agency notes that there are no information collection requirements associated with this rulemaking action.

Civil Justice Reform

This rule does not have any retroactive effect. Under 49 U.S.C. 30103(b), whenever a Federal motor vehicle safety standard is in effect, a state or political subdivision may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle only if the standard is identical to the Federal standard. However, a state may prescribe a standard for a motor vehicle or equipment obtained for its own use that imposes a higher performance requirement than the Federal standard. 49 U.S.C. 30161 sets forth a procedure for judicial review of final rules establishing, amending or revoking Federal motor vehicle safety standards. A petition for reconsideration or other administrative proceedings is not required before parties may file suit in court.

List of Subjects

49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles, Rubber and rubber products, Tires.

49 CFR Part 575

Consumer protection, Labeling, Motor vehicle safety, Motor vehicles, Rubber and rubber products, Tires.

In consideration of the foregoing, 49 CFR Parts 571 and 575 are amended as follows:

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

1. The authority citation for Part 571 is revised to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

2. Section 571.109 is amended by revising S4.2.1(b) and S4.2.2.2(b), and by revising Table I-C and Table II of Appendix A, to read as follows:

§ 571.109 Standard 109; new pneumatic tires.

* * * * *

S4.2.1 * * *

(b) Its maximum permissible inflation pressure shall be either 32, 36, 40, or 60 psi, or 240, 280, 300, 340, or 350 kPa. For a CT tire, the maximum permissible

inflation pressure shall be either 290, 330, 350, or 390 kPa.

* * * * *

§ 4.2.2.2 * * *

(b) (For tires with a maximum permissible inflation pressure of 240, 280, 290, 300, 330, 350 or 390 kPa, or 60 psi) 7 percent or 10 mm (0.4 inches), whichever is larger.

* * * * *

3. Table I-C of Appendix A to § 571.109 is revised to read as follows:

Appendix A—Federal Motor Vehicle Safety Standard No. 109

* * * * *

TABLE I–C.—FOR RADIAL PLY TIRES

Size Designation	Maximum Permissible Inflation											
	Tires other than CT tires								CT Tires			
	psi			kPa					kPa			
	32	36	40	240	280	300	340	350	290	330	350	390
Below 160mm (in-lbs)	1,950	2,925	3,900	1,950	3,900	1,950	3,900	1,950	1,950	3,900	1,950	3,900
160mm or above (in-lbs)	2,600	3,900	5,200	2,600	5,200	2,600	5,200	2,600	2,600	5,200	2,600	5,200

* * * * *

4. Table II of Appendix A to § 571.109 is revised to read as follows:

* * * * *

TABLE II.—TEST INFLATION PRESSURES

Test Type	Maximum permissible inflation pressure to be used for the following test:												
	Tires other than CT tires									CT Tires			
	psi				kPa					kPa			
	32	36	40	60	240	280	300	340	350	290	330	350	390
Physical dimensions, bead unseating, tire strength, and tire endurance	24	28	32	52	180	220	180	220	230	230	270	230	270
High speed performance	30	34	38	58	220	260	220	260	270	270	310	270	310

PART 575—CONSUMER INFORMATION REGULATIONS

1. The authority citation for Part 575 is revised to read as follows:

Authority: 49 U.S.C. 322, 30111, and 30123; delegation of authority at 49 CFR 1.50.

2. Section 575.104(g) is amended by revising Table 1 as follows:

§ 575.104 Uniform tire quality grading standards.

* * * * *

(g) * * *

TABLE I.—TEST INFLATION PRESSURES

Test Type	Maximum permissible inflation pressure for the following test:												
	Tires other than CT tires									CT Tires			
	psi				kPa					kPa			
	32	36	40	60	240	280	300	340	350	290	330	350	390
Treadwear test	24	28	32	52	180	220	180	220	230	230	270	230	270
Temperature resistant test	30	34	38	58	220	260	220	260	270	270	310	270	310

* * * * *

§ 575.104 [Amended]

3. Section 575.104(h) is amended by revising Table 2 as follows:

* * * * *

(h) * * *

TABLE 2

Maximum inflation pressure	Multiplier to be used for treadwear testing	Multiplier to be used for traction testing
Tires other than CT tires		
32 psi	.851	.851
36 psi	.870	.797
40 psi	.883	.753
240 kPa	.866	.866
280 kPa	.887	.804
300 kPa	.866	.866
340 kPa	.887	.804
350 kPa	.866	.866
CT tires		
290 kPa	.866	.866
330 kPa	.887	.804
305 kPa	.866	.866
390 kPa	.887	.804

* * * * *

Issued on July 22,1994.

Christopher A. Hart,

Deputy Administrator.

[FR Doc. 94–18513 Filed 7–29–94; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 605

[Docket No. 930824–4203; I.D. 062194G]

RIN 0648–AG91

Regional Fishery Management Council Guidelines; Conduct of Meetings

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

ACTION: Final rule.

SUMMARY: NMFS adopts as final, without change, an interim final rule that revises the guidelines governing voting procedures of the Regional Fishery Management Councils (Councils) established by the Magnuson Fishery Conservation and Management Act (Magnuson Act). The intent of this rule is to ensure that NMFS understands the fishery management measures in motions on which the Councils vote to request action by the Secretary of Commerce (Secretary) and to ensure that the exact Council vote on emergency actions becomes part of the record or minutes of the meeting.

EFFECTIVE DATE: August 1, 1994.

FOR FURTHER INFORMATION CONTACT: David S. Crestin, Deputy Director, Office of Fisheries Conservation and Management, (301) 713-2334.

SUPPLEMENTARY INFORMATION:

Through an interim final rule published September 27, 1993 (58 FR 50288), NMFS amended 50 CFR 605.24(a)(3)(i) guidelines on conduct of meetings of the Councils to require that, prior to a vote on measures subject to Secretarial consideration, each motion must be recorded in writing and be visible to each Council member and the public. Two additional actions that require a vote by the Councils, Council requests for amendment to regulations implementing a fishery management plan and recommendations for responding to an emergency, were also included under this requirement. Rationale for the regulatory amendments was provided in the preamble to the interim final rule and is not repeated here. Comments were requested.

Comments and Responses

Comments were received from four of the eight Councils, and one trade association. Responses follow.

Comment 1. Three of the Councils felt it unnecessary to codify the requirements that motions subject to Secretarial consideration be recorded in writing and visible to each Council member and the public; two stated that the problems addressed through this rulemaking are infrequent enough that a less formal approach would be adequate. They also expressed concern that the new voting requirements will be administratively burdensome and slow the normal meeting process. The fourth Council commenting had no objection to the procedures, stating that the Council's current procedures are consistent with the new requirements. None of the four Councils commenting objected to the requirement that the exact Council vote on emergency actions must become part of the record or minutes of the meeting.

Response: NMFS disagrees that the voting procedures, as amended, are overly burdensome. As stated in the interim final rule, each Council may determine which of several procedures it will employ. The requirements are not intended to encumber the Council process. Routine procedural matters, such as those not requiring Secretarial review and approval, do not require motions to be in writing; only those actions where a Council is voting to submit an action to the Secretary for consideration must be recorded in visible form at the time of the vote.

Although NMFS concedes that problems resulting from the former voting procedures were infrequent, such problems, when they arise, can have serious consequences for the agency, the Councils, and the public. NMFS believes that ensuring that motions are clear to Council members, the public, and the Secretary is important enough to justify any small administrative burden that may result. Furthermore, all four of the Councils commenting indicated that the new procedures are either consistent with existing Council practices, or that the Councils are, or soon will be equipped to display motions before the Council and public before votes are taken.

Comment 2. The trade association supported both measures, but suggested that all actions taken prior to a final vote also be made available to the public, and that initial motions, as well as final, amended motions, be available in writing.

Regarding votes on emergency measures, the association proposed that the record also reflect potential conflicts of interest of the voting Council members. The association would prefer a requirement that a potential conflict of interest be disclosed by the Council member prior to the vote, but, at a minimum, that it be made part of the formal record.

Response: NMFS agrees, in principle, that there should be maximum public disclosure of the deliberative and decisionmaking process. However, NMFS also realizes that the Council process, because it includes participation from multiple interests and often involves complex issues, can be time-consuming. NMFS concludes that, while the Councils are encouraged to make all materials at public meetings as available and clear to the public as possible, to require that all motions be put before the public in writing could be unnecessarily burdensome to the Councils and not in the best public interest, in terms of administrative efficiency.

With respect to the comments on conflicts of interest, NMFS has taken steps to address this by expanding the financial disclosure forms for members to include fishery participated in, gear type used, and product form produced. In addition, NMFS published an interim final rule on March 11, 1994 (59 FR 11557), that requires annual updates of disclosure forms and makes information

in required financial disclosures of Councils' nominees, voting members, and Executive Directors more readily available for public inspection at all Council meetings, as well as at Council offices. The intent is to disclose possible financial conflicts of interest to the public. Because NMFS believes these actions will adequately address the commenter's concerns, no change has been made to this final rule.

Teleconference Meetings

NMFS notes that Councils occasionally hold meetings via teleconference. In the case of a telephonic vote, NMFS believes it is adequate if someone on the telephone call clearly reads the motion aloud immediately prior to the vote, such that everyone on the call understands the wording of the motion being voted on. The motion would then become part of the written record of the call/vote, which would also include the exact vote of the Council members.

Classification

As a rule of agency procedure or practice, under the provisions of section 553(b) and (d) of the Administrative Procedure Act (APA), the prior notice and opportunity for public comment provisions of section 553 of the APA do not apply and this rule can be, and is being made, immediately effective. This rule has been determined to be not significant for the purposes of E.O. 12866.

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

Dated: July 26, 1994.

Nancy Foster,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

PART 605—GUIDELINES FOR COUNCIL OPERATIONS/ ADMINISTRATION

Accordingly, the interim rule amending 50 CFR part 605 that was published at 58 FR 50288 on September 27, 1993, is adopted as final without change.

[FR Doc. 94–18596 Filed 7–29–94; 8:45 am]

BILLING CODE 3510–22–F

50 CFR Part 678

[Docket No. 920409–3047; I.D. 071994D

Atlantic Shark Fisheries

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

ACTION: Closure.

SUMMARY: NMFS is closing the commercial fishery for large coastal sharks conducted by vessels with a Federal Atlantic Shark permit in the Western North Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea. This action is necessary to prevent exceeding the semiannual quota for the period July 1 through December 31, 1994.

EFFECTIVE DATE: 0001 hours local time August 10, 1994, through December 31, 1994.

FOR FURTHER INFORMATION CONTACT: C. Michael Bailey, 301–713–2347; Kevin B. Foster, 508–281–9260; or Michael Justen 813–893–3161.

SUPPLEMENTARY INFORMATION: The Atlantic shark fishery is managed by the Secretary of Commerce according to the Fishery Management Plan (FMP) for Atlantic Sharks under authority of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR part 678.

Section 678.23(b)(1)(i) of the regulations provides for two semiannual quotas of large coastal sharks to be harvested from Atlantic, Caribbean, and Gulf of Mexico waters by commercial fishermen. The second semiannual quota is available for harvest from July 1 through December 31, 1994.

The Assistant Administrator for Fisheries, NOAA (AA), is required under § 678.24 to monitor the catch and landing statistics and, on the basis of these statistics, to determine when the catch of Atlantic, Caribbean, and Gulf of Mexico sharks will equal any quota under § 678.23(b)(1). When shark harvests reach, or are projected to reach, a quota established under § 678.23(b)(1), the AA is further required under § 678.24 to close the fishery.

The AA has determined, based on the reported catch and other relevant factors, that the semiannual quota for the period July 1 through December 31, 1994, for large coastal sharks, in or from the Western North Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea, will be attained by August 10, 1994. During this closure, for vessels issued a permit under § 678.4, possession of large coastal sharks from the management unit is prohibited, unless the vessel is operating as a charter vessel or headboat, in which case the vessel limit per trip is four large coastal sharks. However, the sale, purchase, trade, or barter or attempted sale, purchase, trade, or barter of carcasses and/or fins of large coastal sharks harvested by a person aboard a vessel that has been issued a permit under § 678.4(a)(4), is prohibited, except for those that were harvested, off-loaded, and sold, traded, or bartered prior to August 10, 1994, and were held in storage by a dealer or processor.

Vessels that have been issued a Federal permit under § 678.4 are reminded that as a condition of permit issuance, the vessel may not retain a large coastal shark during the closure, except as provided by § 678.24(a)(2). Fishing for pelagic and small coastal sharks may continue. The recreational fishery is not affected by this closure.

Classification

This action is taken under 50 CFR part 678 and is exempt from OMB review under E.O. 12866.

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

Dated: July 26, 1994.

Joe P. Clem,

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

[FR Doc. 94–18587 Filed 7–27–94; 8:45 am]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 59, No. 146
Monday, August 1, 1994

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 55, 56, 59, and 70

[Docket No. PY-94-005]

RIN 0581-ABB3

Increase in Fees and Charges for Egg Products Inspection and Egg, Poultry, and Rabbit Grading

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Marketing Service (AMS) proposes to increase the fees and charges for Federal voluntary egg products inspection; voluntary egg, poultry, and rabbit grading; and overtime, holiday, and appeal services under mandatory egg products inspection. These fees and charges need to be increased to cover the increase in salaries of Federal employees, salary increases of State employees cooperatively utilized in administering the programs, and other increased Agency costs.

DATES: Comments must be received on or before August 31, 1994.

ADDRESSES: Send written comments, in duplicate, to Janice L. Lockard, Chief, Standardization Branch, Poultry Division, Agricultural Marketing Service, U.S. Department of Agriculture, room 3944-South, P.O. Box 96456, Washington, DC 20090-6456. Comments received may be inspected at this location between 8:00 a.m. and 4:30 p.m., Eastern Time, Monday through Friday, except holidays. State that your comments refer to Docket No. PY-94-005.

FOR FURTHER INFORMATION CONTACT: Larry W. Robinson, Chief, Grading Branch, 202-720-3271.

SUPPLEMENTARY INFORMATION: This rule has been determined significant for purposes of Executive Order 12866 and has been reviewed by the Office of Management and Budget.

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. It is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

The AMS Administrator has determined that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), because (i) the fees and charges merely reflect, on a cost-per-unit-graded/inspected basis, a minimal increase in the costs currently borne by those entities utilizing the services and (ii) competitive effects are offset under the major voluntary programs (resident shell egg and poultry grading) through administrative charges based on the volume of product handled; i.e., the cost to users increases in proportion to increased volume.

The information collection requirements that appear in the sections to be amended by the proposed rule have been previously approved by the Office of Management and Budget and assigned OMB Control Numbers under the Paperwork Reduction Act of 1980 as follows: § 56.52(a)(4)—No. 0581-0128; § 59.126 and § 59.128(a)—No. 0581-0113; and § 70.77(a)(4)—No. 0581-0127.

Background and Proposed Changes

The Agricultural Marketing Act of 1946, as amended, provides for the collection of fees approximately equal to the cost of providing voluntary egg products inspection and voluntary egg, poultry, and rabbit grading. Likewise, the Egg Products Inspection Act requires the collection of fees to cover costs of overtime, holiday, and appeal inspection services. Each fiscal year, these fees undergo a cost analysis to determine if they are adequate to recover the cost of providing the services.

Grading and inspection fees were last increased effective November 1, 1993. Since then, operating costs have increased more than expected, primarily due to a salary increase for Federal employees of 3.1 percent in January 1994. Also, the cost of life insurance, health benefits, and Medicare increased by about 5 percent, and salaries and fringe benefits of federally licensed State employees increased by about 3 percent.

The regular hourly rate for resident voluntary grading and inspection service would be increased about 7 percent. Resident fees cover Federal and State salaries, fringe benefits, relief, and other service-related costs. Administrative service charges apply to the costs of supervision and other overhead and administrative costs and are assessed on each case of shell eggs and each pound of poultry handled in plants using resident grading service. In 1993, these unit rates were established at $0.034 per case of shell eggs and $0.00029 per pound of poultry, with a minimum of $200 and maximum of $2,000 per monthly billing period for each official plant. The charges per case of shell eggs and pound of poultry would be increased to $0.036 and $0.00031, respectively, with a monthly minimum charge of $215 and a maximum of $2,150.

The hourly rate for nonresident voluntary grading and inspection service would be increased from $31.44 to $33.64. The hourly rate for such services performed on Saturdays, Sundays, or holidays would be increased from $32.88 to $35.52. The hourly rate for voluntary appeal gradings or inspections would be increased from $26.64 to $27.36. The hourly rates for mandatory egg products inspection services would be increased from $23.80 to $26.16 for overtime inspection and from $16.24 to $17.44 for holiday inspection. The hourly rate would also increase from $26.64 to $27.36 for certain mandatory appeal inspections.

Administrative charges for resident voluntary rabbit grading, resident voluntary egg products inspection, and nonresident voluntary continuous poultry and egg grading will continue to be based on 25 percent of the grader's or inspector's total salary costs. The minimum charge per monthly billing period for these programs would be increased from $200 to $215 per official plant.

List of Subjects

7 CFR Parts 55 and 56

Eggs and egg products, Food grades and standards, Food labeling, Reporting and recordkeeping requirements.

7 CFR Part 59

Eggs and egg products, Exports, Food grades and standards, Food labeling, Imports, Polychlorinated biphenyls (PCB's), Reporting and recordkeeping requirements.

7 CFR Part 70

Food grades and standards, Food labeling, Poultry and poultry products, Rabbits and rabbit products, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, it is proposed that 7 CFR Parts 55, 56, 59, and 70 be amended as follows.

PART 55—VOLUNTARY INSPECTION OF EGG PRODUCTS AND GRADING

1. The authority citation for Part 55 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

2. Section 55.510 is amended by revising paragraphs (b), (c), and (d) to read as follows:

§ 55.510 Fees and charges for services other than on a continuous resident basis.

* * * * *

(b) Fees for product inspection and sampling for laboratory analysis will be based on the time required to perform the services. The hourly charge shall be $33.64 and shall include the time actually required to perform the sampling and inspection, waiting time, travel time, and any clerical costs involved in issuing a certificate.

(c) Services rendered on Saturdays, Sundays, or legal holidays shall be charged for at the rate of $35.52 per hour. Information on legal holidays is available from the Supervisor.

(d) The cost of an appeal grading, inspection, laboratory analysis, or review of a grader's or inspector's decision shall be borne by the appellant at an hourly rate of $27.36 for time spent performing the appeal and travel time to and from the site of the appeal, plus any additional expenses. If the appeal grading, inspection, laboratory analysis, or review of a grader's or inspector's decision discloses that a material error was made in the original determination, no fee or expenses will be charged.

3. Section 55.560 is amended by revising paragraph (a)(3) to read as follows:

§ 55.560 Charges for continuous inspection and grading service on a resident basis.

* * * * *

(a) * * *

(3) An administrative service charge equal to 25 percent of the grader's or inspector's total salary costs. A minimum charge of $215 will be made each billing period. The minimum charge also applies where an approved application is in effect and no product is handled.

* * * * *

PART 56—GRADING OF SHELL EGGS AND U.S. STANDARDS, GRADES, AND WEIGHT CLASSES FOR SHELL EGGS

4. The authority citation for Part 56 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

5. Section 56.46 is amended by revising paragraphs (b) and (c) to read as follows:

§ 56.46 On a fee basis.

* * * * *

(b) Fees for grading services will be based on the time required to perform the services. The hourly charge shall be $33.64 and shall include the time actually required to perform the grading, waiting time, travel time, and any clerical costs involved in issuing a certificate.

(c) Grading services rendered on Saturdays, Sundays, or legal holidays shall be charged for at the rate of $35.52 per hour. Information on legal holidays is available from the Supervisor.

6. Section 56.47 is revised to read as follows:

§ 56.47 Fees for appeal grading or review of a grader's decision.

The cost of an appeal grading or review of a grader's decision shall be borne by the appellant at an hourly rate of $27.36 for the time spent in performing the appeal and travel time to and from the site of the appeal, plus any additional expenses. If the appeal grading or review of a grader's decision discloses that a material error was made in the original determination, no fee or expenses will be charged.

7. Section 56.52 is amended by revising paragraph (a)(4) to read as follows:

§ 56.52 Continuous grading performed on a resident basis.

* * * * *

(a) * * *

(4) An administrative service charge based upon the aggregate number of 30-dozen cases of all shell eggs handled in the plant per billing period multiplied by $0.036, except that the minimum charge per billing period shall be $215 and the maximum charge shall be $2,150. The minimum charge also applies where an approved application is in effect and no product is handled.

* * * * *

8. Section 56.54 is amended by revising paragraph (a)(2) to read as follows:

§ 56.54 Charges for continuous grading performed on a nonresident basis.

* * * * *

(a) * * *

(2) An administrative service charge equal to 25 percent of the grader's total salary costs. A minimum charge of $215 will be made each billing period. The minimum charge also applies where an approved application is in effect and no product is handled.

* * * * *

PART 59—INSPECTION OF EGGS AND EGG PRODUCTS (EGG PRODUCTS INSPECTION ACT)

9. The authority citation for Part 59 continues to read as follows:

Authority: 21 U.S.C. 1031–1056.

10. Section 59.126 is revised to read as follows:

§ 59.126 Overtime inspection service.

When operations in an official plant require the services of inspection personnel beyond their regularly assigned tour of duty on any day or on a day outside the established schedule, such services are considered as overtime work. The official plant shall give reasonable advance notice to the inspector of any overtime service necessary and shall pay the Service for such overtime at an hourly rate of $26.16 to cover the cost thereof.

11. Section 59.128 is amended by revising paragraph (a) to read as follows:

§ 59.128 Holiday inspection service.

(a) When an official plant requires inspection service on a holiday or a day designated in lieu of a holiday, such service is considered holiday work. The official plant shall, in advance of such holiday work, request the inspector in charge to furnish inspection service during such period and shall pay the Service therefor at an hourly rate of $17.44 to cover the cost thereof.

* * * * *

12. Section 59.370 is amended by revising paragraph (b) to read as follows:

§ 59.370 Cost of appeals.

* * * * *

(b) The costs of an appeal shall be borne by the appellant at an hourly rate of $27.36, including travel time and expenses if the appeal was frivolous, including but not being limited to the following: The appeal inspection discloses that no material error was made in the original inspection, the condition of the product has undergone

a material change since the original inspection, the original lot has changed in some manner, or the Act or these regulations have not been complied with.

PART 70—VOLUNTARY GRADING OF POULTRY PRODUCTS AND RABBIT PRODUCTS AND U.S. CLASSES, STANDARDS, AND GRADES

13. The authority citation for Part 70 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

14. Section 70.71 is amended by revising paragraphs (b) and (c) to read as follows:

§ 70.71 On a fee basis.

* * * * *

(b) Fees for grading services will be based on the time required to perform such services for class, quality, quantity (weight test), or condition, whether ready-to-cook poultry, ready-to-cook rabbits, or specified poultry food products are involved. The hourly charge shall be $33.64 and shall include the time actually required to perform the work, waiting time, travel time, and any clerical costs involved in issuing a certificate.

(c) Grading services rendered on Saturdays, Sundays, or legal holidays shall be charged for at the rate of $35.52 per hour. Information on legal holidays is available from the Supervisor.

15. Section 70.72 is revised to read as follows:

§ 70.72 Fees for appeal grading, laboratory analysis, or examination or review of a grader's decision.

The costs of an appeal grading, laboratory analysis, or examination or review of a grader's decision will be borne by the appellant at an hourly rate of $27.36 for the time spent in performing the appeal and travel time to and from the site of the appeal, plus any additional expenses. If the appeal grading, laboratory analysis, or examination or review of a grader's decision discloses that a material error was made in the original determination, no fee or expenses will be charged.

16. Section 70.76 is amended by revising paragraph (a)(2) to read as follows:

§ 70.76 Charges for continuous poultry grading performed on a nonresident basis.

* * * * *

(a) * * *

(2) An administrative service charge equal to 25 percent of the grader's total salary costs. A minimum charge of $215 will be made each billing period. The minimum charge also applies where an approved application is in effect and no product is handled.

* * * * *

17. Section 70.77 is amended by revising paragraphs (a)(4) and (a)(5) to read as follows:

§ 70.77 Charges for continuous poultry or rabbit grading performed on a resident basis.

* * * * *

(a) * * *

(4) For poultry grading: An administrative service charge based upon the aggregate weight of the total volume of all live and ready-to-cook poultry handled in the plant per billing period computed in accordance with the following: Total pounds per billing period multiplied by $0.00031, except that the minimum charge per billing period shall be $215 and the maximum charge shall be $2,150. The minimum charge also applies where an approved application is in effect and no product is handled.

(5) For rabbit grading: An administrative service charge equal to 25 percent of the grader's total salary costs. A minimum charge of $215 will be made each billing period. The minimum charge also applies where an approved application is in effect and no product is handled.

* * * * *

Dated: July 22, 1994

Lon Hatamiya,

Administrator.

[FR Doc. 94–18599 Filed 7–29–94; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Chapter II

Meetings of the Federal Gas Valuation Negotiated Rulemaking Committee

Date: July 26, 1994.

AGENCY: Minerals Management Service, Interior.

ACTION: Notice of meetings.

SUMMARY: The Secretary of the Department of the Interior. (Department) has established a Federal Gas Valuation Negotiated Rulemaking Committee (Committee) to develop specific recommendations with respect to Federal gas valuation pursuant to its responsibilities imposed by the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. 1701 *et seq.* (FOGRMA). The Department has determined that the establishment of this Committee is in the public interest and will assist the Agency in performing its duties under FOGRMA.

DATES: The Committee will have meetings as shown below:

Correction of June 27, 1994 **Federal Register** publication, 59 FR 32944:

FROM

Tuesday–Wednesday, August 24–25, 1994—8 a.m.–5 p.m.

TO

Wednesday–Thursday, August 24–25, 1994—8 a.m.–5 p.m.

Subsequent dates are:

Monday–September 12, 1994—8 a.m.–5 p.m.

Tuesday–September 13, 1994—8 a.m.–5 p.m.

Thursday, September 29, 1994—8 a.m.–5 p.m.

Friday, September 30, 1994—8 a.m.–5 p.m.

ADDRESSES: The meetings will be held in the auditorium of building 85 on the Denver Federal Center, West Sixth Avenue and Kipling Street, Lakewood, Colorado.

Written statements may be submitted to Ms. Deborah Gibbs Tschudy, Chief, Valuation and Standards Division, Minerals Management Service, Royalty Management Program, P.O. Box 25165, MS–3150, Denver, CO 80225–0165.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Gibbs Tschudy, Chief, Valuation and Standards Division, Minerals Management Service, Royalty Management Program, P.O. Box 25165, MS–3150, Denver, Colorado, 80225–0165, telephone number (303) 275–7200, fax number (303) 275–7227.

SUPPLEMENTARY INFORMATION: The location and dates of future meetings will be published in the **Federal Register.**

The meeting will be open to the public without advanced registration. Public attendance may be limited to the space available. Members of the public may make statements during the meeting, to the extent time permits, and file written statements with the Committee for its consideration.

Written statements should be submitted to the address listed above. Minutes of Committee meetings will be available for public inspection and copying 10 days following each meeting at the same address. In addition, the materials received to date during the input sessions are available for inspection and copying at the same address.

Dated: July 26, 1994.

Jimmy W. Mayberry,

Acting Associate Director for Royalty Management.

[FR Doc. 94–18612 Filed 7–29–94; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

[2900–AG82]

Transitional Housing Loan Program

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document proposes to establish application provisions and selection criteria for loans to non-profit organizations for use in initial startup costs cor transitional housing for veterans who are in (or have recently been) in a program for the treatment of substance abuse. This new program is intended to increase the amount of transitional housing available for such veterans who need a period of supportive housing to encourage sobriety maintenance and reestablishment of social and community relationships.

DATES: Comments must be received on or before August 31, 1994.

ADDRESSES: Send written comments to: Secretary of Veterans Affairs, (271A), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. All written comments received will be available for public inspection on business days in the Veterans Services Unit, Room 119 of the above address between the hours of 8 a.m. and 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Frederick Lee, Acting Deputy Associate Director for Psychiatric Rehabilitation Services, or Christine Woods, Administrative Officer; either can be reached at (804) 722–9961 x3628. (This is not a toll-free number)

SUPPLEMENTARY INFORMATION:

Background

Substance abuse is a significant problem among veterans, with approximately 25% of veterans discharged from VA Medical Centers having substance abuse as a primary or secondary diagnosis. Many of these veterans, wish not to return to their prior living situation because of negative effects that environment may have on their substance abuse recovery. Group living arrangements, such as described by this Transitional Housing Loan Program, offer affordable housing with other recovering veterans, in an atmosphere free from alcohol and illegal drugs.

To help ensure the availability of such transitional housing, section 8 of PL. 102–54 (Loans to Organizations Providing Transitional Housing to Substance Abusers) authorizes the Secretary of VA to make loans to non-profit organizations to assist in the provision of leased transitional housing exclusively for veterans who are in (or who have recently been in) a program for the treatment of substance abuse.

This proposed rule contains application provisions and selection criteria for obtaining loans. Portions of this proposed rule restate statutory requirements. However, insofar as they establish regulatory material beyond the statutory requirements, the procedures and criteria are designed to provide a mechanism for making loans consistent with the statutory purpose. It is proposed that the interest rate for the loans shall be the same as the rate the VA is charged to borrow these funds from the U.S. Department of the Treasury. It is also proposed that a penalty of 4% of the amount due be imposed on each failure to pay an installment by the date specified in the loan agreement involved. This is in accordance with standard VA debt collection procedures.

Loans may be made for up to $4,500 for each housing unit and may be used only for initial startup costs. Veteran residents will be required to pay for ongoing housing costs through fees collected by the non-profit organization to cover rent and utilities.

Criteria for approval of loan applications will focus on the applicant's favorable credit history, evidence of prior successful experience in providing similar services for groups of people recovering from substance abuse, plans for the provision of transitional housing, and plans for use of loan proceeds.

E.O. 12866

This action is exempt from OMB review under E.O. 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that the provisions of this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The reason for this certification is that in all likelihood, only similar entities that are small entities would seek loans under this program. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirement of sections 603 and 604.

The comment period for this proposed rule has been shortened to thirty days. It has been determined that this is necessary in order to establish a final rule as soon as possible in an effort to help ensure that veterans recovering from substance abuse can be afforded transitional housing in an environment where measures are taken to help assure that they will not relapse.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Daycare, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veteran Healthcare, Health facilities, Health professionals, Health records, Loans, Medical and dental schools, Medical devices, Medical research, Medical health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans, Veterans Affairs Department.

For the reasons set out in the preamble, 38 CFR part 17 is proposed to be amended as set out below:

PART 17—MEDICAL

1. The authority citation for Part 17 is amended to read as follows:

Authority: 38 U.S.C. 501, 7721, unless otherwise noted.

2. Part 17 is amended by adding Sections 17.800 through 17.805 and on undesignated center heading preceding section 17.800 to read as follows:

Transitional Housing Loan Program

Sec.
17.800 Purpose.
17.801 Definitions.
17.802 Application Provisions.
17.803 Order of Consideration.
17.804 Loan Approval Criteria.
17.805 Additional Terms of Loans.

Transitional Housing Loan Program

§ 17.800 Purpose.

The purpose of the Transitional Housing Loan Program regulations is to establish application provisions and selection criteria for loans to non-profit organizations for use in initial startup costs for transitional housing for veterans who are in (or have recently been in) a program for the treatment of substance abuse. This program is intended to increase the amount of transitional housing available for such veterans who need a period of supportive housing to encourage sobriety maintenance and reestablishment of social and community relationships.

§ 17.801 Definitions.

(a) *Applicant:* A non-profit organization making application for a loan under this program.

(b) *Non-profit organization:* A secular or religious organization, no part of the net earnings of which may inure to the benefit of any member, founder, contributor, or individual. The organization must include a voluntary board and must either maintain or designate an entity to maintain an accounting system which is operated in accordance with generally accepted accounting principles. If not named in, or approved under Title 38 U.S.C. (United States Code), Section 5902, a non-profit organization must provide VA with documentation which demonstrates approval as a non-profit organization under Internal Revenue Code, Section 501.c(3).

(c) *Recipient:* A non-profit organization which has received a loan from VA under this program.

(d) *Veteran:* A person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.

(Authority: Sec. 8 of Pub. L. 102–54, 105 Stat 271, 38 U.S.C. 501)

§ 17.802 Application Provisions.

(a) To obtain a loan under these Transitional Housing Loan Program regulations, an application must be submitted by the applicant in the form prescribed by VA in the application package. The completed application package must be submitted to the Deputy Associate Director for Psychiatric Rehabilitation Services, (302/111C), VA Medical Center, 100 Emancipation Drive, Hampton, VA 23667. An application package may be obtained by writing to the preceding address or telephoning (804) 722–9961 x3628. (This is not a toll-free number)

(b) The application package includes exhibits to be prepared and submitted, including:

(1) Information concerning the applicant's income, assets, liabilities and credit history,

(2) Information for VA to verify the applicant's financial information,

(3) Identification of the official(s) authorized to make financial transactions on behalf of the applicant,

(4) Information concerning:

(i) The history, purpose and composition of the applicant,

(ii) The applicant's involvement with recovering substance abusers, including:

(A) Type of services provided,

(B) Number of persons served,

(C) Dates during which each type of service was provided,

(D) Names of at least two references of government or community groups whom the organization has worked with in assisting substance abusers,

(iii) The applicant's plan for the provision of transitional housing to veterans including:

(A) Means of identifying and screening potential residents,

(B) Number of occupants intended to live in the residence for which the loan assistance is requested,

(C) Residence operating policies addressing structure for democratic self-government, expulsion policies for nonpayment, alcohol or illegal drug use or disruptive behavior,

(D) Type of technical assistance available to residents in the event of house management problems,

(E) Anticipated cost of maintaining the residence, including rent and utilities,

(F) Anticipated charge, per veteran, for residing in the residence,

(G) Anticipated means of collecting rent and utilities payments from residents,

(H) A description of the housing unit for which the loan is sought to support, including location, types of neighborhood, brief floor plan description, etc., and why this residence was selected for this endeavor.

(iv) The applicant's plans for use of the loan proceeds.

(Authority: Sec. 8 of Pub. L. 102–54, 105 Stat 271, 38 U.S.C. 501)

§ 17.803 Order of Consideration.

Loan applications will be considered on a first-come-first-served basis, subject to availability of funds for loans, and awards will be made on a first-come-first-serve basis to applicants who meet the criteria for receiving a loan. If no funds are available for loans, applications will be retained in the order of receipt for consideration as funds become available.

(Authority: Sec. 8 of Pub. L. 102–54, 105 Stat 271, 38 U.S.C. 501)

§ 17.804 Loan Approval Criteria.

Upon consideration of the application package, loan approval will be based on the following:

(a) Favorable financial history and status,

(1) A minimum of a two-year credit history,

(2) No open liens, judgments, and no unpaid collection accounts,

(3) No more than two instances where payments were ever delinquent beyond 60 days,

(4) Net ratio: (monthly expenses divided by monthly cash flow) that does not exceed 40%,

(5) Gross ratio: (Total indebtedness divided by gross annual cash flow) that does not exceed 35%,

(6) At least two favorable credit references.

(b) Demonstrated ability to successfully address the needs of substance abusers as determined by a Minimum of one year of successful experience in providing services, such as, provision of housing, vocational training, structured job seeking assistance, organized relapse prevention services, or similar activity. Such experience would involve at least than twenty-five substance abusers, and would be experience which could be verified by VA inquiries of government or community groups with whom the applicant has worked in providing these services.

(c) An acceptable plan for operating a residence designed to meet the conditions of a loan under this program, which will include:

(1) measures to ensure that residents are eligible for residency, i.e., are veterans, are in (or have recently been in) a program for the treatment of substance abuse, are financially able to pay their share of costs of maintaining the residence, and agree to abide by house rules and rent/utilities payment provisions,

(2) adequate rent/utilities collections to cover cost of maintaining the residence,

(3) policies that ensure democratic self-run government, including expulsion policies, and

(4) available technical assistance to residents in the event of house management problems.

(d) Selection of a suitable housing unit for use as a transitional residence in a neighborhood with no known illegal drug activity, and with adequate living space for number of veterans planned for residence (at least one large bedroom for every three veterans, at least one bathroom for every four veterans, adequate common space for entire household)

(e) Agreements, signed by an official authorized to bind the recipient, which include:

(1) the loan payment schedule in accordance with the requirements of PL No. 102–54, with the interest rate being the same as the rate the VA is charged to borrow these funds from the U.S. Department of the Treasury and with a penalty of 4% of the amount due for each failure to pay an installment by the date specified in the loan agreement involved, and

(2) the applicant's intent to use proceeds of loan only to cover initial startup costs associated with the

residence, such as security deposit, furnishings, household supplies, and any other initial startup costs.

(Authority: Sec. 8 of Pub. L. 102–54, 105 Stat. 271, 38 U.S.C. 501)

§ 17.805 Additional Terms of Loans.

In the operation of each residence established with the assistance of the loan, the recipient must agree to the following:

(a) The use of alcohol or any illegal drugs in the residence will be prohibited;

(b) Any resident who violates the prohibition of alcohol or any illegal drugs will be expelled from the residence;

(c) The cost of maintaining the residence, including fees for rent and utilities, will be paid by residents;

(d) The residents will, through a majority vote of the residents, otherwise establish policies governing the conditions of the residence, including the manner in which applications for residence are approved;

(e) The residence will be operated solely as a residence for not less than six veterans.

(Authority: Sec. 8 of Pub. L. 102–54, 105 Stat. 271, 38 U.S.C. 501)

Approved: July 15, 1994.

Jesse Brown,

Secretary of Veterans Affairs.

[FR Doc. 94–18486 Filed 7–29–94; 8:45 am]

BILLING CODE 8320–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[AD–FRL 5025–6]

National Emission Standards for Hazardous Air Pollutants for Source Categories: Aerospace Manufacturing and Rework

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule: Notice of public hearing and extension of public comment period.

SUMMARY: On June 6, 1994 (59 FR 29216), the EPA proposed standards to regulate the emissions of certain hazardous air pollutants from the aerospace manufacturing and rework facilities which are part of major sources under section 112 of the Clean Air Act as amended in 1990 (Act). This notice announces that the EPA will hold a public hearing in Research Triangle Park, North Carolina to provide interested persons with an opportunity for oral presentation of data, views, or arguments concerning the proposed rule. The public hearing will be held on August 15, 1994. The period for receiving comments on the proposed rule is being extended for 30 days, the length of time the record must remain open after the public hearing.

DATES: *Comments.* Comments must be received on or before September 15, 1994.

Public Hearing. The public hearing will be held on August 15, 1994 in the Research Triangle Park, North Carolina. The hearing will start at 9 a.m.

Request to Speak at Hearing. Persons wishing to present oral testimony must contact the EPA by August 8, 1994, (contact Mrs. Julia Latta at (919) 541–5578). Each speaker will be allowed up to 15 minutes, and each organization will be allowed a maximum of 30 minutes.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate if possible) to the EPA's Air and Radiation Docket and Information Center (6102), ATTN: Docket Number A–92–20, Waterside Mall, room 1500, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Public Hearing. The public hearing will be held at the EPA Administration Building Auditorium in Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify Mrs. Julia Latta, Standards Development Branch, Emission Standards Division, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (MD–13), Research Triangle Park, North Carolina 27711, (919) 541–5578.

Dockets. The docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at the EPA's Air and Radiation Docket and Information Center, Waterside Mall, room 1500, 1st floor, 401 M Street, SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Tom Kissell, Standards Development Branch, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone number (919) 541–4516.

Dated: July 25, 1994.

Mary D. Nichols,

Assistant Administrator for Air and Radiation.

[FR Doc. 94–18660 Filed 7–29–94; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 94–83, RM–8494]

Radio Broadcasting Services; Cascade, Montana

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed by Stephen D. Dow proposing the allotment of Channel 285C to Cascade, Montana, as that community's first local broadcast service. There is a site restriction 29.7 kilometers (18.4 miles) northeast of the community. Canadian concurrence will be requested for this allotment at coordinates 47–28–43 and 111–27–13.

DATES: Comments must be filed on or before September 19, 1994, and reply comments on or before October 4, 1994.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: David L. Hill, Audrey P. Rasmussen, O'Connor & Hannan, 1919 Pennsylvania Avenue, NW., Suite 800, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 94–83, adopted July 14, 1994, and released July 27, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's 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 contractors, International Transcription Services, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857–3800.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

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

[FR Doc. 94–18647 Filed 7–29–94; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 94–86, RM–8497]

Radio Broadcasting Services; Klamath Falls, OR

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Terry A. Cowan seeking the allotment of Channel 284C1 to Klamath Falls, Oregon, as the community's fourth local FM service. Channel 284C1 can be allotted to Klamath Falls in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction, at coordinates 42–12–56 North Latitude and 121–47–56 West Longitude.

DATES: Comments must be filed on or before September 19, 1994, and reply comments on or before October 4, 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 NW., 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 Commission's Notice of Proposed Rule Making, MM Docket No. 94–86, adopted July 18, 1994, and released July 27, 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* 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. 94–18646 Filed 7–29–94; 8:45 am]

BILLING CODE 6712–01–M

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47 CFR Part 73

[MM Docket No. 94–84, RM–8478]

Radio Broadcasting Services; Driscoll, Gregory and Robstown, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Cotton Broadcasting, seeking the substitution of Channel 283C3 for Channel 286A at Robstown, Texas, the reallotment of Channel 283C3 from Robstown to Driscoll, Texas, and the modification of Station KMIQ–FM's license to specify Driscoll as the station's community of license. In order to accommodate the allotment of Channel 283C3 to Driscoll, we also propose the deletion of vacant Channel 283A at Gregory, Texas. Channel 283C3 can be allotted to Driscoll in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.8 kilometers (6.7 miles) south. The coordinates for Channel 283C3 at Driscoll are 27–34–45 and 97–43–48. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 283C3 at Driscoll or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

DATES: Comments must be filed on or before September 19, 1994, and reply comments on or before October 4, 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: Lee J. Peltzman, Esq., Shainis & Peltzman, Suite 200, 2000 L Street, Washington, DC 20036 (Counsel for petitioner).

FOR FURTHER INFORMATION CONTACT: Pamela Blumenthal, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 94–84, adopted July 14, 1994, and released July 27, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's 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, ITS, 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. 94–18645 Filed 7–29–94; 8:45 am]

BILLING CODE 6712–01–M

GENERAL SERVICES ADMINISTRATION

48 CFR Part 552

[GSAR Notice 5–392]

RIN 3090–AF46

General Services Administration (GSA) Acquisition Regulation; Qualifications of Employees Working on Construction or Building Service Contracts

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Proposed rule.

SUMMARY: GSA proposes to revise the GSA Acquisition Regulation (GSAR) to modify the contract clause at 552.237–71, Qualifications of Employees to add a requirement that the Contractor require each employee and/or prospective employee who will be performing work under this contract to obtain, for submission to GSA, a copy of the criminal history records for each state in which the prospective employee has resided in during the past ten (10) years.

DATES: Comments on the proposed rule should be submitted September 30, 1994 to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to Ms. Marjorie Ashby, General Services Administration, Office of GSA Acquisition Policy, 18th and F Sts., NW., Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Mr. Edward J. McAndrew, Office of GSA Acquisition Policy (202) 501–1224.

SUPPLEMENTARY INFORMATION:

A. Executive Order 12866

This rule is not considered a significant action under section 3 of Executive Order 12866.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et sequentia. It merely would require prospective employees to obtain copies of criminal and past performance history records for submission to GSA and the cost of obtaining such criminal records from the states is usually nominal. Even if the cost is to be paid by the contractor under a collective bargaining agreement, such costs are not likely to be significant. Interested parties may, nonetheless, submit comments on the proposed rule to the address cited above.

C. Paperwork Reduction Act

The revised provision at 552.237–1, Qualifications of Employees, contains an information collection requirement that is subject to the Paperwork Reduction Act (44 U.S.C. et sequentia) and it has been submitted to the Office of Management and Budget (OMB) for approval under the Act. Comments on the information collection may be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for GSA, Washington, DC 20503. The title of the information is 552.237–1, Qualifications of Employees. The clause is included in building service contracts and requires the contractor to cause each of its employees and/or prospective employees to provide information, for submission to GSA, on previous criminal history, if any, from each state where that person has resided for the past ten years and the person's past employment history for the same period of time. A copy of the criminal history records for each state in which the employee and/or prospective employee has resided during the past ten (10) years must be submitted along with completed GSA Form 176, Statement of Personal History, to GSA. The information is needed in order to process security and suitability clearances which are designed to ensure the security and safety of Federal personnel and property in GSA controlled buildings. The estimated annual burden for this information collection is 10,000 hours. This is based on an estimated burden of one hour to prepare a generic request for criminal history records from the appropriate state law enforcement agencies.

List of Subjects in 48 CFR Part 552

Government procurement.

Accordingly, it is proposed that 48 CFR Part 552 be amended as follows:

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR Part 552 continues to read as follows:

Authority: 40 U.S.C. 486(c).

2. Section 552.237–71 is revised to read as follows:

552.237–71 Qualifications of employees.

As prescribed in 537.110(a), insert the following clause:

Qualifications of Employees (XXX 1994)

(a) The Contracting Officer or a designated representative may require the Contractor to remove any employee(s) from General Services Administration (GSA) controlled buildings or other real property should it be determined that the individual(s) is either unsuitable for security reasons or otherwise unfit to work on GSA controlled property.

(b) The Contractor shall cause each of its employees and/or prospective employees who will be preforming work under this contract to fill out, for submission to GSA, such forms as may be necessary for security or other reasons including the GSA Form 176, Statement of Personal History. The Contractor shall also require each employee and/or prospective employee to obtain, for submission to GSA, a copy of the criminal history records for each State in which the prospective employee has resided in during the past ten (10) years. Upon request of the Contracting Officer, the Contractor shall cause each of its employees and/or prospective employees to be fingerprinted.

(c) Each employee of the Contractor shall be a citizen of the United States of America, or an alien who has been lawfully admitted for permanent residence as evidenced by Alien Registration Receipt Card Form I–151 or other evidence from the Immigration and Naturalization Service that employment will not affect his or her immigration status.

(End of Clause)

Dated: July 21, 1994.

Ida M. Ustad,

Director, Office of GSA Acquisition Policy.

[FR Doc. 94–18602 Filed 7–29–94; 8:45 am]

BILLING CODE 6820–61–M

DEPARTMENT OF ENERGY

48 CFR Chapter 9

Acquisition Regulation; Small Purchases and Small Disadvantaged Business

AGENCY: Department of Energy (DOE).

ACTION: Request for comments.

SUMMARY: The Department is considering a deviation from the Federal Acquisition Regulation to facilitate, on a test basis, the award of small purchases to small, disadvantaged business concerns. The deviation would authorize, under certain circumstances, a purchase from a small, disadvantaged business without securing competitive quotations. The deviation would not continue beyond September 30, 1995, unless it is determined to be beneficial.

DATES: Written comments should be submitted no later than August 31, 1994.

ADDRESSES: Written comments should be submitted to Mr. Langston at the address shown below.

FOR FURTHER INFORMATION CONTACT: Richard B. Langston, Office of Procurement and Assistance Management (HR–521.1) Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–8247.

SUPPLEMENTARY INFORMATION: Section 13.104 of the Federal Acquisition Regulation states that contracting officers shall use the small purchase procedure deemed most suitable, efficient, and economical in the circumstances of the acquisition. Section 13.106(b) provides for the solicitation of a reasonable number of quotations to promote competition to the maximum practicable extent to ensure that the purchase is advantageous to the Government. However, section 13.106(a) allows small

purchases, of $2,500 or less, to be made without securing competitive quotations if the contracting officer determines that award can be made at a reasonable price. The proposed deviation would permit this practice for those small purchases designated for award to a small, disadvantaged business.

The Department of Energy is committed to providing maximum business opportunities to small, disadvantaged business concerns and has established aggressive performance goals to reflect this commitment. This deviation would assist all small, disadvantaged businesses seeking business with the Department. The intent of this deviation is to streamline the small purchase process, and increase the number of small purchase awards, for small, disadvantaged businesses.

This deviation, if approved, would be effective through September 30, 1995. Should the Department wish to continue this practice beyond that date, it would take action to amend the Department of Energy Acquisition Regulation.

To accomplish this, it is proposed that small purchases of $25,000 or less, for which a small, disadvantaged business source is available, may be made using the procedures of section 13.106(a) of the Federal Acquisition Regulation without regard to 13.106(b) or 13.106(c), provided the award can be made at a reasonable price.

Public Comments

Interested persons are invited to participate by submitting data, views or arguments with respect to the class deviation described in this notice. Three copies of written comments should be submitted to the address indicated in the "FOR ADDITIONAL INFORMATION CONTACT" section of this notice. All comments received will be available for public inspection in the DOE Reading Room, 1E–90, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

All written comments received by August 31, 1994 will be carefully assessed and fully considered prior to approval of the class deviation. Any person submitting information which that person believes to be confidential and which may be exempt from public disclosure should submit one complete copy, as well as an additional copy from which the information claimed to be confidential has been deleted. DOE reserves the right to determine the confidential status of the information or data and to treat it according to its determination. DOE's generally applicable procedures for handling information, which has been submitted in a document and which may be exempt from public disclosure, are set forth in 10 CFR 1004.11.

List of Subjects in 48 CFR Chapter 9

Government procurement.

Issued in Washington, DC, on July 21, 1994.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

[FR Doc. 94–18288 Filed 7–29–94; 8:45 am]

BILLING CODE 6450–01–P

Notices

Federal Register
Vol. 59, No. 146
Monday, August 1, 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.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Garnishment of Pay of Officers and Employees of the Federal Judiciary Other Than the Supreme Court

AGENCY: Administrative Office of the United States Courts.

ACTION: Notice of Availability of Regulations.

SUMMARY: The Director of the Administrative Office of the United States Courts has adopted regulations to specify the procedures for garnishment of the pay of any officer or employee who receives or is due to receive pay from the Administrative Office. This includes employees of agencies in the Judicial Branch of the Federal government and officers and employees of the courts listed in 28 U.S.C. 610: the United States courts of appeals, district courts, bankruptcy courts, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Federal Claims and the Court of International Trade.

The regulations also provide for the handling of bankruptcy payment orders, stay of collections under the Bankruptcy Code, and IRS levies concurrently with garnishments. The regulations are adopted at the direction of the Chief Justice of the United States, with the approval of the Judicial Conference of the United States, under authority of section 461 of the Social Security Act (42 U.S.C. 661) and 5 U.S.C. 5520a.

The regulations require service of legal process by certified mail, return receipt requested, or other letter delivery service that provides an indication on the envelope of the date of dispatch and a delivery receipt, to the designated agent at this address: Chief, Human Resources Division, Attention: Legal Process, Administrative Office of the United States Courts, Washington, DC 20544.

Legal process may also be served by personal delivery to one of the following:

Chief, Human Resources Division, Attention: Legal Process, Room 5–433, Administrative Office of the United States Courts, One Columbus Circle, N.E. Washington, D. C. 20002;

Assistant Chief, Human Resources Division, Attention: Legal Process, Room 5–432, Administrative Office of the United States Courts, One Columbus Circle, N.E., Washington, D. C. 20002.

The address must contain the words "Legal Process" to insure that the material is directed immediately to the appropriate office.

EFFECTIVE DATE: February 3, 1994.

FOR FURTHER INFORMATION CONTACT: For more information or a copy of the regulations, contact J. J. FitzGerald, Human Resources Division, telephone (202) 273–1270, or John L. Chastain, Assistant General Counsel, telephone (202) 273–1100. The address for both contacts is: Administrative Office of the United States Courts, Washington, D.C. 20544.

SUPPLEMENTARY INFORMATION: As part of the Hatch Act Amendments of 1993 that liberalized the restrictions on political activities by Federal employees, Congress enacted a new statute that subjects the Administrative Office to state legal process that seeks to collect commercial debts of officers and employees. 5 U.S.C. 5520a, added by Public Law 103–94, section 9 (107 Stat. 1007) (Oct. 6, 1993). Effective February 3, 1994, the Administrative Office must honor legal process that seeks to collect commercial debts, state taxes and other debts that are enforced through state judicial and administrative legal processes. The new statute requires agencies to adopt regulations specifying their procedures for honoring garnishments.

Federal salaries and retirement annuities have long been subject to garnishment for the payment of alimony and child support obligations under section 459 of the Social Security Act (42 U.S.C. 659). That statute remains in effect unchanged. Garnishments for alimony or child support under 42 U.S.C. 659 take priority over garnishments permitted by the new statute, which comprise mainly commercial and state tax debts. In addition, Federal salaries remain subject to bankruptcy court orders and Federal tax levies.

Under both of these statutes, the Federal Government is subject to legal process in like manner and to the same extent as a private person.

Section 303 of the Consumer Credit Protection Act (15 U.S.C. 1673) sets limits on the amount of an employee's pay that is subject to garnishment for debts other than bankruptcy and taxes. Sections 305 and 307 (15 U.S.C. 1675, 1677) make state garnishment restrictions applicable when they are narrower than those provided in section 303.

The Bankruptcy Code (title 11, United States Code) requires all entities to cease the collection of certain pre-petition debts from any person upon receiving notice that the person has filed a bankruptcy petition. 11 U.S.C. 362(a)(2). The Bankruptcy Code also authorizes the bankruptcy court to order any entity from whom a Chapter 13 bankruptcy debtor receives income to pay all or any part of the income to the trustee. 11 U.S.C. 1325(c).

Dated: June 15, 1994.

L. Ralph Mecham,
Director.

[FR Doc. 94–18563 Filed 7–29–94; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF AGRICULTURE

Federal Grain Inspection Service

Designation of the Denver (CO), East Indiana (IN), and Kansas Agencies

AGENCY: Federal Grain Inspection Service (FGIS).

ACTION: Notice.

SUMMARY: FGIS announces the designation of Denver Grain Inspection (Denver), East Indiana Grain Inspection, Inc. (East Indiana), and Kansas State Grain Inspection Department (Kansas) to provide official inspection services under the United States Grain Standards Act, as amended (Act).

EFFECTIVE DATE: September 1, 1994.

ADDRESSES: Janet M. Hart, Chief Review Branch, Compliance Division, FGIS, USDA, Room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454.

FOR FURTHER INFORMATION CONTACT: Janet M. Hart, telephone 202–720–8525.

SUPPLEMENTARY INFORMATION:

This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

In the March 3, 1994, **Federal Register** (59 FR 10108), FGIS announced that the designations of Denver, East Indiana, and Kansas end on August 31, 1994, and asked persons interested in providing official services in the geographic areas assigned to Denver, East Indiana, and Kansas to submit an application for designation. Applications were due by March 31, 1994.

Denver, East Indiana, and Kansas each applied for designation in the entire area they are currently assigned.

FGIS requested comments on the applicants in the May 3, 1994, **Federal Register** (59 FR 22817). Comments were due by May 31, 1994. FGIS received no comments.

FGIS evaluated all available information regarding the designation criteria in Section 7(f)(1)(A) of the Act; and according to Section 7(f)(1)(B), determined that Denver, East Indiana, and Kansas are able to provide official services in the geographic areas for which they applied.

Effective September 1, 1994, and ending August 31, 1997, Denver, East Indiana, and Kansas are designated to provide official inspection services in the geographic areas specified in the March 3, 1994, **Federal Register**.

Interested persons may obtain official services by contacting Denver at 303–292–5361, East Indiana at 317–289–1206, and Kansas at 913–296–3451.

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: July 20, 1994.

Janet M. Hart,

Acting Director, Compliance Division.

[FR Doc. 94–18359 Filed 7–29–94; 8:45 am]

BILLING CODE 3410–EN–F

Opportunity for Designation in the Grand Forks (ND), Lima (OH), and Virginia Areas

AGENCY: Federal Grain Inspection Service (FGIS).

ACTION: Notice.

SUMMARY: The United States Grain Standards Act, as amended (Act), provides that official agency designations shall end not later than triennially and may be renewed. The designations of Grand Forks Grain Inspection Department, Inc. (Grand Forks), Lima Grain Inspection Service, Inc. (Lima), and Virginia Department of Agriculture and Consumer Services (Virginia) will end January 31, 1995, according to the Act, and FGIS is asking persons interested in providing official services in the specified geographic areas to submit an application for designation.

DATES: Applications must be postmarked or sent by telecopier (FAX) on or before August 30, 1994.

ADDRESSES: Applications must be submitted to Janet M. Hart, Chief, Review Branch, Compliance Division, FGIS, USDA, Room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454. Telecopier (FAX) users may send applications to the automatic telecopier machine at 202–720–1015, attention: Janet M. Hart. If an application is submitted by telecopier, FGIS reserves the right to request an original application. All applications will be made available for public inspection at this address located at 1400 Independence Avenue, S.W., during regular business hours.

FOR FURTHER INFORMATION CONTACT: Janet M. Hart, telephone 202–720–8525.

SUPPLEMENTARY INFORMATION:

This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

Section 7(f)(1) of the Act authorizes FGIS' Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services.

FGIS designated Grand Forks, main office located in Grand Forks, North Dakota, and Lima, main office located in Lima, Ohio, to provide official inspection services, and Virginia, main office located in Richmond, Virginia, to provide official inspection and Class X or Y weighing services under the Act on February 1, 1992.

Section 7(g)(1) of the Act provides that designations of official agencies shall end not later than triennially and may be renewed according to the criteria and procedures prescribed in Section 7(f) of the Act. The designations of Grand Forks, Lima, and Virginia end on January 31, 1995.

The geographic area presently assigned to Grand Forks, pursuant to Section 7(f)(2) of the Act, which will be assigned to the applicant selected for designation is as follows:

Bounded on the North by the North Dakota State line;

Bounded on the East by the North Dakota State line south to State Route 200;

Bounded on the South by State Route 200 west-northwest to the western Traill County line; the western Traill County line; the southern Grand Forks and Nelson County lines; the southern Eddy County line west to U.S. Route 281; U.S. Route 281 north to State Route 15; State Route 15 west to U.S. Route 52; U.S. Route 52 northeast to State Route 3; and

Bounded on the West by State Route 3 north to State Route 60; State Route 60 west-northwest to State Route 5; State Route 5 west to State Route 14; State Route 14 north to the North Dakota State line.

Exceptions to Grand Fork's assigned geographic area are the following locations inside Grand Fork's area which have been and will continue to be serviced by the following official agencies:

1. Grain Inspection, Inc.: Farmers Coop Elevator, Fessenden; Farmers Union Elevator, and Manfred Grain, both in Manfred; all in Wells County; and

2. Minot Grain Inspection, Inc.: Harvey Farmers Elevator, Harvey, Wells County.

The geographic area presently assigned to Lima, pursuant to Section 7(f)(2) of the Act, which will be assigned to the applicant selected for designation is as follows:

Bounded on the North by the northern and eastern Williams County lines; the northern and eastern Defiance County lines south to U.S. Route 24; U.S. Route 24 northeast to State Route 108;

Bounded on the East by State Route 108 south to Putnam County; the northern and eastern Putnam County lines; the eastern Allen County line; the northern Hardin County line east to U.S. Route 68 (excluding all of Sidney, Ohio); U.S. Route 68 south to U.S. Route 47;

Bounded on the South by U.S. Route 47 west-southwest to Interstate 75; Interstate 75 south to the Shelby County line; the southern and western Shelby County lines; the southern Mercer County line; and

Bounded on the West by the Ohio-Indiana State line from the southern Mercer County line to the northern Williams County line.

An exception to Lima's assigned geographic area is the following location inside Lima's area which has been and will continue to be serviced by the following official agency: East Indiana

Grain Inspection, Inc.: Payne Cooperative Association, Payne, Paulding County.

The geographic area presently assigned to Virginia, pursuant to Section 7(f)(2) of the Act, which will be assigned to the applicant selected for designation is the entire State of Virginia, except those export port locations within the State.

Interested persons, including Grand Forks, Lima, and Virginia are hereby given the opportunity to apply for designation to provide official services in the geographic areas specified above under the provisions of Section 7(f) of the Act and section 800.196(d) of the regulations issued thereunder. Designation in the specified geographic areas is for the period beginning February 1, 1995, and ending January 31, 1998. Persons wishing to apply for designation should contact the Compliance Division at the address listed above for forms and information.

Applications and other available information will be considered in determining which applicant will be designated.

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: July 20, 1994.

Janet M. Hart,

Acting Director, Compliance Division.

[FR Doc. 94–18351 Filed 7–29–94; 8:45 am]

BILLING CODE 3410–EN–F

Opportunity to Comment on the Applicants for the Fostoria (OH), Idaho (ID), Lewiston (ID), and the State of Utah

AGENCY: Federal Grain Inspection Service (FGIS).

ACTION: Notice.

SUMMARY: FGIS requests interested persons to submit comments on the applicants for designation to provide official services in the geographic areas currently assigned to Fostoria Grain Inspection, Inc. (Fostoria), Idaho Grain Inspection Service, Inc. (Idaho), Lewiston Grain Inspection Service, Inc. (Lewiston), and the Utah Department of Agriculture (Utah).

DATES: Comments must be postmarked, or sent by telecopier (FAX) or electronic mail by August 30, 1994.

ADDRESSES: Comments must be submitted in writing to Janet M. Hart, Chief, Review Branch, Compliance Division, FGIS, USDA, Room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454. SprintMail users may respond to [A:ATTMAIL,O:USDA,ID:A36JHART]. ATTMAIL and FTS2000MAIL users may respond to !A36JHART. Telecopier (FAX) users may send comments to the automatic telecopier machine at 202–720–1015, attention: Janet M. Hart. All comments received will be made available for public inspection at the above address located at 1400 Independence Avenue, S.W., during regular business hours.

FOR FURTHER INFORMATION CONTACT: Janet M. Hart, telephone 202–720–8525.

SUPPLEMENTARY INFORMATION:

This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

In the June 1, 1994, **Federal Register** (59 FR 28336), FGIS asked persons interested in providing official services in the geographic areas assigned to Fostoria, Idaho, Lewiston, and Utah to submit an application for designation. Applications were due by June 30, 1994.

Fostoria, Idaho, Lewiston, and Utah each applied for designation in the entire area currently assigned to them.

FGIS is publishing this notice to provide interested persons the opportunity to present comments concerning the applicants. Commenters are encouraged to submit reasons and pertinent data for support or objection to the designation of these applicants. All comments must be submitted to the Compliance Division at the above address.

Comments and other available information will be considered in making a final decision. FGIS will publish notice of the final decision in the **Federal Register**, and FGIS will send the applicants written notification of the decision.

AUTHORITY: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: July 20, 1994.

Janet M. Hart,

Acting Director, Compliance Division.

[FR Doc. 94–18350 Filed 7–29–94; 8:45 am]

BILLING CODE 3410–EN–F

Rural Electrification Administration

Golden Valley Electric Association, Inc., Notice of Intent to Hold Public Workshops and Prepare an Environmental Assessment and/or an Environmental Impact Statement

AGENCY: Rural Electrification Administration, USDA.

ACTION: Notice of intent to conduct public scoping workshops and prepare an Environmental Assessment.

SUMMARY: The Rural Electrification Administration (REA) intends to hold public scoping workshops and prepare an Environmental Assessment (EA) in connection with possible REA financing assistance relating to a project proposed by Golden Valley Electric Association, Inc., (Golden Valley) of Fairbanks, Alaska. The project consists of the construction and operation of a 230 kV transmission line between Healy and Fairbanks, Alaska.

DATES: REA will conduct two public scoping workshops as follows: (1) Fairbanks, Alaska, September 13, 1994, 4–8 pm. (2) Healy, Alaska, September 14, 1994, 4–8 pm.

ADDRESSES: The scoping workshops will be held at the following locations: (1) Noel Wien Public Library Auditorium, 1215 Cowles Street, Fairbanks, Alaska 99701 (2) Tri-Valley Community Center, 0.5 Mile Usibelli Spur Road, Healy, Alaska 99743.

FOR FURTHER INFORMATION CONTACT: Lawrence R. Wolfe, Chief, Environmental Compliance Branch, Electric Staff Division, room 1246, Agriculture South Building, Rural Electrification Administration, Washington, DC 20250, telephone (202) 720–1784, or Mr. Steven Haagenson, Golden Valley Electric Association, Inc., P.O. Box 71249, Fairbanks, Alaska 99707–1249, telephone (907) 452–1151.

SUPPLEMENTARY INFORMATION: Golden Valley is proposing to construct approximately 100 miles of 230 kV transmission line between Fairbanks and Healy, Alaska.

Alternatives to be considered by REA include no action, energy conservation, local generation, system alternatives, transmission alternatives, and alternative routes.

Comments regarding the proposed project may be submitted orally or in writing at the public scoping workshops or in writing within 30 days after the September 14, 1994, workshop to REA or Golden Valley at the addresses provided in this notice.

Golden Valley and its consultant have prepared an Alternative Evaluation and Macro-Corridor Study for the project. The Alternative Evaluation and Macro-Corridor Study is available for public review at REA or Golden Valley at the addresses provided in this notice.

Based on the Alternative Evaluation and Macro-Corridor Study, input from interested local, state, and Federal agencies, and the public, Golden Valley will prepare an Environmental Analysis

to be submitted to REA for review. If significant effects are not evident based on a review of the Environmental Analysis and other relevant information, REA will prepare an Environmental Assessment to determine if the preparation of an Environmental Impact Statement (EIS) is warranted.

Should REA determine that the preparation of an EIS is not warranted, it will prepare a Finding of No Significant Impact (FONSI). The FONSI will be made available for public review and comment for 30 days. REA will not take its final action related to the project prior to the expiration of the 30-day period.

Any final action by REA related to the proposed project will be subject to, and contingent upon, compliance with all relevant Federal environmental laws and regulations and completion of environmental review procedures as prescribed by the Council on Environmental Quality Regulations and REA Environmental Policies and Procedures.

Dated: July 26, 1994.

Adam M. Golodner,

Deputy Administrator, Program Operations.

[FR Doc. 94–18657 Filed 7–29–94; 8:45 am]

BILLING CODE 3410–15–P

BARRY GOLDWATER SCHOLARSHIP AND EXCELLENCE IN EDUCATION FOUNDATION

Agency Information Collection Activities Under OMB Review

AGENCY: Barry Goldwater Scholarship and Excellence in Education Foundation.

ACTION: Notice of Proposed Information Collection Requests.

SUMMARY: The Barry Goldwater Scholarship and Excellence in Education Foundation has sent to the Office of Management and Budget (OMB) a proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1980 for review and approval. The proposed collection consists of several detachable forms in booklet format that nominees for scholarships from the Goldwater Foundation are requested to complete in order to be considered for a scholarship.

DATES: Interested person are invited to submit comments on or before August 31, 1994.

ADDRESSES: Send comments to Mr. Gerald J. Smith, Executive Secretary, Barry Goldwater Scholarship and Excellence in Education Foundation, Springfield Corporate Center, 6225 Brandon Avenue, Suite 315, Springfield, VA 22150–2519 (703/576–6012) and Mr. Daniel Chenok, Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW, Room 10012, Washington, DC 20503 (202/395–7316).

FOR FURTHER INFORMATION CONTACT: Mr. Gerald J. Smith, Executive Secretary, Barry Goldwater Scholarship and Excellence in Education Foundation, Springfield Corporate Center, 6225 Brandon Avenue, Suite 315, Springfield, VA 22150–2519, (703) 756–6012.

SUPPLEMENTARY INFORMATION: This Information Collection booklet will be used by the Barry Goldwater Scholarship and Excellence in Education Foundation to select nominees for Goldwater Scholarships. Information requested consists of basic biographical and academic data and also respondents' plans for a career in science, mathematics or engineering.

Burden Statement

The estimated public reporting burden for this collection of information is 20 hours per respondent annually. This estimate includes the time for reviewing instructions, searching existing data sources, gathering, maintaining and reviewing the collection of information.

Respondents: Goldwater Scholarship recipients.

Estimated Number of Respondents: 1400.

Responses: 1 per year.

Total Burden Hours: 28,000 per year.

Recording Burden

Recordkeepers: 21.

Total Burden Hours: 525.

Gerald J. Smith,

Executive Secretary.

[FR Doc. 94–18614 Filed 7–29–94; 8:45 am]

BILLING CODE 6820–AK–M

DEPARTMENT OF COMMERCE

International Trade Administration

Intent To Revoke Antidumping Duty Orders and Findings.

AGENCY: Import Administration/International Trade Administration/Department of Commerce.

ACTION: Notice of intent to revoke antidumping duty orders and findings.

SUMMARY: The Department of Commerce is notifying the public of its intent to revoke the antidumping duty orders and findings listed below. Domestic interested parties who object to these revocations must submit their comments in writing no later than the last day of August 1994.

EFFECTIVE DATE: August 1, 1994.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce (the Department) may revoke an antidumping duty order or finding if the Secretary of Commerce concludes that it is no longer of interest to interested parties. Accordingly, as required by § 353.25(d)(4) of the Department's regulations, we are notifying the public of our intent to revoke the following antidumping duty orders and findings for which the Department has not received a request to conduct an administrative review for the most recent four consecutive annual anniversary months:

Antidumping Duty Proceeding

Belgium

Phosphoric Acid
52 FR 31439
August 20, 1987
A–423–602
Contact: Sally Hastings at (202) 482–4366

France

Industrial Nitrocellulose
48 FR 36303
August 10, 1983
A–427–009
Contact: David Dirstine at (202) 482–4033

Japan

Brass Sheet & Strip
53 FR 30454
August 12, 1988
A–588–704
Contact: Chip Hayes at (202) 482–5047

Japan

Pagers
48 FR 37058
August 16, 1983
A–588–007
Contact: Charles Riggle at (202) 482–0650

Thailand

Malleable Pipe Fittings
52 FR 37351
August 20, 1987
A–549–601
Contact: Carlo Cavagna at (202) 482–4851

The People's Republic of China

Petroleum Wax Candles
51 FR 30686
August 28, 1986
A–570–504
Contact: Valerie Turoscy at (202) 482–0145

Venezuela

Certain Electrical Conductor Aluminum Redraw Rod
53 FR 31903
August 22, 1988
A–307–701
Contact: Gayle Longest at (202) 482–2786

Yugoslavia

Tapered Roller Bearings
52 FR 30417
August 14, 1987
A-479-601
Contact: Dennis Askey at (202) 482-2657

Armenia

Titanium Sponge
33 FR 12138
August 28, 1968
A-831-803
Contact: David Genovese at (202) 482-4697

Azerbaijan

Titanium Sponge
33 FR 12138
August 28, 1968
A-832-803
Contact: David Genovese at (202) 482-4697

Belarus

Titanium Sponge
33 FR 12138
August 28, 1968
A-822-803
Contact: David Genovese at (202) 482-4697

Estonia

Titanium Sponge
33 FR 12138
August 28, 1968
A-447-803
Contact: David Genovese at (202) 482-4697

Georgia

Titanium Sponge
33 FR 12138
August 28, 1968
A-833-803
Contact: David Genovese at (202) 482-4697

Japan

Acrylic Sheet
41 FR 36497
August 30, 1976
A-588-055
Contact: Kim Moore at (202) 482-0090

Japan

Cadmium
37 FR 15700
August 4, 1972
A-588-035
Contact: Roy F. Unger Jr. at (202) 482-0651

Kyrgyzstan

Titanium Sponge
33 FR 12138
August 28, 1968
A-835-803
Contact: David Genovese at (202) 482-4697

Latvia

Titanium Sponge
33 FR 12138
August 28, 1968
A-449-803
Contact: David Genovese at (202) 482-4697

Lithuania

Titanium Sponge
33 FR 12138
August 28, 1968
A-451-803
Contact: David Genovese at (202) 482-4697

Moldova

Titanium Sponge
33 FR 12138
August 28, 1968
A-841-803
Contact: David Genovese at (202) 482-4697

Tajikistan

Titanium Sponge
33 FR 12138
August 28, 1968
A-842-803
Contact: David Genovese at (202) 482-4697

Turkmenistan

Titanium Sponge
33 FR 12138
August 28, 1968
A-843-803
Contact: David Genovese at (202) 482-4697

Uzbekistan

Titanium Sponge
33 FR 12138
August 28, 1968
A-844-803
Contact: David Genovese at (202) 482-4697

The following case was inadvertently omitted from the July "Notice of Intent to Revoke." However, written notice was served, on a timely basis via registered mail, upon the domestic interested parties.

Romania

Solid Urea
53 FR 26366
July 14, 1987
A-485-601
Contact: Dennis Askey at (202) 482-0367

If interested parties do not request an administrative review in accordance with the Department's notice of opportunity to request administrative review, and domestic interested parties do not object to the Department's intent to revoke pursuant to this notice, we shall conclude that the antidumping duty orders and findings are no longer of interest to interested parties and shall proceed with the revocation. However, if interested parties do request an administrative review in accordance with the Department's notice of opportunity to request administrative review, or domestic interested parties do object to the Department's intent to revoke pursuant to this notice, the Department will continue the duty order or finding without further notice to the public.

Opportunity To Object

Domestic interested parties, as defined in § 353.2(k) (3), (4), (5), and (6) of the Department's regulations, may object to the Department's intent to revoke these antidumping duty orders and findings by the last day of August 1994, with the exception of Solid Urea from Romania. In that case, the opportunity to object will remain the last day of July. Any submission to a revocation must contain the name and case number of the proceeding and a statement that explains how the objecting party qualifies as a domestic interested party under § 353.2(k) (3), (4), (5), and (6) of the Department's regulations.

Seven copies of such objections should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room B-099, U.S. Department of Commerce, Washington, D.C. 20230. You must also include the pertinent certification(s) in accordance with sections 353.31(g) and 353.31(i) of the Department's regulations. In addition, the Department requests that a copy of the objection be sent to Michael F. Panfeld in Room 4203.

This notice is in accordance with 19 CFR 353.25(d)(4)(i).

Dated: July 27, 1994.

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 94-18682 Filed 7-29-94; 8:45 am]

BILLING CODE 3510-DS-P

COMMODITY FUTURES TRADING COMMISSION

Adverse Registration Actions by National Futures Association With Respect to Floor Brokers, Floor Traders, and Applicants for Registration In Either Category

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice and Order.

SUMMARY: The Commodity Futures Trading Commission (Commission) is authorizing National Futures Association (NFA) to deny, condition, suspend, modify, restrict or revoke the registration of any floor broker (FB), floor trader (FT), or an applicant for registration in either category. The Commission has previously authorized NFA to perform various functions with respect to processing registration records of FBs, FTs and applicants therefor, including, among other things, granting such registrations where appropriate and serving as the official custodian of those Commission records. This Order does not authorize NFA to accept or act upon requests for exemption or to render "no-action" opinions with respect to applicable registration requirements. This Order generally will conform NFA's authority regarding the FB and FT registration categories to the authority delegated by

the Commission to NFA concerning the other categories of registration under the Commodity Exchange Act (Act).[1]

EFFECTIVE DATE: August 1, 1994.

FOR FURTHER INFORMATION CONTACT: Lawrence B. Patent, Associate Chief Counsel, or Robert P. Shiner, Assistant Director, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581. Telephone: (202) 254–8955 or 254–3688, respectively.

SUPPLEMENTARY INFORMATION:

Introduction

The Commission has previously issued Orders authorizing NFA to perform registration processing functions with respect to FBs and FTs. These functions have included: (1) processing and, where appropriate, granting applications for registration under the Act; (2) issuing and terminating, where appropriate, temporary licenses; (3) processing the triennial review of registration information, periodic updates, terminations of trading privileges and requests for withdrawal from registration; and (4) establishing and maintaining systems of records regarding FBs and FTs and serving as the official custodian of those Commission records.[2] However, the Commission has not previously authorized NFA to take adverse actions against FBs, FTs or persons applying for registration in either category, or to accept or act upon requests for exemption or to render "no-action" opinions with respect to applicable registration requirements.[3] By the Order below issued on this date, the Commission is authorizing NFA to assume the performance of additional registration functions on behalf of the Commission, specifically, to deny, condition, suspend, modify, restrict or revoke the registration of any FB, FT or applicant for registration in either category.[4] However, the Commission will continue to handle any matter that has already been referred to it by NFA.

The Commission's order also provides that, until the Commission orders otherwise, with respect to an application for registration as an FB or an FT that NFA previously would have forwarded to the Commission for review of disciplinary history, if NFA determines that registration should be granted in such a case, either with or without conditions, NFA shall transmit the file to the Commission and stay the granting of registration until the Commission has had an opportunity to object to such granting of registration.[5]

Further, this Order does not authorize NFA to accept or act upon requests for exemption or to render "no-action" opinions with respect to applicable registration requirements. This Order will conform NFA's authority concerning the FB and FT registration categories to the authority delegated by the Commission to NFA concerning the other categories of registration under the Act, except with respect to the temporary requirement for forwarding certain matters to the Commission referred to above.[6]

The Commission further notes that in enacting Section 227 of the Futures Trading Practices Act of 1992, Congress added Section 8a(11) to the Act, 7 U.S.C. 12a(11) (Supp. IV 1992), which provided rulemaking authority for the Commission to suspend the registration of any person charged with a felony if the Commission determines that continued registration of the person may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission. The Commission adopted Rule 3.56 to implement this authority at the same time that it adopted rules to govern registration of FTs. 58 FR 19575, 19587–19588, 19595–19596 (April 15, 1993). The Commission expects that NFA will promptly notify the Commission when NFA becomes aware that any registrant has been charged with a felony.

United States of America Before the Commodity Futures Trading Commission Order Authorizing the Performance of Registration Processing Functions

I. Authority and Background

Section 8a(10) of the Act (7 U.S.C. 12a(10) (1988 and Supp. IV 1992)) provides that the Commission may authorize any person to perform any portion of the registration functions under the Act, notwithstanding any other provision of law, in accordance with rules adopted by such person and submitted to the Commission for approval or, if applicable, for review pursuant to Section 17(j) of the Act and subject to the provisions of the Act applicable to registrations granted by the Commission. Section 17(o)(2) of the Act provides that the Commission may authorize NFA, in performing Commission registration functions, to deny, condition, suspend, restrict or revoke any registration, subject to Commission review.[7]

NFA submitted under cover of a letter dated March 8, 1994 amendments to its bylaws and rules to govern adverse actions against FTs, FBs and applicants for registration in either category. These amendments reflect actions taken by NFA's Board at meetings on May 20, 1993 and February 24, 1994. NFA's rule amendments establish procedures for conducting adverse registration proceedings with respect to the FB and FT registration categories that closely track the Commission's Part 3 rules in this regard. NFA's amended rules further provide that NFA's Membership Committee will conduct adverse proceedings regarding FB and FT registrations and applicants for registration in either category and that a Subcommittee conducting such a proceeding will consist of at least three

[1] 7 U.S.C. 1 *et seq.* (1988 & Supp. IV 1992).

[2] 51 FR 25929 (July 7, 1986); 51 FR 34490 (September 29, 1986); 58 FR 19657 (April 15, 1993).

[3] When the Commission issued its most recent delegation Order, it noted that:

Certain commenters on the Commission's proposed rules concerning FT registration suggested that authority to take adverse action against FTs and FBs should be delegated to NFA. The Commission will take the matter under advisement and may consider authorizing NFA to perform such functions at a subsequent date when it has more experience with the FT registration process. 58 FR 19657, 19658 (footnote omitted).

[4] *See* Sections 8a(2), 8a(3), 8a(4) and 8a(11) of the Act, 7 U.S.C. 12a(2), 12a(3), 12a(4) and 12a(11) (1988 & Supp. IV 1992).

[5] *See* 58 FR 19657, 19659. The same treatment will apply in the case of a registered FB or FT with new disciplinary history where NFA determines to maintain registration, either with or without restrictions. NFA need not, however, forward to the Commission any matter related to an FB, FT or applicant for registration in either category where the only "yes" answer to a disciplinary history question relates to a single arrest where there was no subsequent conviction, guilty plea or plea of nolo contendere, or a single misdemeanor conviction based on conduct unrelated to financial market activity that predates the application for registration by at least five years, provided such matter is disclosed on the registration application or any update thereto. If a person willfully makes any materially false or misleading statement or omits to state any material fact in his registration application or any update thereto, that is a separate ground for statutory disqualification from registration. Sections 8a(2)(G) and 8a(3)(G) of the Act, 7 U.S.C. 12a(2)(G) and 12a(3)(G) (1988 & Supp. IV 1992).

[6] The Commission has previously authorized NFA to perform registration processing functions, and to take adverse registration actions, with respect to futures commission merchants, introducing brokers, commodity pool operators, commodity trading advisors, leverage transactions merchants and associated persons of such entities, as well as applicants for registration in any of the aforementioned categories. *See* 48 FR 15940 (April 13, 1983); 48 FR 35158 (August 3, 1983); 48 FR 51809 (November 14, 1983); 49 FR 8226 (March 5, 1984); 49 FR 39593 (October 9, 1984); 50 FR 34885 (August 28, 1985); 54 FR 19594 (May 8, 1989); and 54 FR 41133 (October 5, 1989). In performing Commission registration functions, NFA is required to monitor compliance with the conditions and restrictions imposed on conditioned and restricted registrants.

[7] 7 U.S.C. 21(o)(2) (1988).

persons, the majority of whom are members of the Membership Committee and the remainder of whom are FBs or FTs drawn from a list approved by NFA's Board. By letter dated June 17, 1994, NFA has indicated that, in composing such designated Subcommittees, it will utilize its best efforts to avoid having as Subcommittee members FBs and FTs who have trading privileges at the same exchange as the subject of the proceeding.[8]

NFA has indicated that in carrying out the function of taking adverse registration action involving the FB and FT registration categories, it will be bound by restrictions in Commission rules regarding who may act as a supervisor. Therefore, if NFA determines to condition or restrict the registration of an FB or an FT, someone eligible to do so under Commission rules must sign a Supplemental Sponsor Certification Statement (SSCS) for the FB or FT and supervise compliance with any conditions or restrictions that may be imposed. In the case of an FB, the SSCS must be signed by his employer or, if he has no employer, by another floor broker;[9] if an FT is involved, the SSCS must be signed by an officer of the floor trader's clearing member, if such officer is a registrant or a principal of a registrant, or the chief operating officer on behalf of each contract market that has granted trading privileges.[10]

Upon consideration, the Commission has determined to authorize NFA, effective August 1, 1994, to deny, condition, suspend, modify, restrict or revoke the registration of any FB, FT or an applicant for registration in either category in accordance with the standards established by the Act and rules promulgated thereunder.[11]

[8] Letter from Michael J. Crowley, Associate General Counsel, NFA, to Lawrence B. Patent, Associate Chief Counsel, Division of Trading and Markets.

[9] If the FB has no employer and another FB signs the SSCS, the Commission has required that the FB subject to conditions or restrictions receive customer orders only from the person who signed the SSCS or agents of that person. *See In the Matter of John V. Piccolo*, CFTC Docket No. SD–93–8 (July 20, 1993).

[10] Such a supervising employer or FB, supervising registrant or principal may not be subject to a pending adjudicatory proceeding under the Act or barred from service on self-regulatory organization governing boards or committees based on disciplinary history in accordance with Commission Rule 1.63, 17 CFR 1.63 (1993). *See* Commission Rule 3.60(b)(2)(i), 17 CFR §3.60(b)(2)(i) (1993); NFA letter dated June 17, 1994.

However, the Commission will continue to handle any matter that has already been referred to it by NFA. The Commission is also authorizing NFA to perform records custodianship functions with respect to such adverse registration actions.[12] The Commission has separately approved on this date amendments to NFA Bylaws 305 and 708 and NFA Registration Rules 101, 201, 203, 501, 502, and 504–510 to authorize implementation of these grants of authority.

By prior orders, the Commission has authorized NFA to maintain various other Commission registration records and certified NFA as the official custodian of such records for this agency.[13] The Commission has now determined, in accordance with its authority under Section 8a(10) of the Act, to authorize NFA to maintain and serve as official custodian of the Commission's registration records with respect to adverse actions against FBs, FTs, and applicants for registration in either category from this time forward. This determination is based upon NFA's representations regarding the implementation of rules and procedures for maintaining and safeguarding all such records, as well as the need to facilitate NFA's assumption of responsibility for taking adverse registration action against FBs, FTs, and applicants for registration in either category.

In maintaining the Commission's registration records pursuant to this Order, NFA shall be subject to all other requirements and obligations imposed upon it by the Commission in existing or future Orders or regulations.[14] In this regard, NFA shall also implement such additional procedures (or modify existing procedures) as are necessary and acceptable to the Commission to ensure the security and integrity of the FB, FT or applicant records in NFA's custody; to facilitate prompt access to those records by the Commission and its staff, particularly as described in other Commission Orders or rules; to facilitate disclosure of public or nonpublic information in those records when permitted by Commission Orders or rules and to keep logs as required by the Commission concerning disclosure of nonpublic information; and otherwise to safeguard the confidentiality of the records.

II. Conclusion and Order

The Commission has determined, in accordance with the provisions of Section 8a(10) of the Act, to authorize NFA, effective August 1, 1994, to perform the following registration functions:

(1) To deny, condition, suspend, modify, restrict or revoke registration under the Commodity Exchange Act as a floor broker, floor trader or applicant for registration in either category;

(2) To establish and maintain a system of records regarding such adverse actions involving floor brokers, floor traders and applicants for registration in either category, and to serve as the official custodian of those Commission records.

NFA shall perform these functions in accordance with the standards established by the Act and the regulations promulgated thereunder.

These determinations are based upon the Congressional intent expressed in Sections 8a(10) and 17(o) of the Act that the Commission be allowed to authorize NFA to perform any portion of the Commission's registration responsibilities under the Act for purposes of carrying out these responsibilities in the most efficient and cost-effective manner, and NFA's representations concerning standards and procedures to be followed in administering these functions.

This Order does not, however, authorize NFA to accept or act upon requests for exemption from registration or to render "no-action" opinions or interpretations with respect to applicable registration requirements.

Nothing in this Order or in Sections 8a(10) or 17 of the Act shall affect the Commission's authority to review the granting of a registration application by

[11] In conjunction with this authorization to take adverse action, the Commission is also directing that, until the Commission orders otherwise, with respect to the file of an FB, an FT or an applicant for registration in either category that NFA previously would have forwarded to the Commission for review of disciplinary history, if NFA determines that registration should be maintained or granted in such a case, either with or without restrictions or conditions, NFA shall transmit the file to the Commission and stay the maintenance or granting of registration until the Commission has had an opportunity to object to such maintenance or granting of registration. NFA need not, however, forward to the Commission any matter related to an FB, FT or applicant for registration in either category where the only "yes" answer to a disciplinary history question relates to a single arrest where there was no subsequent conviction, guilty plea or plea of nolo contendere, or a single misdemeanor conviction based on conduct unrelated to financial market activity that predates the application for registration by at least five years, provided such matter is disclosed on the registration application or any update thereto. *See* note 5, *supra*.

[12] In this connection, in a separate notice published elsewhere today in the **Federal Register**, the Commission is publishing a Notice under the Privacy Act of 1974 of modified descriptions of systems of records to incorporate records applicable to adverse registration actions against FBs, FTs or applicants for registration in either category.

[13] 49 FR 39593; 50 FR 34885; 51 FR 25929; 54 FR 19594; 54 FR 41133; 58 FR 19657.

[14] *See, e.g.*, 49 FR 39593, 39595–97; 50 FR 34885, 34887.

NFA in the performance of Commission registration functions, or to review any adverse registration action taken by NFA. *See also* Sections 17(o)(3) and (4) of the Act, 7 U.S.C. 21(o)(3) and (4) (1988 and Supp. IV 1992), and 17 CFR Part 171.

Issued in Washington, D.C. on July 26, 1994 by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 94–15630 Filed 7–29–94; 8:45 am]

BILLING CODE 6351–01–P

Privacy Act of 1974; Modified Descriptions of Systems of Records

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of modified descriptions of systems of records.

SUMMARY: The Commodity Futures Trading Commission (Commission) is modifying the descriptions of one of its existing systems of records to reflect its Order, set forth in a separate notice published elsewhere today in the **Federal Register**, authorizing National Futures Association (NFA) to take adverse registration actions with respect to floor brokers (FBs), floor traders (FTs) and applicants for registration in either category and to maintain Commission records related to such actions.

EFFECTIVE DATE: August 1, 1994.

FOR FURTHER INFORMATION CONTACT: Robert P. Shiner, Assistant Director, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW, Washington, DC 20581, Telephone: (202) 254–3688.

SUPPLEMENTARY INFORMATION:

Introduction

Pursuant to the Privacy Act of 1974, the Commission currently maintains two systems of records related to the registration of persons engaging in certain types of commodity-related activities: CFTC–12 (Fitness Investigations) and CFTC–20 (Registration of Floor Brokers, Floor Traders, Futures Commission Merchants, Introducing Brokers, Commodity Trading Advisors, Commodity Pool Operators, Leverage Transaction Merchants and Associated Persons). As currently set forth, these two systems contain registration forms, related supplements and schedules, fingerprint cards, correspondence, and reports reflecting information developed from various sources relating to the registration or fitness of applicants, registrants and persons affiliated with futures commission merchants (FCMs), introducing brokers (IBs), commodity pool operators (CPOs), commodity trading advisors (CTAs), leverage transaction merchants (LTMs), FBs and FTs.[1] NFA, in performing certain registration functions on behalf of the Commission, currently maintains the Commission's registration records with respect to FCMs, IBs, CPOs, CTAs, LTMs and their respective associated persons (APs), as well as certain registration records of FBs and FTs.[2]

NFA's Board of Directors voted at its meetings on May 20, 1993 and February 24, 1994 to authorize NFA to perform for the Commission the function of taking adverse registration actions against FBs, FTs and applicants for registration in either category. Upon consideration, the Commission has determined to authorize NFA, effective August 1, 1994, to perform such registration functions in accordance with the standards established by the Act and rules promulgated thereunder. Because the maintenance of Commission records associated with those activities is an essential aspect of any such authority granted to NFA by the Commission, the Commission is also authorizing NFA to perform records custodianship functions with respect to adverse registration actions.

In light of the Commission's Order authorizing NFA to perform certain registration functions concerning FBs, FTs and applicants and to become custodian of the relevant records, the Commission has modified its description of the CFTC–12 records system to provide for NFA's expanded role with respect to these registration categories. Because the Commission believes that authorizing NFA to perform records custodianship functions for adverse actions involving the FB and FT registration categories will assist NFA in carrying out responsibilities under the Commodity Exchange Act, the concomitant disclosure to NFA of personal information on individuals that may be contained in those records is permissible under the Commission's current routine use of such information under the Privacy Act.[3] This Notice is being published to inform the public—and, in particular, individuals about whom information is maintained in either system—as to the location of these Commission records.

Description of Systems of Records

CFTC–12

SYSTEM NAME:

Fitness Investigations.

SYSTEN LOCATION:

Records for floor brokers and floor traders with respect to matters commenced prior to August 1, 1994; associated persons and principals of leverage transaction merchants whose registration status as such was inactive prior to January 1, 1986; and also for all other categories where registration status in every applicable capacity was inactive prior to October 1, 1983: Division of Trading and Markets, 2033 K Street NW, Washington, DC 20581.

Records for futures commission merchants, introducing brokers, commodity pool operators, commodity trading advisors, their respective associated persons and principals, with active registration status in any capacity on or after October 1, 1983; leverage transaction merchants and their associated persons and principals with active registration status as such on or after April 13, 1984, except as noted above; records for floor brokers and floor traders with respect to matters commenced on or after August 1, 1994: National Futures Association (NFA), 200 West Madison Street, Suite 1400, Chicago, Illinois 60606.

(*See also* "Retention and Disposal," infra.)

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons who have applied to the Commission or NFA, as applicable, or who may apply to NFA for registration as floor brokers, floor traders or as associated persons, and principals (as defined in 17 CFR 3.1) of futures commission merchants, introducing brokers, commodity pool operators, commodity trading advisors and leverage transaction merchants.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information pertaining to the fitness of the above-described individuals to engage in business subject to the Commission's jurisdiction. The system contains information in computerized and hardcopy format including registration forms, schedules and supplements; fingerprint cards; correspondence relating to registration; and reports and memoranda reflecting information developed from various sources outside the CFTC or NFA. In addition, the system contains records of each CFTC or NFA fitness investigation.

[1] *See* 49 FR 45472 (November 16, 1984); 58 FR 19659 (April 15, 1993).

[2] *Id. See also* 49 FR 39593 (October 9, 1984); 49 FR 45418 (November 16, 1984); 50 FR 34885 (August 28, 1985); 51 FR 25929 (July 17, 1986); and 54 FR 19594 (May 8, 1989).

[3] *See* Routine Use No. 3 at 47 FR 44830, 44831 (October 12, 1982).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 4f(1), 4k(4), 4k(5), 4n(l), 8a(1)–(5), 8a(10), 8a(11), 17(o) and 19 of the Commodity Exchange Act, 7 U.S.C. 6f(1), 6k(4), 6k(5), 6n(1), 12a(1)–(5), 12a(10), 12a(11), 21(o) and 23 (1988 and Supp. IV 1992).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The routine uses applicable to all of the Commission's systems of records, including this system, were set forth under the caption, "General Statement of Routine Uses," in 47 FR 43759, 43760–61 (October 4, 1982), and subsequently modified in 47 FR 44830, 44831 (October 12, 1982). In addition, information contained in this system of records may be disclosed by the Commission as follows:

1. Information contained in this system of records may be disclosed to any person with whom an applicant or registrant is or plans to be associated as an associated person or affiliated as a principal.

2. Information contained in this system of records may be disclosed to any registered futures commission merchants with whom an applicant or registered introducing broker has or plans to enter into a guarantee agreement in accordance with Commission regulation 1.10 (17 CFR 1.10).

NFA may disclose information contained in those portions of this system of records maintained by NFA, but any such disclosure must be made in accordance with Commission-approved NFA rules and under circumstances authorized by the Commission as consistent with the Commission's regulations and routine uses. The currently authorized circumstances are set forth in the Commission's September 28, 1984 Order authorizing NFA to perform certain Commission registration functions including the maintenance of Commission records and are published at 49 FR 39593, 39596 (October 9, 1984), except that Item 2b therein was modified to eliminate the requirement of specific consent by the applicant or registered introducing broker to the disclosure of information to the futures commission merchant with whom it has or plans to enter a guarantee agreement. 51 FR 25930, 25931 (July 17, 1986).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders, computer memory, computer printouts, index cards, microfiche.

RETRIEVABILITY:

By the name of the individual of firm, or by assigned identification number. Where applicable, the NFA's computer cross-indexes the individual's file to the name of the futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator or leverage transaction merchant with which the individual is associated or affiliated.

SAFEGUARDS:

General office security measures including secured rooms or premises and, in appropriate cases, lockable file cabinets with access limited to persons whose official duties require access.

RETENTION AND DISPOSAL:

Applications, biographical supplements, other forms, related documents and correspondence are maintained on the CFTC's or NFA's premises, as applicable, for three years after the individual's registration(s) or affiliation(s) as a principal becomes inactive. Records are then stored at an appropriate site for an additional seven years before being destroyed; CFTC-held records are stored in the Federal Records Center, and NFA-held records are to be stored either on NFA's premises or in appropriate fireproof off-site facilities.

Computer records are maintained permanently on NFA's premises and are updated periodically as long as the individual remains pending for registration, registered in any capacity, or affiliated with any registrant as a principal. Computer records on persons who may apply may be maintained indefinitely. Microfiche records, when produced, are maintained permanently on the CFTC's or NFA's premises.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Director, Registration Unit, Division of Trading and Markets, at the Commission's principal office, or his designee.

For records held by NFA: Vice President for Registration or the Records Custodian, National Futures Association, 200 West Madison Street, Suite 1400, Chicago, Illinois 60606, or a designee.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves, seeking access to records about themselves in this system of records, or contesting the content of records about themselves contained in this system of records, should address written inquiries to the FOI, Privacy and Sunshine Acts Compliance Staff, Commodity Futures Trading Commission, 2033 K Street NW, Washington, DC 20581; telephone (202) 254–3382.

RECORD SOURCE CATEGORIES:

The individual or firm on whom the record is maintained; the individual's employer; federal, state or local regulatory and law enforcement agencies; commodities and securities exchanges, National Futures Association and National Association of Securities Dealers; foreign futures and securities authorities and INTERPOL; and other miscellaneous sources. Computer records are prepared from the forms, supplements, attachments and related documents submitted to the Commission or NFA and from information developed during the fitness inquiry.

Issued in Washington, DC, on July 26, 1994 by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 94–18631 Filed 7–29–94; 8:45 am]

BILLING CODE 6351–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection Request Submitted to OMB for Review

AGENCY: The Corporation for National and Community Service (CNCS).

ACTION: Information Collection Request Submitted to the Federal Office of Management and Budget (FOMB) for Review.

SUMMARY: This notice provides information about an information proposal by CNCS, currently under review by the Office of Management and Budget (OMB).

DATES: OMB and CNCS will consider comments on the proposed collection of information and record keeping requirements received within 7 days from the date of publication. Copies of the proposed form and supporting documents may be obtained by contacting CNCS.

ADDRESSES: Send comments to both:

David Rymph, Study Coordinator, 1100 Vermont Ave., N.W., Washington, DC 20525

Steve Semenuk, Desk Officer for CNCS, Office of Management and Budget,

3002 New Executive Office Building, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Charles Helfer (202) 606–5000 ext. 248.

SUPPLEMENTARY INFORMATION:

Office of the Corporation for National and Community Service

Issuing Proposal: The Evaluation and Policy Coordination Unit.

Title of Forms: Customer Satisfaction Form.

Need and Use: The National and Community Service Trust Act of 1993 (Pub. L. 103–82) requires the Corporation for National and Community Service to evaluate its programs on a regular basis. This information is required for program management, planning, and required record keeping.

Type of request: Submission of a new collection.

Respondent's Obligation to Reply: Voluntary.

Frequency of Collection: One time only.

Estimated Number of Responses: 10,110.

Average Burden Hours Per Response: 0.042 Hours.

Estimated Annual Reporting or Disclosure Burden: 421.25 Hours.

Regulatory Authority: 42 U.S.C. 5056 (a).

Dated: July 22, 1994.

David Rymph,

Director, Evaluation and Policy Coordination Unit

[FR Doc. 94–18615 Filed 7–29–94; 8:45 am]

BILLING CODE BCHC–6050–28–M

DEPARTMENT OF DEFENSE

Department of the Army

Availability of Non-Exclusive, Exclusive, or Partially Exclusive Licensing of U.S. Patent Concerning Monoclonal Antibodies to Cholesterol and Methods

AGENCY: U.S. Army Medical Research and Development Command, DOD.

ACTION: Notice.

SUMMARY: In accordance with 37 CFR 404.6, announcement is made of the availability of U.S. patent No. 4,885,256, entitled "Monoclonal Antibodies to Cholesterol and Methods" issued December 5, 1989 for licensing. This patent has been assigned to the United States Government as represented by the Secretary of the Army.

ADDRESSES: Commander, U.S. Army Medical Research, Development, Acquisitions and Logistics Command, ATTN: Staff Judge Advocate, Fort Detrick, Frederick, Maryland 21702–5012.

FOR FURTHER INFORMATION CONTACT: Mr. John F. Moran, Patent Attorney (301) 619–2065 or telfax (301) 619–7714.

SUPPLEMENTARY INFORMATION: the invention encompassed by this patent involves monoclonal antibodies to cholesterol and methods for the detection of high levels of cholesterol by contacting biological specimens containing cholesterol with the monoclonal antibodies and measuring the formation of antigen-antibody complexes by immunosorbent assay.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 94–18604 Filed 7–29–94; 8:45 am]

BILLING CODE 3710–08–M

Membership Department of the Army Performance Review Boards

AGENCY: Department of the Army, DOD.

ACTION: Notice.

SUMMARY: Section 4314(c)(1) through (5) of Title 5, U.S. Code, requires each agency to establish, in accordance with regulations, one or more Senior Executive Service Performance Review Boards. The boards shall review and evaluate the initial appraisal of senior executives' performance by supervisors and make recommendations to the appointing authority or rating official relative to the performance of these executives.

EFFECTIVE DATE: The effective date of this notice is August 1, 1994.

ADDRESSES: Senior Executive Service Office, Assistant Secretary of the Army, Manpower & Reserve Affairs, 111 Army, the Pentagon, Room 2C670, Washington, DC 20310–0111.

FOR FURTHER INFORMATION CONTACT: Jeanne Raymos, (703) 695–2975.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

The members of the Performance Review Board for the U.S. Army Materiel Command (AMC) are:

1. MG Dewitt T. Irby Jr., Program Executive Officer, Aviation
2. MG Thomas L. Prather, Deputy Chief of Staff for Research, Development and Engineering, U.S. Army Materiel Command
3. BG William R. Holmes, Deputy Chief of Staff for Ammunition, U.S. Army Materiel Command
4. BG Jerry L. Laws, Commander, White Sands Missile Range, U.S. Army Test and Evaluation Command
5. Mr. Paul Bogosian, Executive Director, Acquisition Center, U.S. Army Aviation and Troop Command
6. Dr. Rudolf G. Buser, Director, Night Vision and Electro-Optics, CECOM RD&E Center, U.S. Army Communications-Electronics Command
7. Mr. Jerry L. Chapin, Deputy Program Executive Officer, Armored Systems Modernization
8. Mr. Walter W. Clifford, Chief, Air Warfare Division, U.S. Army Materiel Systems Analysis Activity, AMC
9. Mr. Albert A. Dawes, Chief Counsel, U.S. Army Tank-Automotive Command, AMC
10. Ms. Louann Elledge, Dir, Systems Integration & Mgt Activity, U.S. Army Materiel Command
11. Mr. James B. Emahiser, Assistant Deputy Chief of Staff for Logistics, U.S. Army Materiel Command
12. Mr. Victor J. Ferlise, Deputy to the Commander, U.S. Army Communications-Electronics Command, U.S. Army Materiel Command
13. Mr. Frank E. Fiorilli, Comptroller, U.S. Army Communications Electronics Command, AMC
14. Mr. James L. Flinn III, Director, Integrated Materiel Management Center, U.S. Army Missile Command, AMC
15. Mr. John F. Gehbauer, Deputy Director, Armament R&DE Center, AMC
16. Mr. Feliciano Giordano, Assoc Tech Director, RD&E Center, U.S. Army Communications-Electronics Command, AMC
17. Mr. Spencer S. Hirshman, Assoc Tech Dir, ARDEC, AMC
18. Mr. Thomas L. House, Executive Director, Aviation RD&E Center, U.S. Army Aviation Systems Command, AMC
19. Mr. Robin L. Keesee, Director, Human Research Engineering, U.S. Army Research Laboratory, AMC
20. Mr. Arthur Keltz, Principal Deputy Director, Fire Support Armaments Center, ARDEC, AMC
21. Mr. Joseph T. Lehman, Deputy Director, Fire Support Armaments Center, ARDEC, AMC
22. Dr. Robert W. Lewis, Technical Director, Natick RD&E Center, U.S. Army Troop-Support Command AMC
23. Mr. Victor Lindner, Associate Technical Director, ARDED, AMC
24. Mr. Colin F. MacDonnell, Dir, C3I Logistics & Readiness Center, U.S. Army Communications-Electronics Command, AMC
25. Mr. William H. Mermagen, Sr., Director, Advanced Computing and Information Sciences, U.S. Army Research Laboratory, AMC

26. Dr. James W. Mink, Director, Electronics Division, U.S. Army
27. Mr. Douglas R. Newberry, Director, Resource Management, U.S. Army Tank-Automotive Command, AMC
28. Dr. Kenneth J. Oscar, Principal Deputy for Acquisition, U.S. Army Materiel Command
29. Ms. Renata F. Price, Associate Technical Dir, ARDED, AMC
30. Mr. Joseph J. Pucilowski, Jr., Director, CECOM Center for C3 Systems, U.S. Army Communications-Electronics Command, AMC
31. Dr. Bhakta Rath, Associate Director of Research, Materials Science and Component Technology Directorate, Navy Research Laboratory.
32. Mr. Daniel J. Rubery, Executive Director, Integrated Materiel Management Center, U.S. Army Aviation Systems Command, AMC
33. Dr. Robert E. Singleton, Director, Engineering & Environmental Sciences Division, U.S. Army Research Office, AMC
34. Mr. Robert L. Swint, Acting Deputy for Systems and Logistics, U.S. Army Tank-Automotive Command, AMC
35. Mr. Michael C. Sandusky, Chief, Special Analysis Office, AMC
36. Mr. Edward J. Korte, Command Counsel, AMC.

The members of the Performance Review Board for the Office of the Chief of Staff, Army are:

1. Mr. William P. Neal, Executive Director, Strategic Logistics Agency, Deputy Chief of Staff for Logistics (DCSLOG)
2. Mr. Mark J. O'Konski, Assistant Director for Transportation, Deputy Chief of Staff for Logistics
3. MG William Farmen, Assistant Deputy Chief of Staff for Logistics, DCSLOG
4. MG John J. Cusick, Director, Supply and Maintenance, DCSLOG
5. Dr. James R. Fisher, Executive Director, Sensors Directorate, U.S. Army Space and Strategic Defense Command
6. Ms. Robin B. Buckelew, Director, Engineering and Systems Directorate, U.S. Army Space and Strategic Defense Command
7. Ms Carol Smith, Deputy Assistant Secretary of the Army (Civilian Personnel & Equal Employment Opportunity Policy) Assistant Secretary of the Army, Manpower & Reserve Affairs/Director of Civilian Personnel, Directorate of the Chief of Staff of Personnel, Department of the Army
8. Dr. Edgar Johnson, Director, U.S. Army Research Institute, Deputy Chief of Staff for Personnel
9. BG Arthur Dean, Director, Enlisted Personnel Management, Deputy Chief of Staff for Personnel
10. BG Robert Kerr, Director of Human Resources, Deputy Chief of Staff for Personnel
11. Mr. John A. Riente, Technical Advisor to the Deputy Chief of Staff for Operations and Plans
12. MG Gerald H. Putman, Assistant Deputy Chief of Staff for Operations and Plans
13. Mr. James D. Davis, Assistant Deputy Chief of Staff for Intelligence
14. BG Trent N. Thomas, Assistant Deputy Chief of Staff for Intelligence
15. Ms. Janet C. Menig, Deputy Assistant Chief of Staff for Installation Management, Office, Chief of Staff
16. Dr. Henry C. Dubin, Technical Director, U.S. Army Operational Test & Evaluation Command, Office, Chief of Staff.

The members of the Performance Review Board for the Consolidated Commands are:

1. BG Russell L. Fuhrman, Deputy Chief of Staff, Engineering, Headquarters (HQ), U.S. Army Europe (USAREUR)
2. MG Thomas F. Sikora, Deputy Chief of Staff, Personnel, Headquarters (HQ) U.S. Army Europe
3. Mr. Carl R. Postlewate, Assistant Deputy Chief of Staff, Engineer (Engineering and Housing), U.S. Army Europe
4. Mr. Leland A. Goeke, Jr., Assistant Deputy Chief of Staff for Personnel (Civilian Personnel), U.S. Army Europe
5. MG John P. Herrling, Chief of Staff, U.S. Army Training and Doctrine Command
6. MG Larry Lehowicz, Deputy Chief of Staff for Combat Developments, U.S. Army Training and Doctrine Command
7. Mr. Thomas Edwards, Deputy Commanding General, U.S. Army Combined Arms Support Command and Fort Lee, U.S. Army Training and Doctrine Command
8. Ms. Toni B. Wainwright, Assistant Deputy Chief of Staff for Base Operations Support, Headquarters, U.S. Army Training and Doctrine Command
9. Mr. Thomas D. Collinsworth, Director, MTMC Transportation Engineering Agency, Headquarters, Military Management Command
10. Mr. William R. Lucas, Deputy to the Commander, Headquarters, Military Traffic Management Command
11. BG Clair Gill, Director, Resource Management, Forces Command
12. Mr. William M. Wilkinson, Deputy Director, Resource Management, Headquarters, Forces Command
13. Mr. William S. Fraim, Civilian Personnel Director, Assistant Deputy Chief for Personnel and Installation Management, Headquarters, Forces Command
14. BG R.E. Wynn, Commander, Information Systems Engineering Command, U.S. Army Information Systems Command
15. BG C.G. Sutten, Jr., Commander, 5th Signal Command, Information Systems Command
16. Mr. Leonard J. Mabius, Senior Technical Director/Chief Engineer, Headquarters, U.S. Army Information Systems Command
17. Dr. Michael Gentry, Technical Director, Army Information Systems Engineering Command, U.S. Army Information Systems Command
18. Mr. William S. Rich, Jr., Deputy and Technical Director, U.S. Army Foreign Science and Technology Center, U.S. Army Intelligence and Security Command.

The members of the Performance Review Board for the U.S. Army Acquisition Executive are:

1. Mr. Dale Adams, Program Executive Officer, Armaments
2. Mr. George G. Williams, Program Executive Officer, Tactical Missiles
3. MG Dewitt T. Irby, Program Executive Officer, Aviation
4. BG Richard A. Black, Program Executive Officer, Missile Defense
5. BG David Gust, Program Executive Officer, Communications System
6. Mr. Neil Atkinson, Program Executive Officer, Communications System
7. Mr. David Borland, Director, Information Systems Selection & Acquisition Agency (DISC4)
8. Mr. Maurice R. Donnelly, Assistant Deputy for Plans and Programs (ASA(RDA)).

The members of the Performance Review Board for the United States Army, Corps of Engineers (USACE) are:

1. MG John F. Sobke, Deputy Chief of Engineers, Office of the Chief of Engineers
2. Mr. John F. Wallace, Director, Resource Management, USACE
3. MG Albert J. Genetti, Jr., Commanding General, U.S. Army Engineer Division
4. Mr. Walter E. Boge, Director, USACE U.S. Army Topographic Engineering Center
5. Mr. C. Cary Jones, Chief, Environmental Restoration Division, USACE Directorate Of Military Programs
6. Mr. Paul D. Barber, Chief, Engineering Division, USACE Directorate of Civil Works

7. BG Milton Hunter, Commanding General, United States Army Engineer Division, South Pacific
8. Mr. Kisuk Cheung, Director of Engineering, USACE Pacific Ocean Division
9. Mr. Webster J. Hill, Jr., Director of Construction Operations, USACE Lower Mississippi Valley Division
10. Mr. Charles R. Schroer, Chief, Construction Division, USACE Directorate of Military Programs
11. Mr. John E. Velehradsky, Director of Planning, USACE North Pacific Division
12. Mr. William E. Roper, Ph.D., Assistant Director for Research & Development (Civil Works Programs), USACE Directorate of Research & Development.

The members of the Performance Review Board for the United States Army, Office of The Surgeon General are:

1. MG Thomas R. Tempel, Acting Deputy Surgeon General, and Chief, Dental Corps, Office of the Surgeon General
2. MG Ronald H. Blanck, Commander, Walter Reed Army Medical Center
3. Mr. Robert R. Engle, Ph.D., Deputy Director, Division of Experimental Therapeutics, Walter Reed Army Institute of Research
4. BG Nancy R. Adams, AN, Director of Personnel, Chief, Army Nurse Corps, and Assistant Surgeon General, Office of The Surgeon General
5. Mr. Kamal G. Ishak, M.D., Chairman, Department of Hepatic Pathology, Armed Forces Institute of Pathology
6. Mr. Arthur D. Mason, M.D., Chief, Laboratories Division, U.S. Army Institute of Pathology
7. Mr. Fathollah K. Mostofi, M.D., Chairman, Department of Genitourinary Pathology, Armed Forces Institute of Pathology
8. Ms. Florabel G. Mullick, M.D., Associate Director, Center for Advanced Pathology, Armed Forces Institute of Pathology
9. Mr. Timothy J. O'Leary, M.D., Chairman Department of Cellular Pathology, Armed Forces Institute of Pathology
10. Mr. James A. Vogel, Ph.D., Director, Exercise Physiology Division, U.S. Army Institute of Environmental Medicine.

[FR Doc. 94–18632 Filed 7–29–94; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF ENERGY

Financial Assistance Award: International Electronic Technology, Inc.

AGENCY: Department of Energy.

ACTION: Notice of Intent.

SUMMARY: The U.S. Department of Energy announces that pursuant to 10 CFR 600.6(a)(2) it is making a financial assistance award under Grant Number DE-FG01–94CE15523 to International Electronic Technology Corporation. The proposed grant will provide funding in the estimated amount of $99,477 by the Department of Energy for the purpose of saving energy through development of a power factor correction system by means of continuous modulation.

SUPPLEMENTARY INFORMATION: The Department of Energy has determined in accordance with 10 CFR 600.14(e)(1) that the unsolicited application for financial assistance submitted by International Electronic Technology Corporation is meritorious based on the general evaluation required by 10 CFR 600.14(d) and the proposed project represents a unique idea that would not be eligible for financial assistance under a recent, current or planned solicitation. The applicant, International Electronic Technology Corporation, has been designated to perform the development and commercialization work by the current owner of this patented technology. The skills of its highly experienced electrical engineering professionals and its engineering facilities will be used in the project work. The invention is a solution to problems of power line disruption caused by inductive loads. It will save energy because reliable and inexpensive power factor correction device availability will encourage more use of power factor correction systems. The proposed project is not eligible for financial assistance under a recent, current or planned solicitation because the funding program, the Energy Related Invention Program (ERIP), has been structured since its beginning in 1975 to operate without competitive solicitations because the authorizing legislation directs ERIP to provide support for worthy ideas submitted by the public. The program has never issued and has no plans to issue a competitive solicitation.

FOR FURTHER INFORMATION CONTACT: Please write the U.S. Department of Energy, Office of Placement and Administration, ATTN: Rose Mason, HR–531.23, 1000 Independence Ave., S.W., Washington, D.C. 20585.

The anticipated term of the proposed grant is 18 months from the date of award.

Issued in Washington, D.C. on July 21, 1994.

Richard G. Lewis,

Contracting Officer, Office of Placement and Administration.

[FR Doc. 94–18671 Filed 7–29–94; 8:45 am]

BILLING CODE 6450–01–P

Morgantown Energy Technology Center, Financial Assistance Award; (Award of Grant)

AGENCY: U.S. Department of Energy (DOE), Morgantown Energy Technology Center.

ACTION: Notice of noncompetitive Financial Assistance Award.

SUMMARY: Based upon a determination made pursuant to 10 CFR 600.7(b)(2)(i) Criteria (B), the DOE, Morgantown Energy Technology Center for the Metairie Site Office, announces that it intends to make a Non-Competitive Financial Assistance (Grant) Award to the Interstate Oil and Gas Compact Commission for work entitled "Environmental Compliance for Natural Gas and Oil Exploration and Production," at an estimated cost of $450,000 for a 36 month project period.

FOR FURTHER INFORMATION CONTACT: D. Denise Riggi, I–07 U.S. Department of Energy Morgantown Energy Technology Center P.O. Box 880 Morgantown, West Virginia 26507–0880 Telephone: (304) 291–4241 Procurement Request No. 21–94MC31150.000

SUPPLEMENTARY INFORMATION: The purpose of the grant is to provide financial assistance to the Interstate Oil and Gas Compact Commission (IOGCC), which has initiated a project involving the promotion of dialogue and building of partnerships among the natural gas and oil industry, the States, and other interested parties, to address environmental issues constraining domestic natural gas and oil resource recovery, through a series of meetings of IOGCC committees and organizations. These committees include the Appalachian and Illinois Basin Directors, the NORM Committee, and the Drilling and Production Database Standardization Committee. This project also involves the IOGCC, working through its committees and organizations, to transfer regulatory compliance information and environmental research results through a series of up to 10 regional workshops on naturally occurring radioactive materials (NORM) and other topics

related to "Environmental Compliance for Natural Gas and Oil Exploration and Production." The primary objective of the workshops is to train and motivate applicable independent and major natural gas and oil operating company personnel and state regulatory personnel to more effectively comply with and understand State and Federal environmental regulations and apply available mitigation technologies for natural gas and oil exploration and production operations. The workshops provide practical training focusing on the methodology for environmental compliance for natural gas and oil exploration and production operations. Specific topics may include: Federal Environmental Laws and Regulations, State Environmental Laws and Regional Environmental Concerns, Waste Management Planning (brief summary of API/GRI/DOE Developing Area-Specific Waste Management Plans for Exploration and Production Operations), Waste Minimization and Pollution Prevention, Oil Spill Prevention Control and Countermeasures, Well Abandonment and Plugging, Underground Injection Control, Wastewater Discharge Regulations and National Pollution Discharge Elimination System (NPDES) Permitting, Groundwater Protection Policies, Wetlands Regulations and Section 404 Permitting, Naturally Occurring Radioactive Materials (NORM) in Natural Gas and Oil Production, Environmental Audits and Liability Issues, H_2S Safety Concerns, Stormwater Runoff, and other regulatory compliance topics. The IOGCC and its contractors will be responsible for all course preparation, course instruction, preparation of all course materials, training room verification, delivery of training materials, registration, administration of all hotel arrangements, scheduling, promotional mailings, preparation, printing, and assembly and shipment of course materials. These workshops are currently planned in cities across the United States over a 36-month period and would be based on NORM training and other materials already developed by the IOGCC, Federal and State environmental laws and regulations, American Petroleum Institute documents, and other materials. Through these materials, a determination can be made which describes the best way to plan for environmental compliance responsibilities for natural gas and oil exploration and production operations.

Issued in Washington, D. C., July 22, 1994.

Louie L. Calaway,

Director, Acquisition and Assistance Division, Morgantown Energy Technology Center.

[FR Doc. 94–18672 Filed 7–29–94; 8:45 am]

BILLING CODE 6450–01–P

Chicago Operations Office; Acceptance of an Unsolicited Application; National Association of Regulatory Utility Commissioners (NARUC)

AGENCY: U.S. Department of Energy.

ACTION: Notice of Acceptance of an Unsolicited Application.

SUMMARY: The Department of Energy (DOE), DOE Chicago Operations Office, announces that pursuant to the DOE Financial Assistance Rule, 10 CFR 600.14(f), it intends to award a grant to the NARUC based on the acceptance of an unsolicited application. The objective of the proposed grant is to provide financial support to conduct workshops which will provide a forum for interested parties to present ideas and discuss issues confronting the changing electric utility industry.

FOR FURTHER INFORMATION CONTACT: Valerie A. Brandon, PO–30, U.S. Department of Energy, 1000 Independent Avenue SW., Washington, DC 20585, (202) 586–8426.

SUPPLEMENTARY INFORMATION: These workshops will provide a forum for public utility commissioners, as well as representatives of utilities and other generators of electricity, consumers, environmentalists, state regulators, DOE, and other industry experts to discuss, evaluate, and develop methods to address important issues relating to the Energy Policy Act (EPACT), particularly Title 7, Subtitle B. The format for these workshops will emphasize the use of panels to address specific topics and will include nationally recognized experts from state and federal government, industry representatives, and consultants. This application is meritorious based on the general evaluation that these workshops will develop complementary policies that will coordinate and render coherent federal and state regulations of transmission services provided by the electric utility industry. The NARUC is a non-profit organization and is the only national association for state regulators. It has been the only entity to officially serve and represent the interests of public utility regulation via educational, research, and advocacy programs directed and coordinated by its membership. The NARUC is made up of governmental bodies of the fifty states, District of Columbia, Puerto Rico and the Virgin Islands and its mission is to serve consumer interest by seeking to improve the quality and effectiveness of public utility regulation in America. This application represents a unique approach and does not duplicate or resemble the substance of a recent, current, or planned solicitation, and DOE has determined that a competitive solicitation would be inappropriate. DOE plans to provide funding in the amount of $250,000.00 for this twenty-four month project which is expected to begin in September 1994.

Issued in Chicago, Illinois on July 1, 1994.

Timothy S. Crawford,

Assistant Manager for Human Resources and Administration.

[FR Doc. 94–18670 Filed 7–29–94; 8:45 am]

BILLING CODE 6450–01–M

DOE Request for an Additional 45 Days to Respond to Defense Nuclear Facilities Safety Board Recommendation 94–1, Improved Schedule for Remediation in the Defense Nuclear Complex

AGENCY: Department of Energy.

ACTION: Notice.

SUMMARY: Section 315(b) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2286d(b) requires the Department of Energy to publish its response to Defense Nuclear Facility Safety Board recommendations for notice and public comment. The Defense Nuclear Facility Safety Board published Recommendation 94–1, concerning an improved schedule for remediation in the defense nuclear facilities complex, in the **Federal Register** on June 3, 1994 (59 FR 28848). The Department of Energy (DOE) hereby publishes notice of a request for 45-days additional time to respond to Recommendation 94–1 as allowed by the statute cited above.

DATES: Comments, data, views, or arguments concerning the Secretary's request are due on or before August 31, 1994.

ADDRESSES: Send comments, data, views, or arguments concerning the Secretary's response to: Defense Nuclear Facility Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, D.C. 20004.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas P. Grumbly, Assistant Secretary for Environmental Restoration and Waste Management, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

Issued in Washington, DC, on July 14, 1994.

Mark B. Whitaker,

Acting Departmental Representative to the Defense Nuclear Facilities Safety Board.

The Honorable John T. Conway,
Chairman, Defense Nuclear Facilities Safety Board, Suite 700, 625 Indiana Avenue, NW., Washington, D.C. 20004

Dear Mr. Chairman: This will acknowledge receipt of your Recommendation 94–1, Improved Schedule for Remediation in the Defense Nuclear Facilities Complex. The issues identified are extensive and may have significant impact on many of our existing programs in the Recommendation and Plans. Accordingly, the Department will require additional time to fully evaluate these cross-cutting issues and their impact from both a Headquarters and field perspective.

In accordance with 42 U.S.C. 2286d, the Department requests an additional 45 days to respond to Recommendation 94–1. If a 45-day-extension is granted, the Department will respond to the Board by September 1, 1994.

Sincerely,

Hazel R. O'Leary.

[FR Doc. 94–18673 Filed 7–29–94; 8:45 am]

BILLING CODE 6450–01–M

Federal Energy Regulatory Commission

[Docket No. CP94–641–000]

Columbia Gas Transmission Corp.; Notice of Intent To Prepare an Environmental Assessment for the Proposed 1994 Line A–5 Replacement Project and Request for Comments on Environmental Issues

July 26, 1994.

The staff of the Federal Energy Regulatory Commission (FERC or the Commission) will prepare an environmental assessment (EA) that will discuss environmental impacts of the construction and operation associated with the replacement of facilities proposed in the 1994 Line A–5.[1] This EA will be used by the Commission in its decision-making process to determine whether an environmental impact statement is required and whether or not to approve the project.

Summary of the Proposed Project

Columbia Gas Transmission Corporation (Columbia) wants Commission authorization to:

- replace 4.8 miles of 12-inch-diameter Line A–5 pipeline in Broome County, New York;
- replace 0.1 mile of Line A–5 across Owego Creek, in Tioga County, New York, and Nanticoke Creek and an unnamed tributary to Crocker Creek in Broome County, New York because the pipeline is exposed; and
- hydrostatically test 0.60 mile of existing Line A–5 under Interstate 81, the Chenango River, Chenango Street, and State Route 7 in Broome County, New York; and
- replace two existing above ground valves and one below ground valve at milepost 2.48.

The general location of these facilities is shown in appendix 1.[2]

Land Requirements for Construction

The proposed replacement pipeline would be built within or adjacent to existing pipeline right-of-way. For a portion of the project the pipeline would be offset between 10 to 50 feet and would be in the same location as the original pipeline for the remainder of the project. Typically, Columbia would use a 50-foot-wide construction right-of-way, part of which would overlap existing right-of-way, and it would use a 50-foot-wide permanent right-of-way. Columbia would require some temporary right-of-way clearing in certain areas.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. We call this "scoping". The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission requests public comments on the scope of the issues it will address in the EA. All comments received are taken into account during the preparation of the EA.

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- geology and soils
- water resources, fisheries, and wetlands
- vegetation and wildlife
- endangered and threatened species
- land use
- cultural resources
- hazardous waste

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to Federal, state, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we recommend that the Commission approve or not approve the project.

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Columbia. Keep in mind that this is a preliminary list; the list of issues will be added to, subtracted from, or changed based on your comments and our own analysis. Issues are:

- The replacement pipeline would cross within 50 feet of 12 residences and 2 businesses.
- The pipeline would cross six perennial streams and nine wetlands.
- The pipeline may cross or be near archeological sites.

Public Participation

You can make a difference by sending a letter with your specific comments or concerns about the project. You should focus on the potential environmental effects of the proposal, alternatives to the proposal (including alternative routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please follow the instructions below to ensure that your comments are received and properly recorded:

- Address your letter to: Lois Cashell, Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, D.C. 20426;
- Reference Docket No. CP94–641–000;
- Send a *copy* of your letter to: Mr. John Wisniewski, EA Project Manager, Federal Energy Regulatory Commission, 825 North Capitol Street., NE. Room 7312, Washington, D.C. 20426; and

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[1] Columbia Gas Transmission Corporation's application was filed with the Commission under section 7 of the Natural Gas Act.

[2] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies are available from the Commission's Public Reference Branch, Room 3104, 941 North Capitol Street, N.E., Washington, D.C. 20426, or call (202) 208–1371. Copies of the appendices were sent to all those receiving this notice in the mail.

• Mail your comments so that they will be received in Washington, D.C. on or before August 10, 1994.

If you wish to receive a copy of the EA, you should request one from Mr. Wisniewski at the above address.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding or become an "intervenor". Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must provide copies of its filings to all other parties. If you want to become an intervenor you must file a Motion to Intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) attached as appendix 2. You do not need intervenor status to have your scoping comments considered.

Additional information about the proposed project is available from Mr. John Wisniewski, EA Project Manager, at (202) 208–1073.

Lois D. Cashell,

Secretary.

[FR Doc. 94–18639 Filed 7–29–94; 8:45 am]

BILLING CODE 6717–01–P

[Project No. 11373–000]

SOCAL Energy Limited Partnership; Intent To Prepare a Joint Environmental Impact Statement/ Environmental Impact Report, Conduct Public Scoping Meetings and Site Visit, and Request Additional Scientific Studies

July 26, 1994.

The Federal Energy Regulatory Commission (FERC) and the City of San Diego (City) have received a proposal to construct the proposed Boulder Valley Pumped Storage Project, FERC No. 11373–000, City DEP No. 93–0684. The project would utilize the San Vicente Reservoir located in San Diego County, California, about 30 miles northeast of downtown San Diego.

The FERC staff has determined that licensing this project 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 project in accordance with the National Environmental Policy Act (NEPA).

The City is the state lead agency charged under the California Environmental Quality Act (CEQA) with the responsibility for preparation on an Environmental Impact Report (EIR). The City will be a cooperating agency in preparing the EIS. The City will fulfill their CEQA responsibilities in part by participating actively in the scheduled scoping meetings and in the preparation of a joint EIS/EIR.

All agencies, organizations, and members of the public electing to exercise their right to comment on the scope and content of the EIS/EIR under NEPA and CEQA guidelines should participate directly in the joint EIS/EIR process conducted by FERC and the City as the lead agencies under NEPA and CEQA, respectively.

The review process being utilized for the Boulder Valley Pumped Storage Project will initiate environmental compliance under NEPA and CEQA concurrently with the preparation of the license application. Under the Integrated Environmental Compliance process, scoping and draft EIS/EIR preparation will occur prior to the filing of the final license application with FERC. Participation by interested agencies and members of the public in the early initiation of the NEPA/CEQA process is essential because this process will not be repeated upon the filing of the final license application.

The EIS/EIR will objectively consider both site-specific and cumulative environmental impacts of the project and reasonable alternatives, and will include an economic, financial, and engineering analysis. A draft EIS/EIR will be circulated for review and comment by all interested parties, and FERC and the City will hold a public meeting on the draft EIS/EIR. All comments filed on the draft EIS/EIR will be analyzed by the staffs and considered in a final EIS/EIR. The staffs' conclusions and recommendations will then be presented for the consideration by the Commission in reaching its final licensing decision and for the consideration by the City Council in reaching its certification decision under CEQA.

Scoping Meetings

FERC and the City will conduct two scoping meetings on August 22 and 23, 1994. These meetings are scheduled as follows:

August 22, 1994, 7:00 pm, City of Poway, Council Chamber, 13325 Civic Center Drive, Poway, California

August 23, 1994, 10:00 am, City of San Diego, Water Utilities Department, 5540 Kiowa Drive, La Mesa, California

The morning meeting is oriented towards the resource agencies and the evening meeting towards the public; however, you may attend either meeting. We'll treat written and verbal responses equally.

Interested individuals, organizations, and agencies are invited to comment on the scope of the proposed EIS/EIR. Scoping will help ensure that a full range of issues related to this proposal are addressed in the EIS/EIR, and also will identify significant or potentially significant impacts that may result from the proposed project.

To help focus discussions at the meetings, a preliminary scoping document (Scoping Document I) outlining subject areas to be addressed in the EIS/EIR will be mailed to agencies and interested individuals on the FERC and City mailing lists. Copies of Scoping Document I will also be available at the scoping meetings.

Objectives—At the scoping meetings, the FERC staff will: (1) identify preliminary environmental issues related to the proposed project; (2) identify preliminary resource issues that are not important and do not require detailed analysis; (3) identify reasonable alternatives to be addressed in the EIS; (4) solicit from the meeting participants all available information, especially quantified data, on the resource issues; and (5) encourage statements from experts and the public on issues that should be analyzed in the EIS, including points of view in opposition to, or in support of, the staffs' preliminary views.

Procedures—The meetings will be recorded by a court reporter and all statements (oral and written) thereby become a part of the formal record of the Commission proceedings for the Boulder Valley Project. Individuals presenting statements at the meetings will be asked to clearly identify themselves for the record. Responsible agencies are requested to include their statutory responsibilities in connection with this project when responding.

Persons choosing not to speak at the meetings, but who have views on the issues or information relevant to the issues, may submit written statements for inclusion in the public record at the meetings. In addition, written scoping comments may be filed with the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, D.C. 20426, and the City of San Diego, Development Services Department, 1222 First Avenue, 5th Floor, San Diego, California, 92107 until September 23, 1994.

All written correspondence should clearly show the following caption on the first page: Boulder Valley Pumped Storage Project, FERC Project No. 11373–000, DEP No. 93–0684.

Site Visit:

A site visit to the Boulder Valley Hydro Project is planned for August 22, 1994. Those who wish to attend should plan to meet at 9:00 am at the gated entrance to San Vicente Reservoir or contact Alan Mitchnick, (202) 219–2826 for details.

Consultation with the State Historic Preservation Officer

With this notice, we are initiating consultation with the State Historic Preservation Officer (SHPO), as required by § 106 of the National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR at § 800.4.

Additional Scientific Study Requests

In accordance with section 4.32(b)(7) of the Commission's regulations, if any resource agency, SHPO, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate, factual basis for a complete analysis of this project on its merits, they must file a request for the study with the Commission, together with justification for such request, not later than September 23, 1994, and serve a copy of the request on the potential applicant. This substitutes for the request for additional scientific studies made at the time of tendering for filing of an application under the traditional licensing process.

For further information on this process, please contact Alan Mitchnick, FERC, (202) 219–2826, or Cathy Cibit, City of San Diego (619) 236–6267.

Lois D. Cashell,

Secretary.

[FR Doc. 94–18606 Filed 7–29–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. ER94–1328–000]

CMEX Energy, Inc.; Issuance of Order

July 26, 1994.

On June 2, 1994, CMEX Energy, Inc. (CMEX) submitted for filing a rate schedule under which CMEX will engage in wholesale electric power and energy transactions as a marketer. CMEX also requested waiver of various Commission regulations. In particular, CMEX requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by CMEX.

On July 12, 1994, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under 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 CMEX 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, CMEX 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 within the corporate purposes of the applicant, and compatible with the public interests, 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 CMEX'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 11, 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. 94–18640 Filed 7–29–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP94–647–000]

K N Interstate Gas Transmission Co.; Request Under Blanket Authorization

July 26, 1994.

Take notice that on July 7, 1994, K N Interstate Gas Transmission Co. (K N Interstate), P.O. Box 281304, Lakewood, Colorado 80228–8304, filed in Docket No. CP94–647–000 a request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212) for authorization to construct and operate two delivery taps and appurtenant facilities under K N Interstate's blanket certificate issued in Docket No. CP83–140–000, *et al.*, pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

K N Interstate proposes to construct and operate two new delivery points to facilitate the additional delivery of natural gas to K N Energy, Inc. (KN), an existing local distribution company customer, as shown below. It is stated that the proposed taps would be added as delivery points under an existing transportation agreement between K N Interstate and KN, and the related volumes of gas would be within the current maximum daily transportation quantity set forth in the agreement.

(1) It is stated that one delivery point would be located in SW/4, Section 15, Township 24 North, Range 61 West, in Goshen County, Wyoming, to serve a commercial customer. K N Interstate estimates that the quantities of gas to be delivered through this point would be approximately 1,600 Mcf on a peak day and 300,000 Mcf annually, and the cost of the tap and value would be $25,000.

(2) It is stated that one delivery point would be located in SW/4, Section 32, Township 7 North, Range 6 West, in Clay County, Nebraska, to serve a grain dryer customer. K N Interstate estimates that the quantities of gas to be delivered through this point would be approximately 72 Mcf on a peak day and 655 Mcf annually, and the cost of the tap and value would be $1,150.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 94–18607 Filed 7–29–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP94–234–001]

Transwestern Pipeline Company; Proposed Changes in FERC Gas Tariff

July 26, 1994.

Take notice that on July 21, 1994, Transwestern Pipeline Company

(Transwestern) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, with an effective date of June 6, 1994.

Substitute 1st Revised Sheet No. 95.

On May 5, 1994, Transwestern filed tariff sheets containing changes to its tariff based upon one year of experience under its Order 636 restructuring filing. On June 3, 1994, the Commission issued an order accepting the tariff sheets to be effective June 6, 1994, subject to Transwestern correcting a typographical error in the net present value formula in the electronically filed version of 1st Revised Sheet No. 95. On June 20, 1994, Transwestern submitted a revised electronic version of such tariff sheet in accordance with the June 6 Order. However, such tariff sheet was not submitted in the context of a formal filing. Therefore, Transwestern is submitting Substitute 1st Revised Sheet No. 95 as requested by the Commission, but notes that the typographical error only appeared on the electronic version and did not appear on the previously filed 1st Revised Sheet No. 95.

Transwestern states that copies of the filing were served on its gas utility customers, interested state commissions, and all parties to this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, D.C., 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure.

All such protests should be filed on or before August 2, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94–18608 Filed 7–29–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP94–157–003]

Columbia Gas Transmission Corporation; Proposed Changes in FERC Gas Tariff

July 26, 1994.

Take notice that on July 22, 1994, Columbia Gas Transmission Corporation (Columbia) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following proposed tariff sheets, to be effective April 1, 1994:

Second Substitute Fourth Revised Sheet No. 25

Second Substitute Fourth Revised Sheet No. 26

Second Substitute Fourth Revised Sheet No. 27

Second Substitute Fourth Revised Sheet No. 28

Columbia states that it is tendering this filing in accordance with its reply comments filed with the Federal Energy Regulatory Commission (Commission) on July 1, 1994, in the instant docket. The filing revises Columbia's Transportation Cost Recovery Adjustment (TCRA) rates to incorporate a projection of revenue credits for capacity released and assigned on upstream pipelines.

Columbia requests that the Commission treat this filing as a compliance filing and that it grant such waivers as may be necessary to accept the lower revised rates to be effective April 1, 1994.

Columbia states that copies of the filing were served upon the Company's jurisdictional customers, interested state commissions and parties to this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, D.C. 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before August 2, 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 Columbia's filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94–18609 Filed 7–29–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP94–120–006]

Koch Gateway Pipeline Company; Notice To Move Tariff Sheets Into Effect

July 26, 1994.

Take notice that on July 22, 1994, Koch Gateway Pipeline Company (Koch Gateway) filed in accordance with Section 154.67(a) of the Commission's Rules and Regulations, 18 CFR 154.67(a), to move into effect the tariff sheets listed in Appendix A to be effective August 1, 1994.

On January 31, 1994, Koch Gateway filed revised tariff sheets pursuant to section 4 of the Natural Gas Act, proposing changes to its existing rates and terms and conditions for transportation and storage services. Koch Gateway proposed generally an effective date of March 1, 1994.

On March 2, 1994, the Commission accepted certain tariff sheets, rejected one tariff sheet and suspended the remainder of the tariff sheets, subject to refund and conditions, to become effective August 3, 1994. Koch Gateway Pipeline Company, 66 FERC 61,279 (1994). The Commission also established a hearing concerning the lawfulness of Koch Gateway's rates. On May 2, 1994, the Commission granted Koch Gateway's request to shorten the suspension period to August 1, 1994. Koch Gateway Pipeline Company, 67 FERC 61,128 (1994).

As part of Appendix A, Koch Gateway is filing Substitute First Revised Sheet No. 1706. This sheet was apparently forgotten from Appendix A of the March 2, 1994, suspension order, so Koch Gateway hereby requests clarification that this sheet was approved, subject to refund. In addition, as part of Appendix A, Koch Gateway is filing Second Revised Sheet No. 503 to reflect section numbering changes. Koch Gateway is also filing First Revised Sheet Nos. 4900 and 5000 and Second Substitute First Revised Sheet No. 5200 to reflect the deletion of one of the listed telecopy numbers.

Koch Gateway also states that this filing is being mailed to all parties on the official service list created by the Secretary in this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, D.C. 20426, in accordance with § 385.211 of the Commission's regulations. All such protests should be filed on or before August 2, 1994.

Protests will be considered by the Commission in determining appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

Appendix A

(To be effective August 1, 1994)

Substitute First Revised Sheet No. 400
Substitute First Revised Sheet No. 402
Substitute First Revised Sheet No. 403
Substitute First Revised Sheet No. 501
Substitute First Revised Sheet No. 502
Second Revised Sheet No. 5031

Substitute First Revised Sheet No. 504
Substitute First Revised Sheet No. 807
Substitute First Revised Sheet No. 808
Substitute First Revised Sheet No. 1002
Substitute Second Revised Sheet No. 11042
Substitute First Revised Sheet No. 1305
Substitute First Revised Sheet No. 1306
Substitute First Revised Sheet No. 1307
Substitute First Revised Sheet No. 1308
Substitute First Revised Sheet No. 1309
Substitute Original Sheet No. 1310
Substitute First Revised Sheet No. 1401
Substitute First Revised Sheet No. 1409
Substitute First Revised Sheet No. 1501
Substitute First Revised Sheet No. 1502
Substitute First Revised Sheet No. 1700
Substitute First Revised Sheet No. 1706
Substitute First Revised Sheet No. 1801
Substitute First Revised Sheet No. 1802
Substitute First Revised Sheet No. 1803
Substitute First Revised Sheet No. 1804
Substitute First Revised Sheet No. 1805
Substitute First Revised Sheet No. 1806
Substitute First Revised Sheet No. 1807
Substitute First Revised Sheet No. 1808
Substitute First Revised Sheet No. 1809
Substitute First Revised Sheet No. 1810
Substitute First Revised Sheet No. 1811
Substitute First Revised Sheet No. 1813
Second Substitute First Revised Sheet No. 19064
Substitute First Revised Sheet No. 1907
Substitute First Revised Sheet No. 1908
Substitute First Revised Sheet No. 1909
Substitute First Revised Sheet No. 2001
Substitute Second Revised Sheet No. 27004
Substitute Second Revised Sheet No. 2701
Substitute Second Revised Sheet No. 2702
Substitute Second Revised Sheet No. 2703
Substitute Second Revised Sheet No. 2704
Substitute Second Revised Sheet No. 2705
Substitute Second Revised Sheet No. 2706
Substitute First Revised Sheet No. 2707
Substitute Original Sheet No. 2708
Substitute First Revised Sheet No. 3600
Substitute First Revised Sheet No. 3608
Substitute First Revised Sheet No. 4100
Substitute First Revised Sheet No. 4200
Substitute First Revised Sheet No. 4300
Substitute First Revised Sheet No. 4400
Substitute First Revised Sheet No. 4401
Substitute First Revised Sheet No. 4500
Substitute First Revised Sheet No. 4501
First Revised Sheet No. 4900
First Revised Sheet No. 5000
Second Substitute First Revised Sheet No. 52004

[FR Doc. 94-18610 Filed 7-29-94; 8:45 am]

BILLING CODE 6717-01-M

Morgantown Energy Technology Center, Financial Assistance Award; (Solicitation Announcement)

AGENCY: U.S. Department of Energy (DOE), Morgantown Energy Technology Center.

ACTION: Solicitation available notice.

SUMMARY: The U.S. Department of Energy is announcing its intent to issue solicitation number DE-SC21-94MC31173, for cooperative agreement proposals for work entitled "Industrial Advanced Turbine Systems (ATS) Development and Demonstration." Authority for this action is the DOE Organization Act, Public Law 95-91, and the DOE Financial Assistance Regulations 10 CFR 600. Multiple cooperative agreement awards are anticipated and will consist of a 3-phase effort having a total estimated period of performance of sixty (60) months. A determination will be made whether or not to continue funding during subsequent phases based upon successful accomplishments, completion of objectives, and available funding. DOE plans to make available funds totalling approximately $99M over the project duration. For the purposes of this solicitation, an industrial gas turbine shall comprise those gas turbines with air inflow of the compressor of 15 to 55 kilograms per second at International Standards Organization (ISO) conditions. A minimum cost share requirement is 35 percent for the beginning phase and shall increase to 50 percent of cost share by the start of the last phase. The minimum overall cost share shall be 41 percent of the total estimated cost for the completion of all phases. In addition, the applicant must be in the business of final assembly, testing, and marketing of complete gas turbines.

DATES: The solicitation will be issued on or about August 2, 1994, with a proposal due date 60 days after issuance.

FOR FURTHER INFORMATION CONTACT: Beverly J. Harness, I-07, U.S. Department of Energy, Morgantown Energy Technology Center, P.O. Box 880, Morgantown, West Virginia 26507-0880, Telephone: (304) 291-4089, Procurement Request No. 21-94MC31173.000

SUPPLEMENTARY INFORMATION: The objective of this solicitation is to join the DOE with industry in research and development activities that will lead to commercial implementation of ATS. The successful offeror(s) will be tasked with (1) developing the core engine of the ATS including design, manufacture, and testing of full-scale engine components; (2) developing integrated subsystem components; (3) performing system testing and providing information for permitting; and (4) construction, installation, and testing of the full-scale ATS. A separate **Federal Register** notice will be issued for solicitation number DE-SC21-94MC31176 for research titled "Utility Advanced Turbine Systems (ATS) Technology Readiness Testing and Pre-Commercial Demonstration". Only written requests for the solicitation will be honored. The solicitation package will be provided on electronic media utilizing Word Perfect Version 5.1. Letters requesting the solicitation should be addressed to Beverly J. Harness at the address above and must identify the SCAP number, DE-SC21-94MC31173.

Randolph L. Kesling,

Acting Director, Acquisition and Assistance Division, Morgantown Energy Technology Center.

[FR Doc. 94-18668 Filed 7-29-94; 8:45 am]

BILLING CODE 6450-01-P

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-62136; FRL-4744-1]

Advisory Regarding Availability of an Improved Asbestos Bulk Sample Analysis Test Method; Supplementary Information on Bulk Sample Collection and Analysis

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of advisory.

SUMMARY: This notice announces the availability of an improved asbestos bulk sample analysis test method for use with bulk samples collected for identification of asbestos-containing materials under the Asbestos Hazard Emergency Response Act (AHERA) regulations and the asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP). Supplementary information on the collection of bulk samples and analysis of these samples by the improved method is also provided.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, Telephone: (202-554-1404), TDD: 554-0551.

SUPPLEMENTARY INFORMATION: EPA recently developed an improved test method entitled "Method for the Determination of Asbestos in Bulk Building Materials" (EPA/600/R-93/116). Copies of the test method are available by telephoning the National Technical Information Service (NTIS) at (800)553-6847. The NTIS identifier for the test method is PB93-218576.

The test method provides clarifications and improvements to the 1982 EPA "Interim Method for the Determination of Asbestos in Bulk Insulation Samples" (as found in 40 CFR part 763 Appendix A to Subpart F). Specifically, use of the improved

method can provide more precise analytical results especially at low asbestos concentrations, enhanced analysis of floor tiles which may contain thin asbestos fibers below the limits of resolution of the polarized light microscope (PLM), and clearer instruction on the analysis of bulk materials, particularly where multiple layers are present.

The 1982 method is limited in that it does not provide guidance for analyzing materials that contain thin (<0.25 micrometers) asbestos fibers. As a consequence, floor tiles which were analyzed according to the 1982 method and for which negative results were reported may actually contain undetected asbestos. At this time EPA does not have data to support identification of other materials which may have thin fibers.

The improved method addresses the thin fiber limitation of the 1982 method by providing directions for using transmission electron microscopy (TEM). The test method includes improved procedures for reducing matrices so that fibers may be made available for microscopic analysis. The improved method also directs laboratories to analyze the individual strata or layers and report a single result for each layer. The 1982 method provided that the analytical result for a multi-layered sample with discrete strata be reported as one result across all layers. Because the 1982 method allowed the result to be reported as one number, multi-layered samples which may contain asbestos in a single layer may have been reported by laboratories as nonasbestos-containing. The improved method directs laboratories to analyze and report a result for individual layers. Thus, more than one result will be reported for multi-layered samples, and a multi-layered sample which previously was determined to be nonasbestos-containing may now have layers which will be classified as asbestos-containing based on the presence of asbestos in greater than 1 percent.

In light of the availability of the improved method, EPA recommends that local education agencies (LEAs) use the improved method in place of the 1982 procedures as found in 40 CFR part 763 Appendix A to Subpart F. EPA has made the determination that the improved method is more capable of producing accurate results than the 1982 protocol and thus serves as a preferred substitute method. Further, EPA recommends that LEAs which have PLM laboratory results indicating floor tiles to be nonasbestos-containing (asbestos present in less than or equal to 1 percent) reconsider whether these materials may have thin asbestos fibers. LEAs should also consider whether other materials sampled previously may contain multiple layers, whether each of these layers was analyzed separately, and whether results were reported separately by layer. (Note: For purposes of this analysis, drywall or gypsum board is considered a single-layered material.) LEAs are encouraged to determine from sampling and analysis records whether multi-layered systems were sampled and analyzed separately. (A system is an integrated group of building components which form a unit, i.e., a wall system composed of a browncoat layer as well as other plaster layers.) Although there is no modification of the AHERA requirements at this time and results obtained by following the 1982 protocol and the AHERA sampling rules meet the AHERA legal requirements, it may be prudent for LEAs to assume floor tiles and multi-layered materials with previously negative results to be asbestos-containing or resample and analyze them by the 1993 EPA Test Method.

This approach should be considered for the following circumstances: (1) Floor tiles which may contain thin fibers and which were analyzed under the 1982 PLM method and found not to be asbestos-containing; and (2) materials such as hard wall and acoustical plaster, stucco or other similar multi-layered materials or systems which were not analyzed and reported by layers (discrete strata). LEAs are reminded that they are also required to comply with the asbestos NESHAP regulation when disturbing asbestos-containing building materials. Although building owners/operators are not required by the asbestos NESHAP to collect bulk samples of building products prior to disturbance, they are responsible for knowing whether asbestos is contained in the building product. Often, identification of asbestos content may be obtained only by sampling and analyzing the material. EPA has provided guidance on how to sample and interpret analytical results for multi-layered samples for the asbestos NESHAP in the **Federal Register** notice of January 5, 1994 (59 FR 542). Before undertaking activities which might trigger asbestos NESHAP requirements, it is recommended that LEAs consider resampling multi-layered materials which have been found to be nonasbestos-containing for AHERA purposes or assume them to be asbestos-containing prior to disturbance according to the guidelines set forth in this current notice, in the January 5, 1994 NESHAP **Federal Register** notice, and in the improved analytical method to avoid potential violation of the asbestos NESHAP.

All previous positive results (asbestos present in greater than 1 percent) are acceptable regardless of the EPA method by which they were sampled or analyzed. For AHERA and NESHAP purposes, materials may always be assumed to be asbestos-containing in lieu of sampling and analysis.

EPA is in the midst of preparing a guidance bulletin to assist LEAs in implementing the recommendations discussed in this notice. The guidance will be available in summer 1994. To obtain a single copy of the bulletin, you must send a written request for the "Asbestos Sampling Bulletin" and an 9½ inch by 12 inch self-addressed and stamped envelope (at least $0.75 in postage applied to the envelope) to: TSCA Assistance Information Service, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Requests for the bulletin that are not accompanied by the self-addressed and stamped envelope will not be honored. Multiple copies are not available. Copies will be distributed only in the previously described manner.

Dated: July 21, 1994.

Lynn R. Goldman,

Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. 94–18665 Filed 7–29–94; 8:45 am]

BILLING CODE 6560–50–F

[FRL–5025–1]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this notice announces the Office of Management and Budget's (OMB) responses to Agency PRA clearance requests.

FOR FURTHER INFORMATION CONTACT: Sandy Farmer (202) 260–2740.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency PRA Clearance Requests

OMB Approvals

EPA ICR No. 0155.05; Certification of Pesticide Applicators—40 CFR Part 171;

was approved 06/13/94; OMB No. 2070–0029; expires 06/30/97.

EPA ICR No. 1684.02; Compression Ignition Non-Road Engine Certification Application; was approved 06/16/94; OMB No. 2060–0287; expires 06/30/97. This collection supports the proposed rule.

EPA ICR No. 0866.04; Quality Assurance Specifications and Requirements; was approved 06/17/94; OMB No. 2080–0033; expires 06/30/97.

EPA ICR No. 1132.04; NSPS for Volatile Organic Storage Vessels—Subpart KB, 40 CFR Part 60; was approved 06/22/94; OMB No. 2060–0074; expires 06/30/97.

EPA ICR No. 1049.07; Notification of Episodic Releases of Oil and Hazardous Substances; was approved 06/30/94; OMB No. 2050–0046; expires 06/30/97.

EPA ICR No. 0309.06; Registration of Fuels and Fuels Additives, Application for Registration by Manufacturers; was approved 06/30/94; OMB No. 2060–0150; expires 06/30/97.

EPA ICR No. 1221.04; Milk Cow and Population Survey; was approved 06/22/94; OMB No. 2080–0017; expires 06/30/97.

EPA ICR No. 0234.05; Performance Evaluation Studies on Water and Wastewater Laboratories; was approved 07/08/94; OMB No. 2080–0021; expires 07/31/97.

EPA ICR No. 1583.02; Vendor Information System for Innovative Treatment Technologies; was approved 07/12/94; OMB No. 2050–0114; expires 07/31/97.

EPA ICR No. 1067 (reassigned ICR No. 1683.01); NSPS for Primary Aluminum Reduction Plants, Recording and Recordkeeping—Subpart S; was approved 07/11/94; OMB No. 2060–0031; expires 07/31/97. This collection supports the reinstatement.

OMB Disapprovals

EPA ICR No. 1688.01; RCRA Combustion Permitting and Expanded Public Participation; was disapproved by OMB 07/13/94. This collection supports the proposed rule.

EPA ICR No. 1677.01; NSPS for Request for Date of Purchase Information—Subpart 000-Affected Facilities, Clean Air Act—Section 114; was disapproved by OMB 06/14/94.

Dated: July 22, 1994.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 94–18661 Filed 7–29–94; 8:45 am]

BILLING CODE 6560–50–M

[FRL–5025–5]

Workshop on Ecological Risk Assessment Issue Papers

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice of Meeting.

SUMMARY: This notice announces a workshop sponsored by the U.S. Environmental Protection Agency's (EPA's) Risk Assessment Forum to peer review eight ecological risk assessment issue papers. The papers cover a wide range of topics such as conceptual model development, characterization of effects and exposure, and risk integration methods. When complete, the issue papers will help provide a scientific basis for the development of future Agency-wide ecological risk assessment guidelines.

DATES: The workshop will begin on Tuesday, August 16, 1994 at 8:30 a.m. and end on Thursday, August 18, 1994 at 12:30 p.m. Members of the public may attend as observers.

ADDRESSES: The meeting will be held at the Radisson Plaza Hotel, Mark Plaza, 5000 Seminary Road, Alexandria, Virginia.

Versar, Inc., an EPA contractor, is providing logistical support for the workshop. To attend the workshop as an observer, contact Pat Wood of Versar, 6850 Versar Center, P.O. Box 1549, Springfield, Virginia 22151, Tel: (703) 750–3000, extension 534 by August 12, 1994. Space is limited.

FOR FURTHER INFORMATION CONTACT: Ms. Clare Stine, U.S. Environmental Protection Agency, Risk Assessment Forum (8101), 401 M Street, S.W., Washington, DC 20460, Tel: (202) 260–6743.

SUPPLEMENTARY INFORMATION: EPA's Risk Assessment Forum is developing Agency-wide guidance for conducting ecological risk assessment. The first step in this process was the publication of the EPA report *Framework for Ecological Risk Assessment* (EPA/630/R–92/001), which proposed a simple, flexible structure, or framework, for ecological risk assessment. To help expand the framework into more substantive guidance documents, draft issue papers have been prepared by expert consultants. The papers cover a wide range of topics such as conceptual model development, characterization of effects and exposure, and risk integration methods. Each issue paper emphasizes scientific principles applicable to a wide range of stressors and ecosystems.

Workshop participants will provide comments and recommendations for revision of the papers, discuss larger issues that affect some or all of the papers, and suggest topics that may be of particular importance for future guidelines development. Following revision, the issue papers will be published as EPA reports.

To obtain a single copy of the draft issue papers, interested parties should contact the Office of Research and Development Publications Office, Center for Environmental Research Information, U.S. Environmental Protection Agency, 26 West Martin Luther King Drive, Cincinnati, OH 45268, Tel: 513/569–7562. Please provide your name, mailing address, and the EPA document number (EPA/630/R–94/004A).

Dated: July 18, 1994.

Gary J. Foley,

Acting Assistant Administrator for Research and Development.

[FR Doc. 94–18662 Filed 7–29–94; 8:45 am]

BILLING CODE 6560–50–M

[FRL–5025–2]

Gulf of Mexico Program Policy Review Board Meeting

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Notice of Meeting of the Policy Review Board of the Gulf of Mexico Program.

SUMMARY: The Gulf of Mexico Program's Policy Review Board will hold a meeting at the Omni Royal Orleans Hotel, 621 St. Louis Street, New Orleans, Louisiana.

FOR FURTHER INFORMATION CONTACT: Dr. Douglas Lipka, Acting Director, Gulf of Mexico Program Office, Building 1103, Room 202, John C. Stennis Space Center, Stennis Space Center, MS 39529–6000, at (601) 688–3726.

SUPPLEMENTARY INFORMATION: A meeting of the Policy Review Board of the Gulf of Mexico Program will be held on August 24, 1994, at the Omni Royal Orleans Hotel, 621 St. Louis Street, New Orleans, LA. The board will meet from 8:30 a.m. to 4:30 p.m. Agenda items will include: Federal Interagency Agreement for Gulf of Mexico Program; FY94 Project Funding Results; FY95 Proposed Funding Process; Third Biennial Gulf of Mexico Symposium; Citizens Advisory Committee Report; and Management Committee Report.

The meeting is open to the public.

Douglas A. Lipka,

Acting Director, Gulf of Mexico Program.

[FR Doc. 94–18663 Filed 7–29–94; 8:45 am]

BILLING CODE 6560–50–M

[FRL-5025-3]

Science Advisory Board Drinking Water Committee Open Meeting; August 18–19, 1994

Under the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Science Advisory Board's (SAB) Drinking Water Committee (DWC) will meet Thursday, August 18 (8:30 am to 5:00 pm) and Friday, August 19, 1994 (9:00 am to 4:30 pm) at the Holiday Inn Georgetown, 2101 Wisconsin Avenue NW, Washington, DC 20007. The meeting is open to the public and seating is on a first-come basis.

At the meeting, the Committee will: review (1) the methods being considered by the Agency to estimate national occurrence levels of arsenic in drinking water; (2) the Agency's approach to determining Best Available Technology (BAT) for arsenic removal from drinking water; (3) the basis for selection of quantitation detection limits for arsenic; and, (4) the Agency's approach to the development of a "decision tree" for a regulatory impact assessment for arsenic in drinking water. In addition, the Committee will receive briefings concerning: (1) research activities of the Human Exposure Research Laboratory related to drinking water; (2) arsenic health effects research and issues; (3) chloroform-related activities; (4) research related to Pharmacokinetic/Pharmacodynamic aspects of disinfection by-products; (5) plans for future risk characterization efforts; and, (6) activities regarding Water Quality Human Health Criteria Methodology. The Committee will also be discussing its contribution to the SAB's Futures Project, and developing a preliminary schedule for its activities in Fiscal Year 1995.

The Committee has been provided with review materials concerning arsenic occurrence, analytical methods, and occurrence estimates. Copies of these materials are available from Ben Smith, Chief, Technology Section, Office of Groundwater and Drinking Water, U.S. EPA, 401 M St., SW (Mail Code 4603), Washington, DC 20460. Telephone: (202) 260–3026. No background documents are available for the other items on the agenda.

For copies of the agenda and other practical meeting information, please contact Ms. Mary Winston, Staff Secretary. Telephone: (202) 260–6552; FAX: (202) 260–6118. For more detailed information concerning the meeting, please contact Mr. Manuel R. Gomez, Designated Federal Official (DWC), Science Advisory Board (A–101F), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460 at the same numbers (INTERNET: Gomez.Manuel@EPAMAIL.GOV).

Members of the public who wish to make a brief oral presentation to the Committee must contact Mr. Gomez no later than Monday, August 8, 1994, in order to be included on the Agenda. Written statements of any length (at least 35 copies) may be provided to the Committee up until the meeting. The Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. In general, each individual or group making an oral presentation will be limited to a total time of ten minutes or less, at the Chair's discretion.

Dated: July 25, 1994.

Donald G. Barnes,

Staff Director, Science Advisory Board.

[FR Doc. 94–18664 Filed 7–29–94; 8:45 am]

BILLING CODE 6560–50–P

[OPP-66199; FRL-4904-1]

Notice of Receipt of Request for Cancellation, Announcement of Cancellation Order, and FIFRA Section 6(g) Notification for Mevinphos

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice, pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), announces EPA's receipt and acceptance of a request from Amvac Chemical Corporation to voluntarily cancel all registrations of pesticide products containing mevinphos (2-carbomethoxy-1-methylvinyl dimethyl phosphate, alpha and beta isomers) (trade name Phosdrin). EPA granted the request for voluntary cancellation effective on July 1, 1994, and issued a cancellation order to the registrant on the same date. The registrant in its request for voluntary cancellation requested to waive the 90–day public comment period. The Agency waived the 90–day comment period based on the registrant's request and because it had determined that the continued use of mevinphos poses an unreasonable risk of poisoning to agricultural workers and bystanders. As of July 1, 1994, sale, distribution, and use of canceled mevinphos products is permitted only if such sale, distribution, or use is consistent with the terms of the cancellation order. Pursuant to FIFRA section 6(g), any producer or exporter, registrant, applicant for a registration, applicant or holder of an experimental use permit, commercial applicator, or any person who distributes or sells any pesticide, who possesses any pesticide products containing mevinphos which are canceled through the order is required to notify the Agency and appropriate State and local officials of the quantity and location of canceled mevinphos in their possession in accordance with the procedures, timeframes, and requirements set out in this notice.

DATES: The cancellations became effective on July 1, 1994. Required notification of possession of canceled products containing mevinphos: (a) producers, exporters, the registrant, applicants for a registration, applicants or holders of an experimental use permit, dealers, distributors, and retailers must report its holdings of such products by January 31, 1995, and (b) commercial applicators must submit reports by March 28, 1995.

FOR FURTHER INFORMATION CONTACT: For voluntary cancellation: By mail: Richard Dumas, Special Review Branch, Special Review and Reregistration Division, Office of Pesticide Programs (7508W), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: 3rd floor, Crystal Station #1, 2800 Crystal Drive, Arlington, VA 22202, (703) 308–8015. For notification of possession of canceled products and compliance issues: By mail: Chief, Agriculture Branch, Agriculture and Ecosystems Division, Office of Compliance, Office of Enforcement and Compliance Assurance (2225W), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Crystal Station #1, 2800 Crystal Drive, 5th Floor, Arlington, VA 22202, (703)308–8383. For RCRA requirements for managing mevinphos as a waste: RCRA/Superfund Industrial Assistance Hotline: 800–424–9346.

SUPPLEMENTARY INFORMATION: This notice is divided into two units Unit I concerns requests for voluntary cancellations submitted in response to the Agency's determination that mevinphos poses unreasonable adverse effects, outlines the Cancellation Order of July 1, 1994, and gives detailed requirements regarding existing stocks of canceled mevinphos products. These requirements concern the distribution, sale, export, use and disposal of existing stocks of mevinphos. Unit II outlines the additional requirement under FIFRA section 6(g) that affected persons notify EPA, and the appropriate State and local

officials, of canceled products containing mevinphos that are in their possession (7 U.S.C. 136d(g)).

I. Cancellation Order for Mevinphos Registrations

A. Requests for Voluntary Cancellation

On June 30, 1994, Amvac Chemical Corporation, the sole registrant of mevinphos pesticide products, submitted a voluntary cancellation request in which it agreed to voluntarily cancel all mevinphos registrations, immediately cease production of all mevinphos products for sale, distribution, and use in the U.S., and set terms for the sale, distribution, and use of existing stocks in the channels of trade. This request was submitted on the same day EPA was prepared to initiate action to suspend mevinphos product registrants under FIFRA section 6(c), based on unreasonable risk of poisoning to mixer/loaders, applicators, other farmworkers, and bystanders (7 U.S.C. 136d(c)).

The products for which cancellation was requested are listed in Table 1 below which include all section 3 registrations and section 24(c) Special Local Needs registrations for mevinphos (7 U.S.C. 136a and 136v(c)).

Table 1. Mevinphos Registrations

Registration Number	Product Name
5481-113	Durham Duraphos EM-4
5481-114	Phosdrin IPA 4
5481-161	Phosdrin 10.3 WS Insecticide
5481-248	Phosdrin 400 (formerly Royal Brand Phosdrin Insecticide Spray Concentrate)
5481-411	Phosdrin Insecticide
5481-412	Phosdrin 4 EC Insecticide
5481-425	Mevinphos Insecticide Technical
CA80001800	Phosdrin 4 EC Insecticide (5481–412)
CA81000300	Phosdrin 4 EC Insecticide (5481–412)
CA86006300	Phosdrin 4 EC Insecticide (5481–412)
CA86007300	Phosdrin 4 EC Insecticide (5481–412)

Under section 6(f)(1)(A) of FIFRA, registrants may request at any time that EPA cancel any of their pesticide registrations (7 U.S.C. 136 d(f)(1)(A)). If the pesticide for which cancellation was requested is registered for any minor agricultural use, section 6(f)(1)(C) dictates that EPA publish in the **Federal Register** a notice of the receipt of the cancellation request, and allow 90 days for public comment before granting the request unless either the registrants request a waiver of the 90–day period or the Administrator determines that the continued use of the pesticide would pose an unreasonable adverse effect on the environment (7 U.S.C. 136d(f)(1)(C)). The Agency has waived the 90–day comment period based on the registrant's request and because it has determined that the continued use of mevinphos poses an unreasonable risk to mixer/loaders, applicators, other agricultural workers, and bystanders. As part of its request, Amvac committed to conduct a voluntary recall. This commitment is discussed in unit B below. The Agency accepted Amvac's request for voluntary cancellation and issued a cancellation order covering all products listed in Table 1, effective on July 1, 1994.

B. Summary of the Cancellation Order

The terms of the cancellation order allow continued sale and distribution of existing stocks of canceled products through December 31, 1994, and continued use through February 28, 1995, of such stocks pursuant to the terms of prior approved labeling.

Any distribution, sale, or use of existing stocks of the products listed in Table 1 that is not consistent with the terms of the Existing Stocks Provision of the Cancellation Order will be considered a violation of FIFRA section 12(a)(2)(K) and/or section 12(a)(1)(A) (7 U.S.C. 136a(1)(A) and (2)(K)).

For the purposes of the cancellation order, existing stocks are those stocks of previously-registered mevinphos products as listed in Table 1 which were in the United States and were packaged, labeled, and released for shipment prior to the cancellation of the product's registration on July 1, 1994. The existing stocks provisions are as follows:

1. *Distribution or sale.* No person may distribute or sell existing stocks of canceled mevinphos products after December 31, 1994. Commercial applicators may apply mevinphos, in accordance to prior approved labeling, through February 28, 1995.

2. *Use of existing stocks.* No person may use existing stocks of canceled pesticide products containing mevinphos after February 28, 1995.

3. *Recall of product in hands of distributors and dealers.* The registrant agreed to conduct a voluntary recall. The registrant must develop and implement a recall program in accordance with a recall plan that is acceptable to the Agency. Guidance for developing a voluntary recall plan is located in the Agency's proposed rule on pesticide management and disposal (58 FR 26856, May 5, 1993). All mevinphos product in the hands of distributors and dealers after December 31, 1994, will be eligible for recall. As part of the recall program, the registrant will contact all of its mevinphos distributors and make reasonable efforts to contact mevinphos dealers to inform them of the availability of the recall program and to inform them of the availability of storage facilities to receive any of the registrant's products which such dealers and distributors may have after December 31, 1994. As part of the recall, Amvac must pay the appropriate expense for the recall conducted. Amvac agreed that if it fails to appropriately develop and implement a voluntary recall program, EPA may issue a mandatory recall order. Such recall order would be based on the authority of the agreement between EPA and Amvac, and the cancellation order.

4. *Exception to prohibition of sale and distribution.* Notwithstanding any other provision of the cancellation order, the transfer of canceled products to the registrant will be allowed if such transfer is for the purpose of collecting products for disposal or export. In order to be exported, such stocks must comply with the labeling and purchaser acknowledgement requirements for unregistered pesticides under FIFRA section 17(a) (7 U.S.C. 136 o(a)) and the Agency's Export Policy and Procedures for Exporting Unregistered Pesticides in 40 CFR part 168 subpart D. In addition, recordkeeping requirements for exported pesticides in 40 CFR 169.2(h) apply. The required procedures include the requirement that: Pesticide product be labeled "Not Registered for Use in the United States of America," certain label and labeling statements appear in English and in the language(s) of the country(ies) of import, and that all exportations meet the Foreign Purchaser Acknowledgement Statement (FPAS) procedures described in 40 CFR 169.75. As stated in 40 CFR 168.75, FPASs must be sent to: Environmental Protection Agency, Office of Pesticide Programs (7501C), 401 M St., SW., Washington, DC 20460, and marked, "Attention: Purchaser Acknowledgement Statement." In addition to the labeling requirements stated in 40 CFR 168.65, all exported products must be labeled "Not for Distribution, Sale or Use in the United States of America."

5. *Disposal of canceled mevinphos product.* Under Resource Conservation and Recovery Act (RCRA) regulations, commercial chemical products such as pesticides become "solid wastes" (and thus potentially, hazardous wastes) at the point when a decision is made to discard them. Once intended for disposal, the canceled mevinphos pesticides that have become "waste" are regulated under RCRA. In addition to

the requirements governing disposal under RCRA, there may also be State and local requirements applicable to the disposal of mevinphos products. Persons are encouraged to contact their State and local authorities regarding the safe disposal of mevinphos products. Information on the correct waste classification of canceled mevinphos products can be obtained from the registrant. For further information about the RCRA requirements for managing mevinphos as a waste, contact the RCRA/Superfund Industrial Assistance Hotline at: 800–424–9346.

II. Notification of Possession of Canceled Products as Required Under FIFRA Section 6(g)

A. Pesticides Required to be Reported

Pursuant to FIFRA section 6(g), any producer or exporter, registrant, applicant for a registration, applicant or holder of an experimental use permit, commercial applicator, or any person who distributes or sells any pesticide, who possesses any stocks of canceled pesticide products containing mevinphos which has been canceled under FIFRA section 6 (hereafter, referred to as "affected persons") must notify EPA and appropriate State and local officials of: (1) Such possession; (2) the quantity of suspended mevinphos pesticide product possessed; and, (3) the place at which the suspended mevinphos pesticide product is stored. The term "affected person" includes affected individuals, partnerships, associations, corporations, or any organized group of persons whether incorporated or not. Notification by affected persons to EPA and designated State and local officials pursuant to FIFRA section 6(g) shall be in accordance with the procedures, timeframes, and requirements set out in this Notice. End-users, except commercial applicators, are not required to report their stocks of canceled mevinphos products.

Pursuant to FIFRA section 6(g), affected persons must report the information described below for canceled mevinphos pesticide products which are in their possession as of December 31, 1994. Canceled mevinphos product which is owned by one affected person, but in the physical possession of another affected person who is subject to section 6(g) reporting are to be reported by the person in physical possession of the pesticide.

The Office of Management and Budget (OMB) has given approval for the collection of information under FIFRA 6(g) and assigned the OMB control number 2070–0109.

B. Information Which Must be Included in the Submission

To be in compliance with FIFRA section 6(g), affected persons must submit to the designated EPA and State and local officials the following information certified by a responsible company official as true and correct:

1. The identity and address of the affected person (company).

2. Name and phone number of a contact person (in the company).

3. Indication that the FIFRA section 6(g) information is being submitted for canceled pesticide products containing mevinphos.

4. The relationship of the affected person (company) to the canceled mevinphos pesticide products being reported under FIFRA section 6(g) (i.e., exporter, producer, registrant, applicant for registration, applicant for or holder of an experimental use permit, commercial applicator, distributor, retailer, etc.).

5. The street address of each location owned/leased or operated in the United States by the submitter where the canceled mevinphos pesticide product is held.

6. For each location listed, the quantity (pounds, gallons, or other appropriate measure) of canceled mevinphos pesticide product listed by the number of units of each size container (pound, gallons, or other appropriate measure) and by EPA registration number (e.g., x units of 5 gallon containers of EPA registration number xxx-xxx).

C. When to Report

Affected persons must submit FIFRA 6(g) information according to the following timeframes:

1. The registrant of canceled mevinphos must report by January 31, 1995.

2. Producers, exporters, applicants for a registration, applicants or holders of an experimental use permit, dealers, distributors, and retailers, must report by January 31, 1995.

3. Commercial applicators must report by March 28, 1995.

4. Other end-users other than commercial applicators are not required to report their possession of canceled products containing mevinphos.

D. Where to Submit Section 6(g) Information

The FIFRA section 6(g) information is to be sent to each of the following locations:

1. EPA. Chief, Agriculture Branch, Agriculture and Ecosystems Division, Office of Compliance, Office of Enforcement and Compliance Assurance (2225W), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, "Attention: FIFRA Section 6(g) Information."

2. State. Chief Pesticide Regulatory Official, of the agency in the State government which enforces the State pesticide laws where the canceled mevinphos pesticide product is stored. Envelopes must be marked, "Attention: FIFRA Section 6(g) Information."

3. Local. Chair of the Local Emergency Planning Committee (LEPC), for the location where the canceled mevinphos pesticide is stored. Envelopes should be marked, "Attention: Notification of Possession of Canceled Pesticides." To identify the name and address of the chair of the LEPC, contact the State Emergency Response Commission (SERC) or call the Emergency Planning and Community Right-to-Know (EPCRA) Information Hotline at 1–800–535–0202.

E. Confidentiality of FIFRA Section 6(g) Information

EPA does not consider FIFRA section 6(g) information to be confidential business information (CBI) under the provisions of FIFRA section 10. Such information may be made available by EPA to the public without further notice.

F. Enforcement

Failure to submit complete and accurate FIFRA section 6(g) information, and/or failure to submit accurate section 6(g) information in the required timeframes is a violation of FIFRA section 12(a)(2)(K) and violators may be subject to civil penalties up to $5,000 per offense. Affected persons who possess canceled or suspended pesticide in multiple locations may be fined up to $5,000 per offense for each location for which the FIFRA section 6(g) information is not submitted, submitted late, incomplete, or inaccurate.

Dated: July 27, 1994.

Daniel M. Barolo,

Director, Office of Pesticide Programs.

[FR Doc. 94–18751 Filed 7–29–94; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to Office of Management and Budget for Review

July 22, 1994

The Federal Communications Commission has submitted the

following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507).

Copies of this submission may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857–3800. For further information on this submission contact Judy Boley, Federal Communications Commission, (202) 418–0214. Persons wishing to comment on this information collection should contact Timothy Fain, Office of Management and Budget, Room 10236 NEOB, Washington, DC 20503, (202) 395–3561.

OMB Number: 3060–0076
Title: Application for Renewal of Aircraft Radio Station License
Form Number: FCC Form 405–B
Action: Revision of a currently approved collection
Respondents: Individuals or households, state or local governments, non-profit institutions, and businesses or other for-profit (including small businesses)
Frequency of Response: On occasion reporting requirement or other: every 10 years
Estimated Annual Burden: 13,000 responses; .166 hours average burden per response; 2,200 hours total annual burden
Needs and Uses: FCC Form 405–B is used to renew a license authorization when there are no changes or only certain minor changes to administrative data. This form was previously used by Aircraft and Ship Radio Station licensees. A separate form has been created for use by Ship Radio Station licensees and therefore the total annual burden has been reduced by 6,100 hours.

Federal Communications Commission
William F. Caton
Acting Secretary
[FR Doc. 94–18509 Filed 7–29–94; 8:45 am]
BILLING CODE 6712–01–F

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 25, 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: The counties of Montgomery, Wheeler, and Toombs for Individual Assistance and Public Assistance.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

G. Clay Hollister,
Deputy Associate Director, Response and Recovery Directorate.
[FR Doc. 94–18652 Filed 7–29–94; 8:45 am]
BILLING CODE 6718–02–M

FEDERAL MARITIME COMMISSION

[Docket No. 94–16]

Amsov Co., Inc. v. Dan-Transport Corp.; Notice of Filing of Complaint and Assignment

Notice is given that a complaint filed by Amsov Company, Inc. ("Complainant") against Dan-Transport Corporation ("Respondent") was served July 26, 1994. Complainant alleges that Respondent violated section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. 1709(d)(1), by failing to deliver Respondent's cargo to its destination and refusing to deliver the shipment to the consignee as promised in the bill of lading.

This proceeding has been assigned to the office of Administrative Law Judges. Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61, and only after consideration has been given by the parties and the presiding officer to the use of alternative forms of dispute resolution. The hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. Pursuant to the further terms of 46 CFR 502.61, the initial decision of the presiding officer in this proceeding shall be issued by July 26, 1995, and the final decision of the Commission shall be issued by November 24, 1995.

Joseph C. Polking,
Secretary.
[FR Doc. 94–18564 Filed 7–29–94; 8:45 am]
BILLING CODE 6730–01–M

Fact Finding Investigation No. 21 Activities of the Trans-Atlantic Agreement and Its Members; Order

The Trans-Atlantic Agreement ("TAA" or "Agreement"), FMC Agreement No. 202–011375, became effective August 31, 1992, pursuant to the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1701, *et seq.*[1] Fifteen ocean common carriers are members of this Agreement seven of which operated as independent, non-conference carriers prior to the inception of TAA. According to a commercial data source,[2] the members of the Agreement carry more than seventy percent of the cargo moving in both the eastbound and westbound portions of the trans-Atlantic trade. Because of this market concentration, and the features peculiar to this agreement, the Federal Maritime Commission ("Commission") has exercised its authority under the 1984 Act to monitor the actions of TAA closely since its effectiveness.

In addition to the collective rate-making authority normally contained in conference agreements, TAA includes a unique membership provision that distinguishes between "rate committee" and "non-rate committee" members.[3] Rate committee members discuss and establish mutual and binding rates, as in a traditional conference. Non-rate committee members may be invited to attend rate committee meetings, and may adhere voluntarily to the rates established by the rate committee, or set their own rates independently. Rates for all TAA members are filed in common tariffs.

The rate committee members also comprise TAA's contract committee,[4] which negotiates service contracts on behalf of the contract committee

[1] As discussed *infra*, on July 5, 1994, the parties to this agreement filed modifications which, *inter alia*, would change the agreement's name to "Trans-Atlantic Conference Agreement." Should these modifications become effective, the Commission intends that this investigation continue into the activities described herein.

[2] Port Import and Export Reporting Service, a product of the Journal of Commerce.

[3] At present, TAA has nine rate committee members and six non-rate committee members. The modifications to the Agreement, filed July 5, 1994, would eliminate the rate and contract committees and all distinctions in membership rights which flow therefrom.

[4] See note 2, *supra*.

members. Members of the contract committee may elect not to participate, or to limit their participation, in TAA service contracts, but they may not negotiate contracts independently of TAA.[5] Non-rate committee members may be invited to attend contract committee meetings and may participate in contracts negotiated and entered into by members of the contract committee, subject to mutual agreement on a case by case basis. Non-rate committee members also may negotiate and enter into service contracts individually and/or jointly between or among themselves.

In addition, TAA members have agreed to a capacity management program to reduce excess capacity in the trade. Under the terms of this program, each carrier commits to limit its container capacity in the trade[6] by withholding part of its vessels' capacities from the shipping public.

These features, combined with TAA's large share of the trade in both directions, create an environment in which shippers could be subjected to serious economic harm should TAA abuse its extensive authority. Therefore, the Commission has required periodic reports from TAA to track various indicators of competitive activity. Until recently, neither these monitoring efforts, nor various informal complaints from the shipping public, had persuaded the Commission that there was sufficient cause to investigate TAA's practices formally.

However, in recent weeks, the Commission has received allegations and information from a variety of sources that indicate the necessity for an investigation of TAA's activities to determine whether sufficient evidence exists to warrant formal adjudicatory and assessment proceedings and/or to seek an injunction in a U.S. District Court under the 1984 Act. For example, TAA is alleged to have implemented a program of disproportionately large rate increases and other measures directed at some non-vessel-operating common carriers ("NVOCCs") in an effort to curtail competition from those NVOCCs. Because TAA's non-rate committee members have relied on NVOCC traffic, TAA is said to have agreed also to formulate a program to shift proprietary shippers' cargo to non-rate committee members as a *quid pro quo* for the anticipated loss of NVOCC business. Whether any of these alleged activities may constitute violations of the 1984 Act is an issue which the Commission intends to pursue in this proceeding.

In Petition No. P5–94, Petition for Further Inquiry into the Unlawful Actions of the Trans-Atlantic Agreement ("Petition"), filed with the Commission June 8, 1994, Container Freight International I/S ("CFI") and Danish Consolidation Services ("DCS") alleged, and provided data to show, that TAA rigidly applied its 1994 Business Plan as a rate ceiling for all shippers except Petitioners, in violation of section 10(b)(12) of the 1984 Act, 46 U.S.C. app. 1709(b)(12). In its response, TAA denied those allegations and provided information that shippers in situations similar to CFI and DCS in 1993 received similar treatment in their 1994 contracts. The issues raised in the Petition will be included in this investigation. In order to determine the responsibilities of TAA with respect to the petitioners, this investigation also will gather facts pertinent to the status of these associations and their members.

On June 13, 1994, TAA and its members responded to a Commission order ("Section 15 Order"),[7] issued pursuant to section 15 of the 1984 Act, 46 U.S.C. app. 1714, which related to allegations of refusals of TAA and a member line to accept bookings and of attempts to terminate service contracts prematurely. Those allegations were contained in an earlier Petition, P3–94, filed by CFI and DCS, which was the subject of a separate Commission Order dated March 28, 1994, 26 SRR 1312 (1994) ("March 28 Order"). The responses to the Section 15 Order, which were filed on a confidential basis, contain information related to several possible violations of the 1984 Act, set forth below, and will be used by the Investigative Officers named herein to develop those issues in this proceeding.

Another issue raised in Petition P3–94, which the Commission held in abeyance in its March 28 Order, *supra*, is whether TAA has violated section 6(g) of the 1984 Act, 46 U.S.C. app. 1705(g), by unreasonably increasing transportation costs for CFI and DCS. The Commission staff has been gathering information informally on that issue, and the Investigative Officers will complete that effort through the greater variety of fact-gathering tools available in this proceeding.

On July 11, 1994, the Commission received Petition No. P6–94, Petition of the National Industrial Transportation League for Investigation and Relief from the Anticompetitive Activities of the Trans-Atlantic Agreement ("NITL Petition"), which alleges that "TAA has unreasonably increased transportation rates, unreasonably decreased transportation service, and has generally abused its dominant position in the marketplace." NITL Petition at 4. Sixteen affidavits were submitted in support of the NITL Petition. Petitioners request the Commission to investigate the activities of TAA; determine that TAA is substantially anticompetitive under section 6(g) of the 1984 Act; and, upon that determination, seek to enjoin the Agreement's operation. While TAA has not yet had the opportunity to respond to the NITL Petition, the Commission will include the issues raised therein in this non-adjudicatory investigation. Any reply submitted by TAA or its members will be considered by the Investigative Officers named herein.

The Commission also has received allegations and information that TAA and its members may have entered into service contracts with, and provided transportation for, NVOCCs which do not have tariffs and bonds, as required by sections 8 and 23 of the 1984 Act, 46 U.S.C. app. 1707 and 1721. Such actions may be violative of sections 10(b)(14) and 10(b)(15) of the 1984 Act, 46 U.S.C. app. 1709(b)(14) and 1709(b)(15).

A further issue that the Commission will pursue in this investigation is whether TAA or its members are parties to so-called "connecting carrier agreements" with NVOCCs for cargo moving in or through the Trans-Atlantic trades, or are abusing non-exclusive transshipment agreements with other ocean common carriers in these trades.[8] Such activities could violate various provisions of the 1984 Act and are the

[5] This would appear to preclude rate/contract committee members from participating in service contracts which are negotiated by non-rate committee members. This is an issue that will be addressed in this investigation because of its possible bearing upon various allegations of unlawful conduct by TAA, as discussed *infra*.

[6] While the Agreement permits the implementation of a capacity management program in both the eastbound and westbound directions, the program currently is operating only in the westbound direction. The proposed modifications to the Agreement would alter the provisions of this program, change its name to the "Capacity Regulation Program", and make the revised program applicable both eastbound and westbound.

[7] 26 SRR 1319 (1994)

[8] The term "connecting carrier agreement" is used generally to refer to arrangements under which one carrier serving the point or place of origin, and another carrier serving the port or place of destination, provide transportation via transshipment at an intermediate port. One type of connecting carrier agreement which the Commission has recognized and exempted from filing is a non-exclusive transshipment agreement between ocean common carriers, as defined in 46 CFR 572.306. Section 3(17) of the 1984 Act, 46 U.S.C. app. 1702(17), defines an NVOCC as a shipper in its relationship with an ocean common carrier. Thus, any connecting carrier agreement between an ocean common carrier and an NVOCC may constitute a device or means to circumvent the otherwise applicable tariffs or service contracts, in violation of section 10(b)(4) of the Act, 46 U.S.C. app. 1709(b)(4).

subject of a separate section 15 order, issued simultaneously herewith. The responses to that section 15 order will be utilized by the Investigative Officers named herein to assist in developing this issue.

Finally, the Commission has received allegations that TAA and its members may have reached agreements, or taken other actions, which discourage or suppress the exercise of the right of members to take independent action. This right, which must be incorporated into every conference agreement,[9] has been recognized as the most immediate and practical protection for the shipping public against abuse of conference power, and has been guarded carefully by the Commission, so that its protection is not diminished. Thus, these allegations will be investigated in this proceeding. The use of independent action within TAA also is the subject of a separate section 15 order issued simultaneously herewith. The responses to that order will be considered by the Investigative Officers named herein.

As noted above, the parties to this Agreement filed modifications on July 5, 1994, which appear to contain both substantive and technical changes, and which the Commission staff is currently analyzing. That analysis will be coordinated, as necessary, with this investigation, particularly as to issues arising under section 6(g) of the 1984 Act.

Therefore, the Commission is instituting this nonadjudicatory proceeding to investigate whether or not TAA, and some or all of the fifteen ocean common carriers which comprise TAA's membership, may have engaged in, or may be engaged in, activities violative of various provisions of the 1984 Act. Such activities may include:

—Unreasonably increasing transportation costs by reducing competition in the Trans-Atlantic trades. (Section 6(g) of the 1984 Act)

—Operating under agreements that have not been filed, or in a manner which is not in accordance with the terms of agreements which have been filed, with the Commission. (Sections 10(a) (2) and (3))

—Charging, demanding, collecting or receiving greater, less or different compensation for transportation of property or for any service in connection therewith than the rates and charges shown in applicable tariffs or service contracts. (Section 10(b)(1))

—Allowing persons to obtain transportation for property at less than the rates or charges established in applicable tariffs or service contracts by means of so-called "connecting carrier" agreements, or by any other unfair or unjust device or means. (Section 10(b)(4))

—Retaliating against certain shippers by refusing or threatening to refuse cargo space accommodations, or by resorting to other unfair or unjustly discriminatory methods. (Section 10(b)(5))

—Subjecting particular persons or descriptions of traffic to unreasonable refusals to deal or to undue or unreasonable prejudice or disadvantage. (Section 10(b)(12))

—Knowingly and willfully accepting or transporting cargo for the account of NVOCCs, or entering into service contracts with NVOCCs or in which NVOCCs are listed as affiliates, that do not have tariffs, and bonds or other surety, as required by sections 8 and 23 of the 1984 Act. (Section 10(b) (14) and (15))

—Boycotting or taking other concerted actions resulting in unreasonable refusal to deal. (Section 10(c)(1))

—Allocating shippers among specific carriers or prohibiting members of TAA from soliciting cargo from particular shippers. (Section 10(c)(6))

While the Commission intends that this investigation focus on the issues described above, the Investigative Officers will not be precluded from developing facts related to any other possible violations of the 1984 Act that may be uncovered in the course of this proceeding. Interested persons are invited and encouraged to contact any of the Investigative Officers named herein, at (202) 523–5783 (Phone) or (202) 523–5785 (Fax), should they wish to provide testimony or evidence, or to contribute in any other manner to the development of a complete factual record in this proceeding.

Therefore, *it is ordered*, That pursuant to sections 5, 6, 8, 10, 11, 12 and 23 of the Shipping Act of 1984, 46 U.S.C. app. 1704, 1705, 1707, 1709, 1710, 1711 and 1721, and part 502, subpart R of title 46 of the Code of Federal Regulations, 46 CFR 502.281, *et seq.*, a nonadjudicatory investigation is hereby instituted into the practices of TAA and its member lines listed in the Appendix to this Order, to develop the issues set forth above and to provide a basis for any subsequent adjudicatory, assessment or injunctive action by the Commission.

It is further ordered, That the Investigative Officers shall be Wm. Jarrel Smith, Jr., Vern W. Hill, Charles L. Haslup III, Peter J. King and Martha C. Smith of the Commission. The Investigative Officers shall be assisted by such staff members as may be assigned by the Commission's Managing Director and shall have full authority to hold public or non-public sessions, to resort to all compulsory process authorized by law (including the issuance of subpoenas *ad testificandum* and *duces tecum*), to administer oaths and to perform such other duties as may be necessary in accordance with the laws of the United States and the regulations of the Commission;

It is further ordered, That the Investigative Officers shall issue a joint final report of findings and recommendations no later than 180 days after publication of this Order in the Federal Register, and interim reports if it appears that more immediate Commission action, particularly injunctive action, is necessary, such reports to remain confidential unless and until the Commission provides otherwise;

It is further ordered, That this proceeding shall be discontinued upon acceptance of the joint final report of findings and recommendations by the Commission, unless otherwise ordered by the Commission; and

It is further ordered, That notice of this Order be published in the **Federal Register** and served upon TAA and its member lines listed in the Appendix hereto.

By the Commission.

Joseph C. Polking,

Secretary.

Appendix

Trans-Atlantic Agreement, Meadows Office Complex, 201 Route 17 North, Rutherford, NJ 07070

Polish Ocean Lines, c/o Gydnia America Line, Inc., 39 Broadway, 14th Floor, New York, NY 10006

Neptune Orient Lines Ltd., 300 Montgomery Street, San Francisco, CA 94104

Mediterranean Shipping Co. S. A., 96 Morton Street, New York, NY 10014

DSR/Senator Joint Service, 180 Howard Street, Suite 200, San Francisco, CA 94105

Sea-Land Service, Inc., 150 Allen Road, Liberty Corner, NJ 07938

P&O Containers, Ltd., Att: Corporate Counsel, One Meadowlands Plaza-12th FL., E. Rutherford, NJ 07073

Hapag-Lloyd (America) Inc., One Edgewater Plaza, Staten Island, NY 10305

Orient Overseas Container Line, 2 World Trade Center, New York, NY 10048

Atlantic Container Line BV, 50 Cragwood Road, South Plainfield, NJ 07080

Maersk Line Agency, 221 Main Street, Suite 1450, San Francisco, CA 94105

Nedlloyd, Inc., 5 World Trade Center, Suite 617, New York, NY 10048

NYK North America, Inc., 455 Market Street, Suite 2100, San Francisco, CA 94105

Transportacion Maritima, Mexicana (Mexican Line), c/o Trans-America S.S. Agency, 140 W. 6th Street, San Pedro, CA 90731

Tecomar Line, c/o Phonecian Int'l Shipping, 2350 N. Belt. East, Suite 720, Houston, TX 77032

Cho Yang Line, c/o Effective Tariff Management Corp., Suite 201, 6911 Laurel Bowie Road, Bowie, MD 20715

[FR Doc. 94–18655 Filed 7–29–94; 8:45 am]

BILLING CODE 6730–01–M

[9] 46 U.S.C. app. 1704(b)(8)

FEDERAL RESERVE SYSTEM

Georgia Baker; Change in Bank Control Notice

Acquisition of Shares of Banks or Bank Holding Companies

The notificant listed below has applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notice is available for immediate inspection at the Federal Reserve Bank indicated. Once the notice 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 indicated for the notice or to the offices of the Board of Governors. Comments must be received not later than August 22, 1994.

A. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Georgia Baker, Granbury, Texas; to acquire an additional 8.42 percent for a total of 28.78 percent of the voting shares of Community Bankers, Inc., Granbury, Texas, and thereby indirectly acquire Community Bank, Granbury, Texas, and Community Bank, Rockwall, Texas.

Board of Governors of the Federal Reserve System, July 26, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-18636 Filed 7-29-94; 8:45 am]

BILLING CODE 6210-01-F

Greensburg Bancorp, Inc., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than August 25, 1994.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Greensburg Bancorp, Inc., Shepherdsville, Kentucky; to become a bank holding company by acquiring 100 percent of the voting shares of Peoples Bancorp Green County, Inc., Greensburg, Kentucky, and thereby indirectly acquire Peoples Bank & Trust Company, Greensburg, Kentucky.

B. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Commerce Bancshares, Inc., Kansas City, Missouri; to acquire 100 percent of the voting shares of Twin City Corporation, Kansas City, Kansas, and thereby indirectly acquire Twin City State Bank, Kansas City, Kansas.

Board of Governors of the Federal Reserve System, July 26, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-18635 Filed 7-29-94; 8:45 am]

BILLING CODE 6210-01-F

Republic Bancorp, Inc.; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) 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. 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 16, 1994.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Republic Bancorp, Inc., Ann Arbor, Michigan; to acquire through its wholly owned subsidiary, Mayflower Mortgage Incorporation, a corporation doing business as Republic Bancorp Mortgage, Inc., certain assets and liabilities of Home Funding, Inc., Hopewell Junction, New York, and thereby engage in the activity of making and servicing loans, pursuant to § 225.25(b)(1) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, July 26, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-18634 Filed 7-29-94; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Scientific Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) has made final findings of scientific misconduct in the following case:

Mark S. Chagnon, Sc.D., Molecular BioQuest, Inc. A report of the Office of Research Integrity (ORI) of its

investigation into allegations of possible scientific misconduct made against Mark S. Chagnon found that he engaged in scientific misconduct by misrepresenting his academic credentials in five research grant applications submitted to the National Institutes of Health. ORI found that Dr. Chagnon falsely claimed to have completed undergraduate and graduate studies in chemistry at the Massachusetts Institute of Technology (MIT), Lowell University (Lowell Institute of Technology) and Northeastern University. ORI also concluded that Dr. Chagnon falsely claimed to have earned and M.S. degree in organic chemistry from MIT. Although he neither admits nor denies the ORI finding of scientific misconduct, Dr. Changnon has agreed to a Voluntary Exclusion and Settlement Agreement under which he will not apply for Federal grant or contract funds and will not serve on PHS advisory committees, boards, or peer review groups for a three-year period beginning June 28, 1994.

FOR FURTHER INFORMATION CONTACT: Director, Division of Research Investigations, Office of Research Integrity, 301–443–5330.

Lyle W. Bivens,

Director, Office of Research Integrity.

[FR Doc. 94–18569 Filed 7–29–94; 8:45 am]

BILLING CODE 4160–17–M

Agency for Toxic Substances and Disease Registry

[Announcement 490]

Model for Development, Implementation, and Evaluation of Tribal Environmental Health Activities

Introduction

The Agency for Toxic Substance and Disease Registry (ATSDR) announces the availability of fiscal year (FY) 1994 funds for a cooperative agreement with tribal governments to develop, implement, and evaluate environmental health education projects.

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 to reduce morbidity and mortality and improve quality of life. This announcement is related to the priority area of Environmental Health. (For ordering a copy of "Healthy People 2000," see the section WHERE TO OBTAIN ADDITIONAL INFORMATION.)

Authority

This program is authorized under Sections 101(36), 104(i) (14) and (15) and 126 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) [42 U.S.C. 9601(36), 9604(i) (14) and (15) and 9626].

Smoke-Free Workplace

The PHS 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.

Eligible Applicants

Assistance will be provided to Indian tribes or consortia of Indian tribes. Indian tribes are defined in Section 101(36) 42 U.S.C. 9601 as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

Availability of Funds

Approximately $200,000 is available in FY 1994 to fund 2–5 awards. It is expected that the average award will be $53,000, ranging from $40,000 to $75,000. It is expected that the awards will begin on or about September 30, 1994, and will be for a 12-month budget period within a total project period of up to five years. Funding estimates may vary and are subject to change.

Continuation awards within the project period will be made on the basis of satisfactory progress and the availability of funds.

Use of Funds

Funds may be expended for reasonable program purposes, such as personnel, travel, supplies and services, including contractual services. A tribal government, native Alaska village, or tribal consortium as the direct and primary recipient in a PHS grant program, must perform a substantive role in carrying out project activities and not merely serve as a conduit for an award to another party or provide funds to an ineligible party.

Purpose

The purpose of this cooperative agreement program is to build environmental health capacity within the American Indian and Alaska Native communities. Capacity building efforts will address one or both of the following: (a) the design of a model for health care professions and community environmental health education, or (b) the development of an environmental health education program related to hazardous substances. The cooperative agreement program will assist tribal and village governments in addressing community concerns related to hazardous substances waste sites and in the development, implementation, and evaluation of culturally relevant, tribal-based environmental health education activities for American Indian and Alaska Native communities and for the health professionals and paraprofessionals serving these communities.

American Indian and Alaska Native environmental and health staff and other professionals and paraprofessionals need additional training to be able to respond appropriately to environmental health questions currently being asked by individual community members and to develop, implement, and evaluate appropriate community and health professional environmental health education activities.

The proposed program should include health professional and paraprofessional training in: (1) the surveillance and prevention of human exposure to hazardous substances prioritized by the Environmental Protection Agency (EPA) and ATSDR, (2) the screening, diagnosis, and treatment of environmental illness in American Indian and Alaska Native community members, and (3) appropriate outreach and risk communication with members of communities potentially exposed to hazardous substances in the environment.

Project activities may include: courses, workshops, or conferences; development of culturally appropriate environmental health materials; and participation in other activities necessary to educate American Indian and Alaska Native community members, tribal health and environment professionals and paraprofessionals, and other health professionals serving American Indian and Alaska Native communities. The community education activities should be designed to appropriately address identified community health concerns related to hazardous substances waste sites and to promote interest in health and science careers.

The program should also result in the development of models for

environmental health training and education activities that can be disseminated for use by other American Indian and Alaska Native governments.

Program Requirements

In conducting activities to achieve the purpose of the program, an American Indian and Alaska Native government or consortium shall be responsible for conducting activities under A., below, and ATSDR will be responsible for conducting activities under B., below:

A. Recipient Activities

1. Develop and implement education activities related to preventing and managing environmental health problems on tribal lands. These activities should be designed to improve the knowledge and skills of community members and health professionals and paraprofessionals concerning such topics as:

a. Health conditions possibly related to hazardous substances at sites;

b. Health studies being done by ATSDR concerning chronic exposure of American Indian/Alaska Natives to hazardous substances;

c. Hazardous substances information and site-specific risk communication;

d. American Indian and Alaska Native community risk communication and outreach;

e. Environmental health guidelines and policy, and health-based environmental standards.

2. Develop educational materials specifically targeted for American Indian and Alaska Native communities and the health professionals and paraprofessionals serving them, including materials in appropriate languages.

3. Select and implement appropriate methods to disseminate educational materials to American Indian and Alaska Native communities and the health professionals and paraprofessionals serving them.

4. Develop an evaluation plan to ascertain the effectiveness and impact of the program activities and the overall program.

5. Develop, evaluate, and disseminate to appropriate audiences the tribal training and education model developed as a result of this project.

B. ATSDR Activities

1. Assist in the identification of education and training needs of target audiences.

2. Assist in the design, implementation, and evaluation of community environmental health education and health professional and paraprofessional health education activities.

3. Assist in the design and implementation of training activities for tribal, local, and State staff serving the environmental health needs of American Indian and Alaska Native communities.

4. Provide current information and instructional resources about the possible health effects related to exposure to hazardous substances in the environment.

5. Assist in development of an overall evaluation plan to determine the effectiveness and impact of the project on knowledge, skills, attitudes, and behaviors of target audiences.

6. Provide site-specific assistance and direction on possible cost recovery activities.

Evaluation Criteria

The application will be reviewed and evaluated by an ATSDR-convened objective review panel based on the following criteria:

A. Technical Review Criteria

1. *Proposed Program*—50%

a. Understanding of environmental health problems to be addressed;

b. Identification of target groups and their education and training needs;

c. Extent to which project objectives are realistic, measurable, and related to program requirements;

d. Specificity and feasibility of proposed activities and methods used to carry out the project; and

e. Specificity and feasibility of the proposed schedule for implementing project activities.

2. *Proposed Project Management*—20%

a. Ability of the applicant to provide appropriate program staff and support staff, including possible contractor(s), to the project; and

b. Plans for collaborative efforts and appropriate letters of support included.

3. *Proposed Project Evaluation*—30%

The adequacy of the proposal relative to:

a. Appropriateness of the methods used to evaluate the individual activities and overall project;

b. Thoroughness of the methods used to evaluate the individual activities and overall project; and

c. Extent to which the evaluation plan includes measures of program outcome and effectiveness, such as changes in participant's knowledge, attitudes, and behaviors.

4. *Proposed Project Budget*—(not scored)

The extent to which the proposed budget is reasonable, clearly justified with a budget narrative, and consistent with the intended use of cooperative agreement funds.

B. Continuation awards within the five-year project period will be made on the basis of the following criteria:

1. Satisfactory progress in meeting past budget period objectives;

2. Objectives for the next budget period are realistic, specific, and measurable;

3. Any proposed changes in project objectives, methods of operation, staff or contractor(s), or evaluation procedures which will facilitate achievement of project goals.

4. Any budget changes or requests are clearly justified and consistent with the intended use of cooperative agreement funds.

Executive Order 12372 Review

This program is not subject to Executive Order 12372 review.

Public Health System Reporting Requirements

This program is not subject to the Public Health System Reporting Requirements.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance Number is 93.161.

Other Requirements

A. Disclosure

The applicant is required to provide documentation that any medical information obtained pursuant to the agreement, pertaining to an individual and therefore considered confidential, will be protected from disclosure when the consent of the individual to release identifying information is not obtained.

B. Cost Recovery

The CERCLA of 1980, as amended by the SARA of 1986, provides for the recovery of costs incurred for response actions at each NPL Superfund site from potentially responsible parties. The recipient would agree to maintain an accounting system that will keep an accurate, complete, and current accounting of all financial transactions on a site-specific basis, i.e., individual time, travel, and associated costs including indirect costs, as appropriate for the site. The applicant would also maintain documentation that describes the site-specific actions taken with respect to the site, e.g., contracts, work assignments, progress reports, and other documents that describe the work performed related to a site. The recipient will retain the documents and records to support these financial

transactions, for possible use in a cost recovery case, for a minimum of ten years after submission of a final Financial Status Report (FSR), unless there is a litigation, claim, negotiation, audit, or other action involving the specific site, then the records will be maintained until resolution of all issues at the specific site.

C. Third Party Agreements

Project activities which have been approved for contracting shall be formalized in a written agreement that clearly established the relationship between the tribal government and the proposed contractor. The written agreement shall at a minimum:

1. State all applicable requirements imposed on the contractor under the terms of the cooperative agreement, including requirements concerning technical review and ownership of materials.

2. State that any copyrighted or copyrightable works shall be subject to a royalty-free, nonexclusive, and irrevocable license to the Federal government to reproduce, publish, or otherwise use them, and to authorize others to do so for Federal government purposes.

3. State that whenever any work subject to this copyright policy may be developed in the course of the cooperative agreement project by the contractor, the written agreement must require the contractor to comply with these requirements, and can in no way diminish the government's right in that work.

4. State the activities to be performed, the time schedule for those activities, the policies and procedures to be followed in carrying out the agreement, and the maximum amount of money for which the recipient may become liable to the contractor under the agreement.

The written agreement required shall not relieve a tribal government of any part of its responsibility or accountability to PHS under the grant. The agreement shall retain sufficient rights and control to the tribal government to enable the tribal government to fulfill this responsibility and accountability.

D. ATSDR Review

All materials developed with cooperative agreement funding must be reviewed by the ATSDR Project Officer in draft before they are used and disseminated. ATSDR will return draft materials with comments within two weeks of receipt.

E. OMB Clearance

Projects that involve the collection of information from 10 or more individuals and funded by cooperative agreement will be subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

Application Submission and Deadline

The original and two copies of the application PHS Form 5161–1 (Revised 7/9, OMB Control Number 0937–0189) must be submitted to Henry Cassell, Grants Management Officer, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 255 East Paces Ferry Road, NE., Room 300, Mailstop E–13, Atlanta, GA 30305, on or before September 1, 1994.

1. Deadline

Applications shall be considered as meeting the deadline if they are either:

a. Received on or before the deadline date: or

b. Sent on or before the deadline date and received in time for submission to the objective review group. (Applicants must 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.)

2. Late Applications

Applications which do not meet the criteria in 1.a. or 1.b. above are considered late applications. Late applications will not be considered in the current competition and will be returned to the applicant.

Where To Obtain Additional Information

To receive additional written information call (404) 332–4561. You will be asked to leave your name, address, and phone number and will need to refer to Announcement 490. You will receive a complete program description, information on application procedures, and application forms.

If you have questions after reviewing the contents of all the documents, business management technical assistance may be obtained from Maggie Slay, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 255 East Paces Ferry Road, NE., Room 300, Mailstop E–13, Atlanta, GA 30305, telephone (404) 842–6797. Programmatic technical assistance may be obtained from Christine Rosheim, D.D.S., M.P.H., Health Education Specialist, Division of Health Education, ATSDR, 1600 Clifton Road, Mailstop E–33, Atlanta, GA 30333, telephone (404) 639–6206.

Please refer to Announcement 490 when requesting information and submitting an application.

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) referenced in the Introduction through the Superintendent of Documents, Government Printing Office, Washington, DC 20402–9325, telephone (202) 783–3238.

Dated: July 26, 1994.

Claire V. Broome,

Deputy Administrator Agency for Toxic Substances and Disease Registry.

[FR Doc. 94–18613 Filed 7–29–94; 8:45 am]

BILLING CODE 4163–70–P

Centers for Disease Control and Prevention

Control of Inorganic Lead Exposures During Lead Reclamation: Meeting

The National Institute for Occupational Safety and Health (NIOSH) of the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Control of Inorganic Lead Exposures During Lead Reclamation.

Time and Date: 1 p.m.-5 p.m., August 11, 1994.

Place: Alice Hamilton Laboratory, Conference Room A, NIOSH, CDC, 5555 Ridge Avenue, Cincinnati, Ohio 45213.

Status: Open to the public, limited only by the space available.

Purpose: The purpose is to conduct an open meeting for the peer review of a NIOSH project entitled, "Control of Inorganic Lead Exposures During Lead Reclamation." This project will evaluate engineering controls and occupational programs (incentive, hygiene, training, etc.) in lead smelters. The goal of this project is to identify the technologies and occupational programs that are effective in reducing lead exposures to the lead smelter worker. Viewpoints and suggestions from industry, labor, academia, other government agencies, and the public are invited.

Contact Person for Additional Information: Ronald M. Hall, NIOSH, CDC, 4676 Columbia Parkway, Mailstop R5, Cincinnati, Ohio 45226, telephone 513/841–4387.

Dated: July 25, 1994.

William H. Gimson,

Acting Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 94–18611 Filed 7–29–94; 8:45 am]

BILLING CODE 4163–19–M

Food and Drug Administration

[Docket No. 93N-0349]

Satish R. Shah; Denial of Hearing and Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is denying a hearing for and is issuing a final order under section 306(a)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 335a(a)(2)) permanently debarring Mr. Satish R. Shah, #28858-037, L.S.C.I. Allenwood, P.O. Box 1500, White Deer, PA 17887, from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Mr. Shah was convicted of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval, of a drug product and relating to the regulation of a drug product under the act.

EFFECTIVE DATE: August 1, 1994.

ADDRESSES: Application for termination of debarment to the Dockets Management Branch (HFA-305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1-23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Tamar S. Nordenberg, Center for Drug Evaluation and Research (HFD-366), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-594-2041.

SUPPLEMENTARY INFORMATION:

I. Background

Mr. Satish R. Shah, a former research and development supervisor in Par Pharmaceutical, Inc.'s (Par), Research and Development Department, was sentenced on April 30, 1993, for his conviction of, among other counts, one count of making a false statement to a Federal agency, a felony offense under 18 U.S.C. 1001. The basis for this conviction was Mr. Shah's material false statement to FDA regarding the formulation and the bioequivalency and stability testing of Par's generic drug product Triamterene 75 milligram (mg)/ Hydrochlorothiazide 50 mg tablets.

In a certified letter received by Mr. Shah on October 22, 1993, the Deputy Commissioner for Operations offered Mr. Shah an opportunity for a hearing on the agency's proposal to issue an order under section 306(a) of the act permanently debarring Mr. Shah from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a) of the act, that Mr. Shah was convicted of a felony under Federal law for conduct relating to the development, approval, and regulation of a drug product.

The certified letter informed Mr. Shah that his request for a hearing could not rest upon mere allegations or denials but must present specific facts showing that there was a genuine and substantial issue of fact requiring a hearing. The letter also notified Mr. Shah that if it conclusively appeared from the face of the information and factual analyses in Mr. Shah's request for a hearing that there was no genuine and substantial issue of fact, FDA would enter summary judgment against him, making findings and conclusions, and denying his request for a hearing.

Mr Shah requested a hearing in a letter dated November 23, 1993. However, Mr. Shah has not submitted any information or analyses to justify a hearing. Mr. Shah's failure to raise any issues of fact, and his failure to submit information or analyses in support of his hearing request, constitute a waiver of his opportunity for a hearing and a waiver of any contentions concerning his debarment (21 CFR 12.22).

II. Denial of Hearing

Because he failed to present any arguments or information to show why he should not be debarred, FDA finds that Mr. Shah has failed to identify any genuine and substantial issue of fact requiring a hearing. Accordingly, pursuant to 21 CFR 12.28, the agency denies Mr. Shah's request for a hearing.

III. Findings and Order

Therefore, the Acting Deputy Commissioner for Operations, under section 306(a) of the act and under authority delegated to her (21 CFR 5.20), finds that Mr. Satish R. Shah has been convicted of a felony under Federal law for conduct: (1) Relating to the development or approval, including the process for development or approval, of a drug product (21 U.S.C. 335a(a)(2)(A)); and (2) relating to the regulation of a drug product (21 U.S.C. 335a(a)(2)(B)). Specifically, Mr. Shah's felony conviction under 18 U.S.C. 1001 was for making a false statement to FDA by submitting false pilot batch records for a drug product. Pilot batch records are used by FDA in its determination of whether to approve a generic drug product based, among other things, on bioequivalence with its name brand counterpart. Because a showing of bioequivalence is a prerequisite to drug approval, the actions for which Mr. Shah was convicted affected the drug approval process.

As a result of the foregoing findings, Mr. Satish R. Shah is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application under sections 505, 507, 512, or 802 of the act (21 U.S.C. 355, 357, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective (insert date of publication in the **Federal Register**) (21 U.S.C. 335a(c)(1)(B) and (c)(2)(A)(ii) and 21 U.S.C. 321(ee)). Any person with an approved or pending drug product application who knowingly uses the services of Mr. Shah, in any capacity, during his period of debarment, will be subject to civil money penalties. If Mr. Shah, during his period of debarment, provides services in any capacity to a person with an approved or pending drug product application, he will be subject to civil money penalties. In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Mr. Shah during his period of debarment.

Any application by Mr. Shah for termination of debarment under section 306(d)(4) of the act should be identified with Docket No. 93N-0349 and sent to the Dockets Management Branch (address above). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j). Publicly available submissions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: July 18, 1994.

Linda A. Suydam,

Interim Deputy Commissioner for Operations.

[FR Doc. 94–18624 Filed 7–29–94; 8:45 am]

BILLING CODE 4160–01–F

Conference on Feasibility of Genetic Technology to Close the HIV Window in Donor Screening; Notice of Public Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting.

SUMMARY: The Food and Drug Administration (FDA), Office of the Commissioner, is sponsoring a public meeting to evaluate the feasibility and utility of gene-amplification techniques to enhance viral detection in the seronegative "window" phase of human immunodeficiency virus (HIV) infection.

DATES: The public meeting will be held on Monday, September 26, 1994, 7 a.m. to 4 p.m. through Wednesday, September 28, 1994, 12 m.

ADDRESSES: The public meeting will be held at the Holiday Inn-Silver Spring, 8777 Georgia Ave., Silver Spring, MD.

FOR FURTHER INFORMATION CONTACT: Nicholas P. Reuter, Food and Drug Administration, Office of Health Affairs (HFY–20), 5600 Fishers Lane, Rockville, MD 20857, 301–443–1382, FAX 301–443–0232. Those persons interested in attending the meeting should mail their registration to Nicholas P. Reuter (address above). Registration should include name, title, organization, address, and telephone number and/or fax number. There is no charge for this meeting, but advance registration is required and early registration is encouraged due to seating limitations. The cutoff date for registration is August 26, 1994.

SUPPLEMENTARY INFORMATION: Several novel approaches have been described for the detection of genetic sequences by amplification. Although these techniques offer high sensitivity for detection, problems of nonspecificity, reproducibility and reduced throughput have hampered their use in routine diagnosis. The program is designed to assess the current status of technology development and readiness for applications to donor screening. The procedural and economic aspects of implementing these techniques will also be discussed.

Dated: July 26, 1994.

Michael R. Taylor,

Deputy Commissioner for Policy.

[FR Doc. 94–18680 Filed 7–29–94; 8:45 am]

BILLING CODE 4160–01–F

Public Health Service

Agency for Health Care Policy and Research; Meeting

In accordance with section 10(a) of the Federal Advisory Committee Act (Title 5, U.S.C., Appendix 2) announcement is made of the following special emphasis panel scheduled to meet during the month of August 1994:

Name: Health Care Policy and Research Special Emphasis Panel.

Date and Time: August 18, 1994, 9:30 a.m.

Place: Holiday Inn Crowne Plaza, 1750 Rockville Pike, Conference Room TBA, Rockville, Maryland 20852.

Open August 18, 9:30 a.m. to 10:00 a.m. Closed for remainder of meeting.

Purpose: This Panel is charged with conducting the initial review of grant applications related to research on care for persons with AIDS/HIV diseases.

Agenda: The open session of the meeting on August 18 from 9:30 a.m. to 10:00 a.m. will be devoted to a business meeting covering administrative matters. During the closed session, the committee will be reviewing complex and detailed grant applications dealing with (1) cost and financing of HIV/AIDS treatments and services; (2) organization and delivery of services; (3) characteristics and interactions of providers and patients; (4) comorbidity, and (5) special populations. In accordance with the Federal Advisory Committee Act, Title 5, U.S.C., Appendix 2 and Title 5, U.S.C., 552b(c)(6), the Administrator, AHCPR, has made a formal determination that this latter session will be closed because the discussions are likely to reveal personal information concerning individuals associated with the grant applications. This information is exempt from mandatory disclosure.

Anyone wishing to obtain a roster of members or other relevant information should contact Gerald E. Calderone, Ph.D., Agency for Health Care Policy and Research, Suite 602, 2101 East Jefferson Street, Rockville, Maryland 20852, Telephone (301) 594–2462.

Agenda items for all meetings are subject to change as priorities dictate.

Dated: July 22, 1994.

Clifton R. Gaus,

Administrator.

[FR Doc. 94–18620 Filed 7–29–94; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–942–04–4730–02]

Filing of Plats of Survey; Nevada

AGENCY: Bureau of Land Management; Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public and interested State and local government officials of the filing of Plats of Survey in Nevada.

EFFECTIVE DATE: Filing is effective at 10:00 a.m. on the dates indicated below.

FOR FURTHER INFORMATION CONTACT: John S. Parrish, Chief, Branch of Cadastral Survey, Bureau of Land Management (BLM), Nevada State Office, 850 Harvard Way, P.O. Box 12000, Reno, Nevada 89520, 702–785–6541.

SUPPLEMENTARY INFORMATION: 1. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on April 25, 1994:

The plat representing the dependent resurvey of a portion of the subdivisional lines and a portion of the subdivision of section 26, the subdivision of the SE¼ of section 26, and the metes-and-bounds survey of lot 1 of section 26, T. 22 S., R. 61 E., Mount Diablo Meridian, Nevada, under Group No. 742, was accepted April 19, 1994.

This survey was executed to meet certain administrative needs of the Bureau of Land Management and the City of Henderson.

2. The Plat of Survey, in three sheets, of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on May 4, 1994:

The plat representing the dependent resurvey of the Eighth Standard Parallel North, through a portion of Ranges 64 and 65 East, a portion of the south boundary, the west boundary, and the dependent and independent resurvey of the subdivisional lines and the metes-and-bounds survey of Tract Nos. 37, 38, 39, 40, 41, 42 and 43, T. 40 N., R. 65 E., Mount Diablo Meridian, Nevada, under Group No. 673, was accepted April 20, 1994.

This survey was executed to meet certain administrative needs of the Bureau of Land Management.

3. The Supplemental Plat of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on May 16, 1994:

The Supplemental Plat showing amended and additional lotting of sec. 40, T. 35 N., R. 56 E., Mount Diablo Meridian, Nevada, was accepted May 9, 1994.

This plat was prepared to meet certain administrative needs of the Bureau of Land Management and Allie and Bill Bear.

4. The Plat of Survey, in three sheets, of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on May 27, 1994:

The plat representing the dependent resurvey of a portion of the north boundary, a portion of the subdivisional lines, a portion of the meanders of Lake Tahoe, and the subdivision of certain sections, T. 14 N., R. 18 E., Mount Diablo Meridian, Nevada, under Group No. 657, was accepted May 23, 1994.

This survey was executed to meet certain administrative needs of the U.S. Forest Service.

5. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on June 23, 1994:

The plat representing the dependent resurvey of the east and west boundaries, a portion of the north boundary and a portion of the subdivisional lines of T. 41 N., R. 65 E., Mount Diablo Meridian, Nevada, under Group No. 676, was accepted June 15, 1994.

This survey was executed to meet certain administrative needs of the Bureau of Land Management.

6. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on June 30, 1994:

The plat representing the dependent resurvey of a portion of the subdivisional lines, and the subdivision of certain sections, of T. 16 N., R. 33 E., Mount Diablo Meridian, Nevada, under Group No. 701, was accepted June 23, 1994.

This survey was executed to meet certain administrative needs of the U.S. Navy.

7. The Supplemental Plat of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on June 30, 1994:

The Supplemental Plat representing the subdivision of former lots 6 and 7, section 5, T. 19 S., R. 60 E., Mount Diablo Meridian, Nevada, was accepted June 27, 1994.

This plat was prepared to meet certain administrative needs of the Bureau of Lane Management and Olympic Lands, Inc.

7. The above-listed surveys are now the basic record for describing the lands for all authorized purposes. These surveys will be placed in the open files in the BLM Nevada State Office and will be available to the public as a matter of information. Copies of the surveys and related field notes may be furnished to the public upon payment of the appropriate fees.

John S. Parrish,

Chief Cadastral Surveyor, Nevada.

[FR Doc. 94–18601 Filed 7–29–94; 8:45 am]

BILLING CODE 4310–HC–M

Fish and Wildlife Service

Fish and Wildlife Service Hydropower Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: Based on an internal review and on public comments received in response to a January 10, 1990, **Federal Register** notice, the Fish and Wildlife Service (Service) determined that a national policy specifically directed toward non-Federal hydropower projects was not necessary. The Service Hydropower Policy issued in 1988 was rescinded on June 1, 1994. Other Servicewide policies, specifically the Mitigation Policy published in a **Federal Register** notice of January 23, 1981, will continue to apply to Service activities which evaluate impacts of land and water development projects, including non-Federal hydropower projects.

DATES: The Hydropower Policy rescission became effective June 1, 1994.

FOR FURTHER INFORMATION CONTACT: Marge Kolar, Chief, Branch of Federal Activities, U.S. Fish and Wildlife Services, MS 400 ARLSQ, 1849 C Street, N.W., Washington, D.C. 20240, (703) 358–2183.

SUPPLEMENTARY INFORMATION: On July 25, 1988, the Service issued a hydropower policy intended to provide guidance on the role of the Service in the planning and development of non-Federal hydropower projects. In a **Federal Register** notice of January 10, 1990, the Service requested comments on its role in the Federal Energy Regulatory Commission's (FERC) hydropower licensing program, as it relates to provisions of the Electric Consumers Protection Act of 1986 (Pub. L. 99–495). That notice specifically requested comments on the need for Servicewide hydropower policy and on the scope and content of such a policy.

The Service received 54 comment letters from Federal and State agencies, organizations, and individuals. Only a minority of these letters specifically identified a need for a national policy. Of these, several expressed a need for consistent national approach from the Service's decentralized organization toward hydropower project recommendations, particularly during 1990 to 1993, when a large number of projects were due to be relicensed. Other commentors recommended that the Service concentrate its efforts on relicensing consultations and on the new FERC consultation regulations rather than on preparing a new hydropower policy. The Service agrees with the need for a consistent national approach and with the recommendations for focusing on consultations and regulations. Specifically, the Service agrees with the many other commentors who suggested that the Service's Mitigation Policy, which was developed for all types of land and water development projects and published in the January 23, 1981 **Federal Register**, provides sufficient information and more detailed guidance for Service biologists and hydropower developers. The Service believes that the Mitigation Policy provides a consistent national approach for reviewing hydropower projects across the country.

Althogh not specifically requested, many letters commented on the Service's 1988 hydropower policy. One concern identified was that the policy was not consistent with the Electric Consumers Protection Act of 1986, which directs FERC to include license conditions that "protect, mitigate damages to, and enhance" fish and wildlife resources. The Service's 1988 policy discussed only mitigation and enhancement, and not protection. Many concerns were also expressed regarding the definitions of mitigation and enhancement, particularly as related to relicensing issues. Confusion over the interpretation of these terms has led to inconsistent approaches to mitigation planning at non-Federal hydropower projects. Most commentors recommended that, if a policy was determined to be necessary, major alterations should be made to the Service's 1988 hydropower policy.

Because of the broad spectrum of comments received from within and without the Service, and the lack of need for a specific Servicewide hydropower policy, the Service rescinded its 1988 hydropower policy on June 1, 1994. The Service's Mitigation Policy will continue to apply to Service activities on land and water development projects, including non-Federal hydropower projects. The Service will also continue to develop or modify technical guidelines for staff biologists in reviewing hydropower projects.

Dated: July 11, 1994.

Mollie H. Beattie,

Director.

[FR Doc. 92–18667 Filed 7–29–92; 8:45 am]

BILLING CODE 4310–55–M

National Park Service

Olympic National Park; Intent To Prepare Two Environmental Impact Statements; Elwha River Ecosytem Restoration

SUMMARY: The National Park Service (NPS) intends to adopt an existing environmental impact statement (EIS) and circulate it with supplemental information concerning removal of the Glines Canyon and Elwha Dams (the projects) from the Elwha River in the state of Washington. The NPS intends to adopt the March 1991 draft EIS, as amended in 1993 by the Federal Energy Regulatory Commission (FERC), and incorporate by reference the Congressionally mandated "Elwha Report," as information for the Secretary of the Interior (Secretary) on whether to remove the projects as means to restore the Elwha River ecosystem.

NPS will adopt the FERC 1993 document with supplemental information as the NPS draft EIS. The

supplemental information will include any new data and findings regarding restoration of the Elwha River ecosystem gathered since the release of the FERC document. The range of alternatives and issues analyzed by FERC will essentially be the same; however, the purpose and need and proposed action will change to fully restoring the Elwha River ecosystem and native anadromous fishery through removal of the projects. Should this process conclude with a decision to remove one or both projects as means to restore the ecosystem, NPS intends to prepare and issue a second EIS on alternatives to implement this decision, such as timing, methods for removing the dams, and managing sediment. NPS intends to work concurrently on both EIS's; however, if the Secretary, on the basis of the first EIS, selects an alternative other than removal of both projects, preparation of the "Implementation EIS" will cease.

Extensive public scoping and comment on the FERC EIS occurred in 1991 and 1993 and NPS will make available public comments and FERC's responses on the 1991 document. NPS intends to ask for public comment on the adopted EIS and supplemental information when released to the public in the fall of 1994. Additional public scoping on the "Implementation EIS" will also be solicited in the future. Persons wishing additional information should contact the National Park Service, Superintendent, Olympic National Park, 600 East Park Avenue, Port Angeles, Washington 98362., attn. Elwha River Restoration Project/Brian Winter, or at telephone number (206) 452–0302.

Background

The Elwha River, which forms the largest watershed within Olympic National Park, once supported ten stocks of anadromous salmon trout and a variety of aquatic and terrestrial species. In the early 1900's, two hydroelectric dams (the projects) were constructed in the lower portion of the river. These dams were constructed without fish passage measures, restricting anadromous fish to less than five miles of the available 75 miles of spawning and rearing habitat.

The Federal Energy Regulatory Commission (FERC) released a draft EIS in March 1991 and, in response to public comments, amended it in 1993 on licensing the Elwha project and re-licensing the Glines Canyon project pursuant to the Federal Power Act. FERC evaluated a range of project alternatives against three primary resource objectives: (1) restoration of wild, self-sustaining runs of anadromous fish; (2) restoration of natural Elwha River Basin conditions within Olympic National Park; and (3) provision of renewable hydroelectric energy. FERC concluded that removal of both dams would best meet the first two objectives. FERC's EIS was not finalized and a record of decision was not issued.

The Elwha River Ecosystem and Fisheries Restoration Act (P.L. 102–495) was enacted by Congress in October 1992 to legislatively resolve numerous conflicts surrounding these two projects. It directs the Department of the Interior to prepare a report (subsequently titled *The Elwha Report*) including plans for dam removal, fish restoration, and protection of local water supplies, and power supply replacement. The Act authorizes the Secretary of the Interior to acquire both dams if determined dam removal is necessary for the full restoration of the Elwha River ecosystem and native anadromous fisheries and that funds be made available for that purpose.

The Elwha Report was prepared by NPS in cooperation with several federal agencies and the Lower Elwha S'Klallam tribe. It was submitted to the Office of Management and Budget in December 1993 and to Congress in June 1994. The report summarizes much of the FERC EIS and added feasibility and cost analyses for a range of scenarios for dam removal and mitigation of subsequent impacts. It concludes that removal of both projects is the only alternative that would achieve the goal of full restoration of the Elwha River ecosystem and native anadromous fisheries.

As provided for by the Council on Environmental Quality (CEQ) regulations (40 CFR 1506.3), NPS intends to adopt the amended FERC EIS and incorporate by reference the 1994 Elwha Report in a draft EIS for public review and comment. Depending on the outcome of this EIS, a second "Implementation EIS" will address a range of specific dam removal and sediment management options, analyzing the impacts of each in more depth.

SUPPLEMENTARY INFORMATION: The National Park Service will prepare both EIS's in cooperation with the U.S. Fish and Wildlife Service, the Bureau of Indian Affairs, Army Corps of Engineers, Bureau of Reclamation, and Lower Elwha S'Klallam Tribe. The responsible official is Charles Odegard, Regional Director, Pacific Northwest Regional Office. The preparation of both EISs and subsequent Record of Decisions is expected to take about two years. The public will have an opportunity to review and comment on the first EIS in the fall, 1994. A final EIS is expected to be released in early 1995. Should the decision be made to remove the projects, the draft "Implementation EIS" would be released for public review mid-year, 1995, with a final EIS anticipated in early 1996.

Dated: July 22, 1994.

Denis P. Galvin,

Associate Director, Planning and Development, National Park Service.

[FR Doc. 94–18568 Filed 7–29–94; 8:45 am]

BILLING CODE 4310–70–P

Meeting of the National Park System Advisory Board

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of Meeting of National Park System Advisory Board.

Notice is hereby given in accordance with the Federal Advisory Committee Act, 5 U.S.C. Appendix, that a meeting of the National Park System Advisory Board will be held on August 14 and 15, 1994, at the State Plaza Hotel, Diplomat Room, 2117 E Street, NW, Washington, DC. The Board will convene for the opening of the general business meeting at 1:30 p.m., Sunday, August 14, and will meet until about 5:00 p.m. The Board will reconvene at about 8:00 a.m., Monday, August 15, and the meeting will be adjourned about 5:00 p.m., that day. The meeting will follow orientation tours of Manassas National Battlefield Park, Virginia; the White House; and the core Memorial Area in the District of Columbia and environs.

On August 14, after opening remarks by the Director of the National Park Service, the Board's Land and Water Conservation Fund Review Committee will propose recommendations for deliberation and adoption by the Board. The Board will then receive an interim report from its Denali Committee, which is currently scheduled to provide a final report in late fall 1994.

On August 15, the Board will receive the report of its History Areas Committee and potential National Historic Landmarks will be brought before the Board for deliberation and recommendation to the Secretary of the Interior. Activities relating to the National Park Service's upcoming American Labor History theme study will also be discussed.

The Board may be addressed at various times by officials of the Department of the Interior and the National Park Service, and other miscellaneous topics and reports may be

covered. The order of the agenda may be changed, if necessary, to accommodate travel schedules or for other reasons.

The business meeting will be open to the public. Space and facilities to accommodate members of the public are limited and persons will be accommodated on a first-come, first-served basis. Anyone may file with the Board a written statement concerning matters to be discussed. The Chairman may also permit attendees to address the Board, but may restrict the length of presentations as necessary to allow the Board to complete its agenda within the allotted time.

Persons wishing further information concerning the meeting, or who wish to submit written statements, may contact Shirley S. Smith, Office of Policy, National Park Service, P. O. Box 37127, Washington, DC 20013–7127 (telephone 202–208–4030). More specific information on potential National Historic Landmarks may be obtained from Acting Chief Historian Benjamin Levy, History Division, National Park Service (telephone 202–343–8164) at the above post office box address.

Draft minutes of the meeting will be available for public inspection about 12 weeks after the meeting, in Room 1220, Main Interior Building, 1849 C Street, NW, Washington, DC.

Dennis Fenn,

Acting Deputy Director.

[FR Doc. 94–18565 Filed 7–29–94; 8:45 am]

BILLING CODE 4310–70–P

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects from Hancock County, ME, in the Control of the National Park Service.

AGENCY: National Park Service, Interior

ACTION: Notice.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003(d), of completion of the inventory of human remains and associated funerary objects from a site in Hancock County, ME, that are presently in the control of the National Park Service.

A detailed inventory and assessment of these human remains has been made by National Park Service curatorial staff, contracted specialists in physical anthropology and prehistoric archeology, and representatives of the Penobscot Nation, Aroostook Band of Micmac, Houlton Band of Maliseet, and the Passamaquoddy Nation, identified collectively hereafter as the Wabanaki Tribes of Maine.

The partial remains of at least seven individuals (including five adults, one subadult, and one child) were recovered in 1977 from a single grave at the Fernald Point Site (ME Site 43–24), a prehistoric shell midden on Mount Desert Island, within the boundary of Acadia National Park. A bone harpoon head, a modified beaver tooth, and several animal and fish bone fragments were found associated with the eight individuals. Radiocarbon assays indicate the burial site dates between 1035–1155 AD. The human remains and associated funerary objects have been catalogued as ACAD–5747, 5749, 5750, 5751, 5752, 5783, 5784. The partial remains of an eighth individual (an elderly male) was also recovered in 1977 from a second grave at the Fernald Point Site. No associated funerary objects were recovered with this individual. Radiocarbon assays indicate the second burial site dates between 480–680 AD. The human remains have been catalogued as ACAD–5748. The human remains and associated funerary objects of all nine individuals are currently in the possession of the University of Maine, Orono, ME.

Inventory of the human remains and associated funerary objects and review of the accompanying documentation indicates that no known individuals were identifiable. A representative of the Wabanaki Tribes of Maine has identified the Acadia National Park area as a historic gathering place for his people and stated his belief that there exists a relationship of shared group identity between these individuals and the Wabanaki Tribes of Maine. The Prehistoric Subcommittee of the Maine State Historic Preservation Office's Archaeological Advisory Committee has found it reasonable to trace a shared group identity from the Late Prehistoric Period (1000–1500 AD) inhabitants of Maine as an undivided whole to the four modern Indian tribes known collectively as the Wabanaki Tribes of Maine on the basis of geographic proximity; survivals of stone, ceramic and perishable material culture skills; and probable linguistic continuity across the Late Prehistoric/Contact Period boundary. In a 1979 article, Dr. David Sanger, the archeologist who conducted the 1977 excavations at the Fernald Point Site and uncovered the abovementioned burials, recognizes a relationship between Maine sites dating to the Ceramic Period (2,000 B.P. - 1600 A.D.) and present-day Algonkian speakers generally known as Abenakis, including the Micmac, Maleseet, Passamaquoddy, Penboscot, Kennebec, and Pennacook groups.

Based on the above mentioned information, officials of the National Park Service have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity which can be reasonably traced between these human remains and associated funerary objects and the Wabanaki Tribes of Maine.

This notice has been sent to officials of the Wabanaki Tribes of Maine. Representatives of any other Indian tribe which believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Len Bobinchock, Acting Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, ME 04609, telephone: (207) 288–0374, before August 31, 1994. Repatriation of these human remains and associated funerary objects to the Wabanaki Tribes of Maine may begin after that date if no additional claimants come forward.

Dated: July 21, 1994

Francis P. McManamon, Ph.D.

Departmental Consulting Archeologist, Chief, Archeological Assistance Division

[FR Doc. 94–18388 Filed 7–29–94; 8:45 am]

BILLING CODE 4310–70–F

INTERSTATE COMMERCE COMMISSION

[Docket No. AB–167 (Sub-No. 1139)]

Consolidated Rail Corporation—Abandonment—Between Corry and Meadville, in Erie and Crawford Counties, PA

The Commission has issued a certificate authorizing Consolidated Rail Corporation (Conrail) to abandon a line of railroad known as the Meadville Line, between milepost 60.5 in Corry, and milepost 102.3 in Meadville, a distance of approximately 41.8 miles, in Erie and Crawford Counties, PA. The abandonment was granted subject to: (1) the condition that Conrail keep intact all of the right-of-way underlying the track, including bridges, trestles, culverts, and tunnels, and retain the line intact and not sell any portion thereof, for a period of 180 days from the effective date of the decision to enable any State or local government agency or other interested person to negotiate the acquisition of the right-of-way for public use; (2) the condition that Conrail retain its interest in and take no steps to alter the historic integrity of the Meadville Line until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; and (3) the employee

protective conditions in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). The abandonment certificate will become effective on August 31, 1994, unless the Commission finds that: (1) a financially responsible person has offered financial assistance (through subsidy or purchase) to enable the rail service to be continued; and (2) it is likely that the assistance would fully compensate the railroad.

Any financial assistance offer must be filed with the Commission and Conrail no later than 10 days from the date of publication of this Notice. The following notation shall be typed in bold face in the lower left-hand corner of the envelope containing the offer: "Office of Proceedings, AB–OFA." Any offer previously made must be remade within this 10-day period.

Information and procedures regarding financial assistance for continued rail service are contained in 49 U.S.C. 10905 and 49 CFR 1152.27.

Decided: July 27, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Acting Secretary.

[FR Doc. 94–18676 Filed 7–29–94; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32349]

Consolidated Rail Corporation—Trackage Rights Exemption—The Pittsburg & Shawmut R.R. Co.

The Pittsburg & Shawmut R.R. Co. (P&S) has agreed to grant overhead trackage rights to Consolidated Rail Corporation over 22.1± miles of rail line between Freeport Junction, PA and West Mosgrove, PA, beginning at the connection of the main line of P&S (milepost 88.0±) with Conrail's Conemaugh line at Freeport Junction, PA, thence to Bridgeburg, PA (milepost 68.6±), thence over the P&S West Mosgrove Branch (milepost 0.0±) to West Mosgrove, PA (milepost 2.7±) to the connection between P&S and the Buffalo & Pittsburgh R.R. Co. The trackage rights were to become effective on July 20, 1994.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: John J. Paylor, Associate General Counsel, Consolidated Rail Corporation, 2001 Market St., 16A, P.O. Box 41416, Philadelphia, PA 19101–1416 and Gary B. Pettengill, Executive Vice President, The Pittsburg & Shawmut R.R. Co., P.O. Box 45, R.D. 8, Kittanning, PA 16201.

As a condition to use of this exemption, any employees adversely affected by the trackage rights will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Decided: July 25, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Acting Secretary.

[FR Doc. 94–18674 Filed 7–29–94; 8:45 am]

BILLING CODE 7035–01–P

[Finance Docket No. 32550]

Iowa Interstate Railroad, Ltd.—Trackage Rights Exemption—Mokena Illinois Railroad Company

Mokena Illinois Railroad Company (MIRC) has agreed to grant to Iowa Interstate Railroad, Ltd., trackage rights over approximately 3,250 feet of rail line, from milepost 0.0 to the end of the MIRC's line, in Will County, IL. The trackage rights were to become effective on July 21, 1994.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction. Pleadings must be filed with the Commission and served on: T. Scott Bannister, 1300 Des Moines Building, 405 6th Avenue, Des Moines, IA 50309.

As a condition to the use of this exemption, any employees affected by the trackage rights will be protected pursuant to *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Decided: July 26, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Acting Secretary.

[FR Doc. 94–18677 Filed 7–29–94; 8:45 am]

BILLING CODE 7035–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated August 26, 1993, and published in the **Federal Register** on September 2, 1993 (58 FR 46656), Celgene Corporation, 7 Powder Horn Drive, Warren, New Jersey 07059, made application to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
2,5-Dimethoxyamphetamine (7396).	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Phenylacetone (8501)	II

An objection was received relative to the application of Celgene Corporation as a bulk manufacturer of Amphetamine (1100), Methamphetamine (1105) and Phenylacetone (8501). Subsequently, Celgene Corporation withdrew their application as a bulk manufacturer of these three substances. Therefore, pursuant to Section 303 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and Title 21, Code of Federal Regulations, § 1301.54(e), Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of 2,5-Dimethoxyamphetamine (7396) only is granted.

Dated: July 20, 1994.

Gene R. Haislip,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 94–18666 Filed 7–29–94; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Coal Mine Respirable Dust Standard; Single-Shift and Noncompliance Determinations

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Extension of comment period; close of record.

SUMMARY: In response to requests from the mining community for additional time in which to prepare post-hearing comments, the Mine Safety and Health Administration (MSHA) is extending

the period for public comment on the February 18, 1994, notices addressing changes to the Federal respirable dust program for coal miners. The comment period will be extended for the notices which address: (1) the use of single, full-shift respirable dust measurements to determine noncompliance under the MSHA coal mine respirable dust program; and (2) the joint finding by the Secretary of Labor and the Secretary of Health and Human Services that the average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed can be measured accurately over a single shift.

DATES: All comments and information must be submitted on or before September 30, 1994. Commenters are encouraged to send comments on a computer disk with their original comments in hard copy.

ADDRESSES: Send comments to the Mine Safety and Health Administration, Office of Standards, Regulations, and Variances, Room 631, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, MSHA, (703) 235–1910.

SUPPLEMENTARY INFORMATION: On February 18, 1994, the Secretary of Labor and the Secretary of Health and Human Services jointly published a notice in the **Federal Register** (59 FR 8357) announcing a new finding that the average concentration of respirable dust to which each miner in the active workings of a coal mine is exposed can be accurately measured over a single shift in accordance with section 202(f)(2) of the Federal Mine Safety and Health Act of 1977. Based on this finding, the National Institute for Occupational Safety and Health and MSHA proposed to rescind the finding issued on July 17, 1971, and affirmed on February 23, 1972.

Concurrently, MSHA published a notice in the **Federal Register** (59 FR 8356) announcing its intention to use both single, full-shift respirable dust measurements, and the average of multiple, full-shift respirable dust samples, to determine noncompliance and issue citations for violations of the respirable dust standard under the MSHA coal mine respirable dust program.

Public hearings on these matters were held on July 6, 1994, in Morgantown, West Virginia and on July 19, 1994, in Salt Lake City, Utah.

Based on comments received at the public hearings and in response to specific requests, the Agency intends to supplement the rulemaking record with additional data before September 9, 1994. Parties interested in reviewing this data should call the phone number listed in this notice. The Agency will notify all such parties as soon as the data is available.

The rulemaking record was scheduled to close on August 5, 1994; however by this notice, the Agency is extending the comment period until September 30, 1994. All interested parties are encouraged to submit comments prior to that date.

Dated: July 26, 1994.

J. Davitt McAteer,

Assistant Secretary for Mine Safety and Health.

[FR Doc. 94–18654 Filed 7–29–94; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Advisory Committee on Preservation Meeting

Notice is hereby given that the National Archives Advisory Committee on Preservation will meet on September 28, 1994. The meeting will be held from 9:00 a.m. to 5:00 p.m. in Conference Room 1902, National Archives at College Park, 8601 Adelphi Road, College Park, Maryland 20740–6001.

The agenda for the meeting will be:

1. U.S. Government's National Policy on Permanent Papers—P.L. 101–423.

2. EO 12873, "Federal Recycling, Acquisition and Use of Environmentally Preferable Products and Services."

3. Inter-relationships of the objectives to promote use of permanent paper and recycled paper.

4. Possible impact on archival preservation programs.

This meeting is open to the public. For further information contact Alan Calmes on (301) 713–7403.

Notice of the meeting is made in accordance with the Federal Advisory Committee Act.

Dated: July 25, 1994.

Trudy Huskamp Peterson,

Acting Archivist of the United States.

[FR Doc. 94–18675 Filed 7–29–94; 8:45 am]

BILLING CODE 7515–01–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Cooperative Agreement to Enhance the Ability of U.S. Visual and Performing Artists and Arts Organizations to Participate at International Festivals and Exhibits

AGENCY: National Endowment for the Arts.

ACTION: Notification of availability.

SUMMARY: The National Endowment for the Arts is requesting proposals leading to the award of a Cooperative Agreement to carry out a project to enhance the ability of U.S. visual and performing artists and arts organizations to participate at international festivals and exhibitions and other events abroad. The tasks will include the administration of a process for the review of applications and awarding of grants to the performing artists and arts organizations invited to international festivals, the administration of funds to represent the United States at significant international exhibitions, and the development of budget projections and regular budget reporting on the visual and performing arts activities of the Fund in consultation with participating contributors. Eligibility to apply for the Cooperative Agreement is limited to nonprofit organizations. Those interested in receiving the Solicitation package should reference Program Solicitation PS 94–13 in their written request and include two (2) self-addressed labels. Verbal requests for the Solicitation will not be honored.

DATES: Program Solicitation PS 94–13 is scheduled for release approximately August 18, 1994 with proposals due on September 19, 1994.

ADDRESS: Requests for the Solicitation should be addressed to National Endowment for the Arts, Contracts Division, Room 217, 1100 Pennsylvania Ave., N.W., Washington, D.C. 20506.

FOR FURTHER INFORMATION CONTACT:

Anna Mott/William Hummel, Contracts Division, National Endowment for the Arts, 1100 Pennsylvania Ave., N.W., Washington, D.C. 20506 (202/682–5482).

Anna Mott,

Acting Director, Contracts and Procurement Division.

[FR Doc. 94–18603 Filed 7–29–94; 8:45 am]

BILLING CODE 7537–01–M

NATIONAL SCIENCE FOUNDATION

Special Emphasis Panel in Civil and Mechanical Systems; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: Special Emphasis Panel in Civil and Mechanical Systems (#1205).

Date and time: August 16 and 17, 1994, 8:30 am to 6:00 pm.

Place: Room 370, NSF, 4201 Wilson Blvd., Arlington, VA.

Type of meeting: Closed.

Contact person: Dr. John B. Scalzi, Program Director, ENG/CMS, Room 545, 703–306–1361, 4201 Wilson Blvd., Arlington, VA 22230.

Purpose of meeting: To provide advice and recommendations concerning proposals submitted to NSF for financial support.

Agenda

To review and evaluate Large Structural and Building Systems proposals as part of the selection process for awards.

Reason for Closing

The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: July 25, 1994.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 94–18591 Filed 7–29–94; 8:45 am]

BILLING CODE 7555–01–M

Special Emphasis Panel in Geosciences; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463), as amended), the National Science Foundation announces the following meeting.

Date and time: August 15–18, 1994.

Place: Center for Analysis and Prediction of Storms (CAPS), Sarkeys Energy Center, University of Oklahoma, School of Meteorology, 100 East Boyd #1310, Norman, Oklahoma 73019.

Type of Meeting: Closed.

Contact person: Dr. Stephen P. Nelson, Program Director for the Mesoscale Dynamics Meteorology, Division of Atmospheric Sciences, Room 775, National Science Foundation, 4201 Wilson Blvd., Arlington, Virginia 22230. Telephone number is (703) 306–1526.

Purpose of Meeting: Site visit and technical review of the Center for Analysis and Prediction of Storms (CAPS), Science and Technology Center (STC).

Agenda

To review and evaluate the request for the renewal of the Center for Analysis and Prediction of Storms, Science and Technology Centers proposal.

Reason for Closing

The materials being reviewed include information of a proprietary or confidential nature, including technical information; financial data; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government Sunshine Act.

Dated: July 26, 1994.

M. Rebecca Winkler,

Committee Management Officer

[FR Doc. 94–18592 Filed 7–29–94; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–298]

Nebraska Public Power District (Cooper Nuclear Station); Exemption

I

Nebraska Public Power District (the licensee) is the holder of Operating License No. DPR–46, which authorizes operation of Cooper Nuclear Station (CNS). The operating license provides, among other things, that CNS is subject to all rules, regulations, and orders of the Commission now or hereafter in effect.

The facility consists of a boiling water reactor at the licensee's site in Nemaha County, Nebraska.

II

One of the conditions of all operating licenses for water-cooled power reactors, as specified in 10 CFR 50.54(o), is that the primary containment shall meet the leakage test requirements set forth in 10 CFR part 50, appendix J, paragraph III.C.1. Type C tests require: "Type C tests shall be performed by local pressurization. The pressure shall be applied in the same direction as that when the valve would be required to perform its safety function, unless it can be determined that the results from the tests for a pressure applied in a different direction will provide equivalent or more conservative results."

By letter dated June 29, 1994, the licensee requested an exemption from appendix J to 10 CFR part 50 to allow Type C (local leak rate) testing of four containment isolation valves in the reverse direction. As stated above, Paragraph III.C.1 of Appendix J requires that for Type C testing the test pressure must generally be applied to the valve from the same side as that when the valve would be required to perform its safety function (i.e., the inside-containment side, also called the accident direction or the forward direction). However, the regulation allows an exception if it can be determined that testing with the pressure applied in the reverse direction provides equivalent or more conservative results. In its letter dated June 29, 1994, the license stated that four containment isolation valves cannot now be shown to satisfy the equivalent-or-more-conservative requirement that permits reverse-direction testing. The licensee did, however, provide justification that reverse pressure testing, along with additional measures to ensure the leaktightness of valve packing and body-to-bonnet flanges, provide adequate assurance that the overall objectives of 10 CFR part 50, appendix J, will be met.

The NRC staff has performed an evaluation of the exemption request and has determined that the licensee has provided adequate justification for the requested exemption.

III

According to 10 CFR 50.12(a)(2), the Commission will not consider granting the exemption unless special circumstances are present. Pursuant to 10 CFR 50.12(a)(2)(ii), special circumstances exist where application of the regulation is not necessary to achieve the underlying purpose of the rule. Based on our evaluation, the NRC staff has concluded that the licensee has taken prudent steps to ensure that containment integrity is preserved in the absence of forward-direction local leakrate testing for the subject valves. Hence, application of the regulation with respect to forward-direction testing is not necessary.

Therefore, the Commission has determined that the requested exemption from the Appendix J forward-direction testing requirements for the subject valves should be granted.

IV

Accordingly, the Commission has determined, pursuant to 10 CFR 50.12(a), that this exemption is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby approves the following exemption request.

An exemption is granted from the requirements of 10 CFR Part 50, Appendix J, Paragraph III.C.1 that

requires the conduct of a local leak rate test in the forward direction for containment isolation valves RHR-MOV-M167A, RHR-MOV-M167B, RCIC-V-37, and HPCI-V-44. For good cause shown, this exemption will permit testing of the subject valves in the reverse direction, in lieu of forward-direction testing, provided that the additional measures described in the licensee's June 29, 1994, letter are implemented.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will have no significant impact of the quality of the human environment (59 FR 35952).

Dated at Rockville, Maryland this 22nd day of July 1994.

For the Nuclear Regulatory Commission.

Elinor G. Adensam,

Acting Director, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 94-18642 Filed 7-29-94; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-445 and 50-446]

Texas Utilities Electric Co.; 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 amendments to Facility Operating License Nos. NPF-87 and NPF-89, issued to Texas Utilities Electric Company (the licensee), for operation of the Comanche Peak Steam Electric Station (CPSES) Units 1 and 2, located in Somervell County, Texas.

The proposed amendments would change the technical specifications to allow the use of fuel enrichments up to 5.0 weight percent U-235. The present maximum enrichment allowed is 4.3 weight percent.

Before issuances of the proposed license amendments, 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 31, 1994, the licensee may file a request for a hearing with respect to issuance of the amendments 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 of 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 the University of Texas at Arlington Library, Government Publications/Maps, 701 south Cooper, P.O. Box 19497, Arlington, Texas 76019. 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 to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 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 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-examination 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 be 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 William D. Beckner, Director, Project Directorate IV-1: 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 George L. Edgar, Esq., Newman and Holtzinger, 1615 L Street, NW., Suite 1000, Washington, DC 20336, 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 future 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 April 22, 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 University of Texas at Arlington Library, Government Publications/Maps, 701 South Cooper, P.O. Box 19497, Arlington, Texas 76019.

Dated at Rockville, Maryland, this 15th day of July 1994.

For the Nuclear Regulatory Commission.

William D. Beckner,

Director, Project Directorate IV-1, Division of Reactor Projects—III/IV, Office of Nuclear Reactor Regulation.

[FR Doc. 94–18641 Filed 7–29–94; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–34428; File No. SR–NASD–94–31]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change to Eliminate Access Market Maker Procedures From Schedule D to the NASD By-Laws

July 22, 1994.

On May 25, 1994, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder.[2] The rule change eliminates access market maker procedures from Schedule D to the NASD By-Laws.[3]

Under the rule as amended, member firms that do not subscribe to Level III service will no longer be able to qualify for access market maker status. Prior to the amendment, a firm, with NASD approval, could enter into an agreement with a Level III subscriber whereby the subscriber would input two-sided quotations reflecting the dealer interest of the non-subscribing firm. These quotations would be displayed with the entering subscriber's market maker identifier along with a special indicator which would inform other dealers that an access arrangement existed with respect to the quotation displayed. While the entering subscriber assumed responsibility for executing trades at the displayed bid and offer, the entering subscriber and the access market maker were jointly responsible for compliance with the various market maker obligations as set forth in Part V of Schedule D to the NASD By-Laws. The effect of the amendment to the rule is to limit market maker participation to Level III service subscribers.

Notice of the proposed rule change, as amended, together with its terms of substance was provided by issuance of a Commission release[4] and by publication in the **Federal Register**.[5] No comments were received in response to the Notice. This order approves the proposed rule change.

As the NASD indicated in its rule filing, changes in market making practices in recent years have dramatically reduced the use of the access market maker arrangement. In fact, at the time the NASD filed the proposed rule change, no NASD member was using the arrangement. The NASD concluded that the changes in practices and lack of interest reflected the obsolescence of the access market maker provision. The NASD also noted that limiting market maker participation to Level III service will enhance the audit trail and fix the responsibility for every quotation and reported transaction at the source.

The Commission has determined to approve the NASD's proposal. The Commission finds that the rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD, including the requirements of Sections 15A(b)(6) and 15A(b)(11) of the Act.[6] Section 15A(b)(6) requires, in part, that the rules of the NASD be designed to prevent fraudulent and manipulative acts and practices; to foster cooperation and coordination with persons engaged in regulating, clearing, and processing information with respect to, and facilitating transactions in securities, and to protect investors and the public interest. Section 15A(b)(11) authorizes the NASD to adopt rules governing the form and content of quotations disseminated by member firms for the purposes of providing fair and informative quotations, preventing fictitious or misleading quotations, and promoting orderly procedures for collecting and distributing quotation information.

The Commission finds that the elimination of the access market maker feature is consistent with the foregoing statutory provisions. This amendment will require market maker to subscribe to Level III service in order to enter quotations into the Nasdaq system. This requirement will eliminate an extra step in the quotation process and further, inter alia, the objectives of facilitating transactions and promoting orderly procedures for collecting and distributing quotation information.

The Commission does not believe that the rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change SR–NASD–94–31 be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

[FR Doc. 94–18581 Filed 7–29–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34433; File No. SR–NYSE–94–29]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Incorporated, Relating to Exchange Options Specialist "Trade or Fade" Requirement

July 22, 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 July 18, 1994, the New York Stock Exchange, Incorporated ("Exchange" or "NYSE") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and

[1] 15 U.S.C. 78s(b)(1)

[2] 17 CFR 240.19b–4

[3] *NASD Manual*, Schedules to the By-Laws, Schedule D, Part IX, (CCH) ¶ 1864.

[4] Securities Exchange Act Rel. No. 34217 (June 15, 1994).

[5] 59 FR 32032 (June 21, 1994).

[6] 15 U.S.C. 78o–3(b)(6) and (b)(11).

[7] 17 CFR 200.30–3(a)(12).

simultaneously granting accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The New York Stock Exchange proposes to modify Rule 758A (Specialists Options Transactions) by imposing a "trade or fade" requirement on Exchange options specialists for multiply-traded options.

II. Self-Regulatory Organization's Statement of the Purpose of and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) *Purpose*—Exchange Rule 758A (Specialist Options Transactions) requires an options specialist to sell (or buy) at least ten contracts at the offer (or bid) that the specialist is displaying when he receives an order for the account of a non-broker-dealer customer (the "ten-up requirement"). The proposed rule change adds new paragraph (d) to Rule 758A in order to require an options specialist to fill an order in its entirety at the displayed market quote or, if the specialist does not fill any part of the order or partially fills the order, to update the quote to reflect that the previously displayed quote is no longer available (*i.e.*, a "trade or fade" requirement).[1] It would apply to all orders for the principal account of a broker-dealer at the market quote and to all portions of orders for the account of customers that the specialist does not fill pursuant to the ten-contract requirement.

The Exchange intends for this provision to limit the incidences of actual or apparent "trade-throughs," thereby facilitating orderly trading in multiply listed options. A trade-through is an order executed on an exchange at a price which appears to be inferior to a price displayed at another exchange. Thus, a trade-through occurs when an order appears to have "traded through" the better displayed price. In order to avoid a trade-through, the member of the exchange initially receiving the order may agree to match the best price from among the competing exchanges. The member may also send the order to the exchange displaying the superior quotation, which would then be obliged to either fill the order at the more favorable quotation or revise the quotation. This obligation should make it easier to determine whether a competing exchange's quotation is in fact the best price at which a trade can be effected.

The Exchange also proposes to add Supplementary Material .10 to Rule 758A to clarify that the obligation to "trade or fade" in paragraph (d) does not authorize the NYSE specialist to trade through a more favorable quotation on another exchange.

The proposed rule change also adds Supplementary Material .20 to the Rule, which deems the practice of a specialist who redisplays a previously disseminated market quote immediately following a "fade" inconsistent with just and equitable principles of trades (unless warranted by a change in market conditions). The Exchange intends for this provision to reduce abuses of the rule.

(2) *Basis*—The proposed rule change is intended to further the objectives of Section 6(b)(5) of the Act by facilitating transactions in securities, removing impediments to and perfecting the mechanism of a free and open market and a national market system, and promoting just and equitable principles of trade.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of Proposed Rule Change and Timing of Commission Action

The Exchange requests that the Commission find good cause for approving the proposed rule change prior to the thirtieth day after publication of the notice in the **Federal Register**.

IV. Commission's Findings and Order Granting Accelerated Approval

The Commission finds that the proposed rule change is consistent with the requirements of 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, to foster cooperation and coordination with persons engaged in regulating, clearing, settling and processing information with respect to, and facilitating transactions in securities, and in general, to protect investors and the public interest.

Specifically, the Commission believes that requiring NYSE specialists to execute orders or update their markets facilitates transactions in securities, protects investors and the public interest, and promotes fair competition among options markets. The proposal should reduce the likelihood that an outdated quote from one options market will hinder the execution of an order on another options market by making such execution appear to be at an inferior price (*i.e.*, a trade-through). The Commission further notes that, concurrently with approval of this proposal, it is approving similar proposals by the American Stock Exchange ("AMEX"), Chicago Board Options Exchange ("CBOE"), Pacific Stock Exchange ("PSE") and Philadelphia Stock Exchange ("PHLX").[2]

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing in the **Federal Register**. The NYSE proposal to require specialists to trade at a disseminated quote or update their markets is substantially similar to proposals by AMEX, CBOE, PSE and PHLX. The PSE, CBOE, and PHLX proposals were subject to a full notice and comment period and no comments were received.[3] Accordingly, since the Commission finds that no new issues are raised by the current proposal, the Commission believes it is consistent with Sections 19(b)(2) and 6(b)(5) of the

[1] For example, if as a result of displaying a more competitive offer, an exchange is sent an order to buy 50 contracts that was originally received by another exchange, it may buy fewer than 50 contracts at its quoted price, but must then revise its quotation to reflect that the price is no longer available.

[2] *See* Securities Exchange Act Release No. 34431, 34432, 34435, and 34434, (July 22, 1994), respectively.

[3] *See* Securities Exchange Act Release Nos. 31962 (March 8, 1993), 58 FR 13661 (March 12, 1993), 34158 (June 3, 1994), 59 FR 30074 (June 10, 1994), and 32406 (June 3, 1993), 58 FR 32404 (June 9, 1993), respectively.

Act.[4] to approve the NYSE's proposal to permit the NYSE to implement its trade or fade requirement at the same time as these requirements are implemented by the other options exchanges, which will facilitate compliance with Rule 19c-5.[5]

V. 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 in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All such submissions should refer to the file number in the caption above and should be submitted by August 22, 1994.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[6] that the proposed rule change (SR-NYSE-94-29) relating to the amendments to Rule 758A is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94-18582 Filed 7-29-94; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-34431; File No. SR-Amex-93-23]

Self-Regulatory Organizations; Notice of Filing and Partial Accelerated Approval of a Proposed Rule Change by the American Stock Exchange, Inc. Relating to the Definition of Public Customer Orders and Requirements That Specialists Fill Incoming Orders or Update Existing Markets

July 22, 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 July 25, 1993, the American Stock Exchange ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments from interested persons and is simultaneously granting partial accelerated approval to the portion of the rule change relating to requirements that Specialists fill incoming orders or update existing markets.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Amex Rule 958A to (i) clarify the definition of "public customer order" and (ii) incorporate a requirement that Amex specialists respond to orders, at the currently disseminated bid or offer, either by satisfying the order or updating the existing market in the subject series.

The text of the proposal is available at the Office of the Secretary, Amex, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and 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 Items 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 Exchange states that the purpose of the proposed rule change is to (i) clarify the definition of what is a "public customer order" in options for purposes of Exchange Rule 958A (the "Rule"), (ii) give the Exchange the ability to determine the option series which are subject to the rule, (iii) provide for appropriate order marking procedures for such orders and (iv) incorporate a "trade or fade" requirement for Specialists applicable to multiply-traded options.

First, the proposed rule change clarifies the definition of what is a "public customer order." The Exchange states that options specialists are required by Amex Rule 958A to guarantee execution of customer orders for at lest 10 contracts at a single price. The Rule mandates that such specialists are required to buy (sell) at least 10 contracts at the bid (offer) price disseminated on the display screen a the time the order reaches the specialist's post. This is frequently referred to as the "firm quote" or "ten up" rule. Holding specialists to a firm quote requirement ensures that they will continually update options market quotations on a timely basis and execute customer orders at such quoted markets.

The Exchange states that while specialists are willing to ensure "ten up" single price executions at displayed market quotes for "true" off-floor public customers, they are understandably reluctant to do so for off-floor professionals. The Exchange believes that the term "non-broker dealer customer orders" as presently used in paragraph (b) of the Rule has proven to be vague and imprecise, creating uncertainty as to whether a particular order is entitled to the guarantee.

Accordingly, the Exchange proposes to amend paragraph (b) of the Rule to use the term "public customer order" and to define such term. Under the amendment, a "public customer order" would be entitled to receive the ten-up guarantee. The proposal defines a "public customer order" as an order which is not for a "professional trading account." The proposal further defines a "professional trading account" as: (1) An account of a registered broker-dealer; or (2) an account of a person engaged in business or employed as a professional trader in securities; or (3) an account of a person whose orders are computer generated and automatically transmitted to the Exchange via Auto-Ex, the Exchange's automatic execution system; or (4) an account of a person who has been determined by the Exchange to have engaged in a pattern of trading that has previously been determined to have the effect of abusing the purposes of the Auto-Ex system. Lastly, any account in which any person referred to in clauses (1) through (4) of the preceding sentence is a participant, has an interest or exercises investment control shall be deemed to be an account of such person. The Exchange believes that this proposed definition will serve to identify those persons originally intended to receive the benefits of the ten-up rule.

With respect to orders entered by registered representatives for their own

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[4] 15 U.S.C. 78s(b)(2) and 78f(b)(5) (1988).

[5] 17 CFR 240.19c-5 (1993).

[6] 15 U.S.C. 78s(b) (1988).

[7] 17 CFR 200.30-3(a)(12) (1993).

accounts, paragraph (c) of the proposed rule considers such orders to be "public customer order" (thereby entitled to "ten-up" treatment), provided the representative's account does not fall within the purview of the definition of "professional trading account."

Further, the proposed rule seeks to prohibit persons engaged in a "pattern of trading" from using the Exchange's Auto-Ex system to profit from the inability of the Specialists to post quoted markets in response to market movement. In determining what constitutes a "pattern" or abuse of the system, the Exchange would consider, among other things, the frequency of transactions in an account; whether the account has direct access to the Exchange's electronic order entry, delivery and execution systems; and whether participants in the account have access to non-public market information. Additionally, since the Auto-Ex system was designed for small orders (currently equity option orders of ten contracts or less), persons entering a number of small orders for the same series within a relatively short period of time could be deemed to be abusing the system.

The Exchange believes that these changes will address Specialists' needs to have sufficient time within which to adjust quotes to reflect changes in the markets underlying their options. The Exchange further believes that this proposal will also provide all market makers (Specialists and non-Specialists alike) who participate in the Auto-Ex system with legitimate relief in situations where other professionals from "off floor" seek to profit by placing their orders through Auto-Ex before Specialists can update their quotes.

Second, the proposed rule change provides that Exchange Rule 958A(a) will apply to options series that are determined from time to time at the discretion of the Exchange. Currently, Amex rule 958A(a) provides that the ten-up guarantee applies to options series in the two nearest-term expiration months. The Exchange represents that while member firms have asked that such guarantees be expanded beyond near-term expiration series, as a practical matter, on a voluntary basis, Exchange Specialists in many cases do guarantee ten-up markets in the two further-term months. Accordingly, the Exchange believes that in order for it to have the needed flexibility to determine from time to time which option series are to be subject to the Rule, the proposed amendments to paragraph (a) are needed.

Third, the proposed rule change adds a new Commentary .01 to Rule 958A that provides that all orders subject to the Rule be marked in accordance with procedures established by the Exchange. The Exchange believes that this new Community will assist the Exchange in conducting surveillance for violations of the Rule.

Fourth, the proposed rule change adds a new Commentary .03 to Amex Rule 958A that provides:

> With respect to broker-dealer order to buy (sell) at the displayed offer (bid), or portions of customer orders that are not entitled to an execution pursuant to the provisions of paragraph (a) [the ten-up rule], the specialist is required to either (1) sell (buy) the number of contracts specified in the order, or (2) change the displayed offer (bid) to reflect that such displayed offer (bid) is no longer available.[1] In such an instance, where a displayed offer (bid) is revised, it shall be considered conduct inconsistent with just and equitable principles of trade for the specialist to immediately re-display the previously disseminated offer (bid), unless such action is warranted by a change in market conditions.

The Exchange states that Rule 19c-5 under the Act effectively permitted multiple listing of all options selected for trading on or after January 22, 1990. With respect to options on exchange-listed stocks that began trading on one of the five option exchanges prior to January 22, 1990 ("grandfathered options"), the Commission and the options exchanges have been working to "achieve the orderly expansion" of multiple trading to those options.[2] The Exchange states that an integral part of the expansion of multiple trading to the grandfathered options is the adoption of joint-exchange procedures to identify and minimize potential customer "trade-throughs" in multiple traded options. A trade-through is an order executed on an exchange at a price which appears to be inferior to a price displayed at another exchange. Thus, a trade-through occurs when an order appears to have "traded through" the better displayed price.

In order to minimize the possibility of trade-throughs, the Amex states that it is currently modifying the procedures and automated systems to detect the existence of apparently better markets in multiply-traded options. Further, to immediately address member firm concerns about trade-throughs, the Exchange represents that its specialists have agreed to guarantee best execution of customer orders by either (i) matching the best bid (offer) quoted on another exchange, or (ii) going to such other exchange, executing the trade (as principal) at the better price and then filling the customer order at that better price.

The Exchange states that to assure that a competing exchange's disseminated price is in fact the best price at which a trade can be effected, the options exchanges have discussed the need to develop a "trade or fade" rule. Such a rule requires that any exchange displaying the best quoted market, upon receipt of an order, either "trade" at the displayed price of "fade" (withdraw) that price. For example, if an Amex specialist in an option multiply listed at another exchange is offering to sell at 2¾ when a 2¼ offer is being displayed by such other exchange, the Amex specialist can either change his offer to meet the better (2¼) price or attempt to buy the options at the other exchange for 2¼ (before selling it to the customer at that price). If however, the Amex specialist in attempting to buy the option(s) at the other exchange finds that the competing market maker/specialists is unwilling to trade at (honor) his displayed price, then such market maker/specialist must fade (withdraw) the price to reflect an offer of 2⅜ or higher. Thus, the Exchange believes that incorporating a trade or fade requirement into Amex Rule 958A will further ensure that options customers will receive the best executions for the orders.

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and Section 6(b)(5) in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Amex does not believe that the proposed rule change will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. With respect to the portion of the proposed rule change clarifying the definition of "public customer order," only "professional trading accounts" would be affected by the amendments and the Amex believes that any incidental

[1] The Commission understands the provision to allow an exchange, upon receipt of a market or marketable limit order, to execute less than the total number of contracts contained in the order, but the exchange then becomes obligated to update its quotation if it is not willing to transact with any more of the order at the same price. For example, if as a result of displaying a more competitive offer, an exchange is sent an order to buy 50 contracts that was originally received by another exchange, it may buy fewer than 50 contracts at its quoted price, but must then revise its quotation to reflect that the price is no longer available.

[2] The Amex states that proposed Commentary .03 is in response to a letter from Chairman Breeden to James R. Jones, Chairman, Amex, dated June 30, 1992.

burden on such accounts is justified by the more than countervailing benefits to public customers and others that would result from the adoption of these amendments.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rulechange were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Amex has requested that the current proposal be given accelerated effectiveness. For the reasons set forth below, the Commission has determined to give the portions of the proposed rule change dealing solely with the addition of Commentary .03 to Amex Rule 958A, which will require specialists to trade at a disseminated quote or update their markets, accelerated effectiveness prusuant to Section 19(b)(2) of the Act.

The Commission finds that the portions of the proposed rule change relating to the requirement that specialists trade at a disseminated quote or update their markets 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(c)(5).[3] Specifically, the Commission finds that requiring Amex specialists to execute orders or update their markets facilitates transactions in securities, protects investors and the public interest, and promotes fair competition among options markets by reducing the likelihood that an outdated quote from one options market will hinder the execution of an order on another options market by making such execution appear to be at an inferior price (*i.e.*, a "trade-through").

Currently, in light of the expansion in the multiple trading of options, the options exchanges have either implemented or are working to implement systems upgrades which will prevent orders that are identified as potential "trade-throughs" from being automatically executed and will re-route these orders to the appropriate market maker or specialist for non-automated execution. Further, to attract order flow, many market makers and specialists from the different options exchanges have represented to their customers that they will execute the orders they receive at the best price available at any of the five options exchanges. The current proposal, therefore, will, consistent with Section 6(b)(5) of the Act, facilitate options transactions by encouraging Amex specialists to keep their markets up-to-date. This, in turn, should reduce the likelihood that outdated quotes will cause orders on other exchanges, that could be automatically executed, to be rerouted for non-automated handling. It also should reduce the likelihood that outdated quotes will cause orders executed on other exchanges at current market prices to appear to be executed at inferior prices. The commission further notes that, concurrently with approval of this proposal, it is approving similar proposals by the Pacific Stock Exchange, Inc. ("PSE"), the Philadelphia Stock Exchange, Inc. ("PHLX"), the New York Stock Exchange ("NYSE") and the Chicago Board Options Exchange, Inc. ("CBOE").[4]

The Commission finds good cause for approving the above-noted portions of the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Amex proposal to require specialists to trade at a disseminated quote or update their markets is substantially similar to proposals by PSE, PHLX, NYSE and the CBOE. The PSE, PHLX and the CBOE proposals were subject to a full notice and comment period and no comments were received.[5] Accordingly, since the Commission finds that no new issues are raised by the current proposal, the Commission believes it is consistent with Sections 19(b)(2) and 6(b)(5) of the Act[6] to approve the Amex's proposal to permit the Amex to implement its trade or fade requirements at the same time as these requirements are implemented by the other options exchanges.

With respect to the other portions of the proposed rule change, the Commission, 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 find such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, 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 in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by August 22, 1994.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the portion of the proposed rule change (SR-Amex-93-23) relating to the addition of Commentary .03 to Amex Rule 958A is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margart H. McFarland,

Deputy Secretary.

[FR Doc. 94–18583 Filed 7–29–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34432; File No. SR–CBOE–93–17]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to Requirements That Market Makers Fill Incoming Orders or Update Existing Markets

July 22, 1994.

The Chicago Board Options Exchange, Inc., ("CBOE" or "Exchange"), filed with the Securities and Exchange Commission ("Commission"), on March 30, 1993, pursuant to Section 19(b) of the Securities Exchange Act of 1934

[3] 15 U.S.C. 78f(b)(5) (1988).

[4] See Securities Exchange Act Release No. 34435, 34434, 34433, and 34432, (July 22, 1994), respectively.

[5] See Securities Exchange Act Release Nos. 31962 (March 8, 1993), 58 FR 13661 (March 12, 1993), 34158 (June 3, 1994), 59 FR 30074 (June 10, 1994), and 32406 (June 3, 1993), 58 FR 32404 (June 9, 1993), respectively.

[6] 15 U.S.C. 78s(b)(2) and 78f(b)(5) (1988).

[7] 15 U.S.C. 78s(b) (1988).

[8] 17 CFR 200.30–3(a)(12) (1993).

("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to require members of the CBOE trading crowd to respond to orders at the currently displayed bid or offer, either by satisfying the orders at the displayed price or by updating the existing market in the subject series.

The proposed rule change was published for comment in Securities Exchange Act Release No. 32406 (June 3, 1993), 58 FR 32404 (June 9, 1993). No comments were received on the proposed rule change.

The proposal amends CBOE Rule 8.51 to require members of the CBOE trading crowd to execute an order, at the currently displayed quote, in its entirety or change the displayed quote to reflect that the previously displayed quote is no longer available.[3] The proposal also adds Interpretation and Policy .04 to CBOE Rule 8.51, which prohibits the trading crowd from immediately re-displaying the previously disseminated market quote, unless warranted by a change in market conditions.

Further, the proposal amends Interpretations and Policies .01 through .03 to Rule 8.51 to extend certain obligations, regarding disseminated firm quotes, that are currently only imposed on Floor Brokers and Order Book Officials to Designated Primary Market-Makers ("DPM's"). Specifically, the obligation imposed on the trading crowd under Interpretation .01 to make a disseminated quote good for ten contracts, will also be triggered if the disseminated quotation is on behalf of an order represented by a DPM. In addition, Interpretation .02 will now obligate a DPM to remove, after a fill or cancellation, a quotation that he has caused to be disseminated or otherwise be responsible for satisfying the firm quote requirement with respect to the next order.

Finally, the proposal amends Interpretation and Policy .03 to Rule 8.51 to require that all market maker orders and other broker-dealer proprietary orders, that in each case are for less than ten contracts and are represented by a Floor Broker or a Designated Primary Market-Maker, not be reflected in the displayed market quote. This requirement currently only applies to CBOE market markers.[4]

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).[5] Specifically, the Commission finds that requiring members of the CBOE trading crowd to execute orders or update their markets facilities transactions in securities, protects investors and the public interest, and promotes fair competition among options markets by reducing the likelihood that an outdated quote from one options market will hinder the execution of an order on another options market by making such execution appear to be at an inferior price (*i.e.*, a "trade-through").

Currently, in light of the expansion in the multiple trading of options, the options exchanges have either implemented or are working to implement systems upgrades which will prevent orders that are identified as potential trade-throughs from being automatically executed and will re-route these orders to the appropriate market maker or specialist at each exchange for non-automated execution. Further, to attract order flow, many market makers and specialists from the different options exchanges have represented to their customers that they will execute the orders they receive at the best price available at any of the five options exchanges. The current proposal, therefore, will, consistent with Section 6(b)(5) of the Act, facilitate options transactions by encouraging members of the CBOE trading crowd to keep their markets up-to-date. This, in turn, should reduce the likelihood that outdated quotes will cause orders on other exchanges, that could be automatically executed, to be re-routed for non-automated handling. It also should reduce the likelihood that outdated quotes will cause orders executed on other exchanges at current market prices to appear to be executed at inferior prices. The Commission further notes that, concurrently with approval of this proposal, it is approving similar proposals by the American Stock Exchange ("AMEX"), New York Stock Exchange ("NYSE"), Pacific Stock Exchange ("PSE") and the Philadelphia Stock Exchange ("PHLX").[6]

The commission also finds that extending obligations regarding the dissemination of firm quotes, which are already applicable to Floor Brokers, to Designated Primary Market-Makers, facilitates transactions in securities, protects investors and the public interest, and promotes fair competition among options markets by helping to ensure the accuracy of CBOE options quotations.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[7], that the proposed rule change (SR–CBOE–93–17) requiring that members of a CBOE trading crowd execute a trade at the disseminated quote or update their market and extending to Designated Primary Market-Makers certain obligations related to firm quote disseminations is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18578 Filed 7–29–94; 8:45 am]

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[1] 15 U.S.C. 78s(b) (1988).

[2] 17 CFR 240.19b–4 (1993).

[3] The Commission understands this provision to allow an exchange, upon receipt of a market or marketable limit order, to execute less than the total number of contracts contained in the order, but the exchange then becomes obligated to update its quotation if it is not willing to transact with any more of the order at the same price. For example, if as a result of displaying a more competitive offer, an exchange is sent an order to buy 50 contracts that was originally received by another exchange, it may buy fewer than 50 contracts at its quoted price, but must then revise its quotation to reflect that the price is no longer available.

[4] *See* Letter from Michael L. Mayer, Schiff, Hardin & Waite, attorneys for CBOE, to Scott C. Kursman, attorney, National Market System Branch, Division of Market Regulation, Commission (nonsubstantive amendment clarifying Interpretation and Policy .03 under Rule 8.51).

[5] 15 U.S.C. 78f(b)(5) (1988).

[6] *See* Securities Exchange Act Release No. 34431, 34433, 34435, and 34434, (July 22, 1994), respectively.

[7] 15 U.S.C. 78s(b) (1988).

[8] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–34438; International Series Release No. 692; File No. SR–MBS–94–04]

Self-Regulatory Organizations; MBS Clearing Corporation; Notice of Filing of Proposed Rule Change Relating to Special Provisions Applicable to Foreign Participants

July 25, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on June 27, 1994, the MBS Clearing Corporation ("MBS") filed with the Securities and Exchange Commission ("Commission") the proposed rule change (File No. SR–MBS–94–04) as described in Items I, II, and III below, which Items have been prepared primarily 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 Organizations Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will add Article III, Rule 1, Section 13 to MBS's

[1] 15 U.S.C. 78s(b)(1) (1988).

rules which will set forth special provisions applicable to foreign participants.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in section A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of, the Purpose of, and Statutory Basis for, the Proposed Rule Change

Currently, MBS's rules are silent on the issue of admitting applicants from a foreign country as a participant at MBS. The purpose of the proposed rule change is to set forth additional requirements for foreign applicants in order to ensure that MBS can properly monitor these potential participants adequately.

In particular, the proposed rule change will add a new Section 13 to Article III, Rule 1 of MBS's rules. These requirements are in addition to all other requirements applicable to MBS participants in general.

Specifically, a foreign participant will be required to: prepare and maintain all required financial and other reports and a general ledger chart of accounts and any description thereof in English and U.S. dollars; ensure the availability of an individual fluent in English and knowledgeable in securities and financial matters to assist representatives of MBS; maintain an agent located in the U.S. for service of process; satisfy the financial net worth requirements in MBS's rules, computed in accordance with generally accepted U.S. accounting principals; and maintain an office or agent located in the U.S. that can adequately address all purchase and sales, margin compliance, clearance, and cash settlement functions for the participant.

MBS believes that the proposed rule change is consistent with Section 17A of the Act and the rules and the regulations thereunder in that it provides for the safeguarding of securities or funds in MBS's custody or control or for which it is responsible.

B. Self-Regulatory Organization's Statement on Burden on Competition

MBS does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

MBS has not solicited comments with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five 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 ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of MBS. All submissions should refer to File Number SR–MBS–94–04 and should be submitted by August 22, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18574 Filed 7–29–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34429; File No. SR–PSE–93–12]

Self-Regulatory Organizations; Pacific Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to New Listing and Maintenance Standards

July 22, 1994.

I. Introduction

On August 11, 1993, the Pacific Stock Exchange, Inc. ("PSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish new quantitative and qualitative listing standards with respect to common stock, preferred stock, bonds and debentures, warrants, contingent value rights, and other securities. Subsequently, the PSE filed Amendments Nos. 1, 2 and 3, dated December 8, 1993, February 3, 1994, and July 16, 1994 respectively.[3]

The proposed rule change and Amendments Nos. 1 and 2 were published for comment in Securities Exchange Act Release No. 33759 (March 14, 1994), 59 FR 13019 (March 18, 1994). No comments were received regarding the proposal.

II. Description of the Rule Change

This rule change includes original listing and maintenance criteria and establishes qualitative standards and corporate governance policies applicable to all listed companies. Specifically, the rule change eliminates all of the current listing standards and establishes a new two-tier listing structure.[4] Tier I and Tier II securities

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[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1993).

[3] Amendment No. 3, which is available in the Commission's Public Reference Room, was largely technical in nature and generally had no substantive impact on the original filing. Therefore, it was determined that Amendment No. 3 did not need to be published for public comment.

[4] The Commission is currently considering the PSE's proposed rule change to list and trade common stock under a Small Corporate Offering Registration/Regulation A ("SCOR") designation. See Securities Exchange Act Release No. 32514 (June 25, 1993), 58 FR 35496 (July 1, 1993) (File No. SR–PSE–92–42); and Securities Exchange Act

are distinguished with respect to quantitative initial listing and maintenance standards. Tier I includes standards for listing common stock, preferred stock and similar issues, bonds and debentures, warrants, contingent value rights, unit investment trusts, and other securities suited for auction market trading. Tier I contains more stringent quantitative standards than the PSE's current standards. Tier II includes listing standards for listing common stock, preferred stock and similar issues, bonds and debentures, and warrants. The Tier II standards are comparable to the PSE's current listing standards.

In addition to the quantitative standards, the Exchange will consider other factors in determining a company's listing eligibility including, for example, the voting rights of shareholders, the nature and scope of the applicant's operations, the applicant's financial condition, and the composition of the applicant's assets. The Exchange may also evaluate such factors as the experience and reputation of the applicant and its management, and the nature and effect of governmental policies on the company's products or properties. In the case of initial public offerings, the exchange will consider the estimated proceeds to be received by the issuer from the offering and the specific purposes for which the proceeds are to be used by the issuer. In the case of bonds and debentures, the Exchange will consider the credit rating by agencies designated as nationally recognized statistical rating organizations, such as Standard & Poor's and Moody's Investors Services, as an indication of the quality of the issuer.

All securities, regardless of the requirements used for their admission to listing, will be subject to auction market trading rules and real-time reporting. Transactions in Tier II will be identified by a special suffix to the ticker symbol so that these securities can be distinguished from other securities traded on the Exchange. The suffix will not be applied, however, to a security listed on either the NYSE, Amex, or NASDAQ/NMS even though it is designated by the Exchange as a Tier II security. Finally, all of the Exchange's rules and surveillance procedures will be applicable to transactions in securities listed under the Tier I and Tier II designations.

Special transition rules will apply for securities listed or approved for listing prior to the effective date of the new standards. For inclusion under Tier I, the securities must meet the applicable initial listing standards, except that securities also listed on the NYSE, Amex, or NASDAQ/NMS may be designated as Tier I securities if they meet the applicable Tier I maintenance requirements. All securities currently listed that do not meet the Tier I listing standards will be designated Tier II securities. These Tier II securities must meet the Tier II maintenance standards within six months of the effectiveness of the rule change.[5]

1. Tier I

The PSE's new listing standards for Tier I common stock are based on standards established in a Memorandum of Understanding ("MOU") between the North American Securities Administrators Association, Inc. ("NASAA")[6] and the Chicago Board Options Exchange Inc. ("CBOE").[7] The CBOE and NASAA developed the MOU in an effort to provide issuers with securities listed on the CBOE a basis for obtaining an exemption from state securities registration requirements (*i.e.*, blue sky exemption). The MOU created minimum quantitative initial inclusion and maintenance standards, corporate governance requirements and minimum voting rights for listing on the CBOE. The PSE has adopted the MOU's two alternative minimum quantitative initial inclusion standards for common stock, as follows:

Description	Alt. No. 1	Alt. No. 2
Net Worth	$4,000,000	$12,000,000.
Pre-Tax Income.	750,000	
Net Income	400,000	
Public Float (Shares).	500,000	1,000,000.
Market Value of Float.	3,000,000	15,000,000.
Minimum Bid	$5/share	$3/share.
Public Beneficial Holders.	800/400*	400.
Operating History.	.....	3 years.

*800 shareholders are required for companies with at least 500,000 but less than 1 million shares publicly held, or 400 shareholders for companies with at least 1 million shares publicly held, or 500,000 shares publicly held and daily trading volume in excess of 2,000 shares per day for six months.

The original listing criteria for preferred stock vary depending on where the issuer has common stock listed. If the related common stock is listed on the PSE, NYSE or Amex, there must be at least 100,000 preferred shares publicly held and an aggregate market value of at least $2,000,000. If the related common stock is not so listed, there must be at least 400,000 preferred shares publicly held, an aggregate market value of at least $4,000,000, and at least 800 public beneficial holders of 100 shares or more. In all cases, the issuer must meet the net worth and earnings requirements for common stock, and each share of preferred stock must have a minimum share price of $10 to be eligible for listing.

With respect to bonds and debentures, issuers will be evaluated according to the same net tangible assets and earnings criteria applicable to common stock. If an issuer's common stock is traded on the PSE, NYSE or Amex, the bonds or debentures must have a minimum aggregate market value and principal amount of $5,000,000 each and at least 100 public beneficial holders. If related common stock is not traded on any of the above referenced exchanges, the bonds or debentures must have an aggregate market value and principal amount of at least $20,000,000 each and at least 100 public beneficial holders.[8] If a debt security is convertible into a class of equity security, such equity security must meet the applicable Tier I listing requirements. Current last sale information must be publicly available with respect to the underlying security into which the bond or debenture is convertible.

The Exchange will not list warrants under the Tier I designation unless the common stock of the company or other security underlying the warrants is already listed, or will be listed concurrently with the warrants, on the PSE under the Tier I designation. For a Tier I listing of warrants there must be at least 500,000 warrants publicly held

Release No. 34328 (July 7, 1994) (Amendment No. 1 to File No. SR-PSE-92-42). The SCOR listing requirements would, in effect, constitute a third tier of less stringent listing requirements; however, for purposes of the exchange exemption under state blue sky laws, SCOR securities would not be deemed "listed" on the Exchange

[5] During this six month transition period, the PSE's current listing and maintenance standards will be applied to Tier II securities not meeting the new maintenance standards.

[6] NASAA is an association of securities administrators from each of the 50 states, the District of Columbia, Puerto Rico, Mexico and 12 Canadian provinces and territories.

[7] The MOU criteria were approved by the NASAA membership on May 30, 1991. The Commission approved a CBOE rule change adopting the standards set forth in the MOU in Securities Exchange Act Release No. 29748 (September 27, 1991), 56 FR 50404 (October 4, 1991).

[8] Additionally, issuers must meet and appear to be able to satisfy interest and principal when due on the bond or debenture to be listed.

by not less than 250 public beneficial holders.[9]

For the listing of Tier I contingent value rights ("CVRs"), issuers must meet the net worth and earnings requirements applicable to common stock.[10] In addition, there must be at least 600,000 publicly held CVRs with a market value of at least $18,000,000, at least 1,200 public beneficial holders, and total assets of at least $100,000,000. The CVRs must have a maturity of at least one year. Prior to the commencement of trading of CVRs, the Exchange will distribute a circular to its membership explaining the specific risks associated with CVRs and providing guidance regarding member firm compliance responsibilities when handling transactions in such securities.

The PSE also is adopting listing standards for Unit Investment trusts ("UITs").[11] To list UITs, the new rule requires at least 1,000,000 publicly held shares or units, at least 400 public beneficial holders, and total trust assets of at least $60,000,000 at the time of formation.[12] Additionally, the stated term must be at least two years, but may be subject to earlier termination under specific circumstances set forth in the UIT's governing documents and disclosed in the UIT prospectus. Where a UIT has been divided into separate components, any voting rights accorded the UIT interest may be divided between the component securities as specified in the UIT prospectus.

The Exchange will consider listing other securities not otherwise covered by the Tier I listing requirements provided the issue is suited for auction making trading. Prior to commencement of trading of such securities, the Exchange will evaluate the nature and complexity of the issue.[13] Such securities must have at least 1,000,000 publicly held trading units and a principal amount/market value of at least $20,000,000, and at least 400 public beneficial holders.[14] In addition, the issuer must have total assets of at least $100,000,000. If the issuer is unable to satisfy the earnings requirements applicable to Tier I common stock, the Exchange will require the issuer to have total assets of at least $200,000,000 and net worth of at least $10,000,000, or total assets of at least $100,000,000 and net worth of at least $20,000,000.[15]

2. Tier II Listing Standards

For issuers not satisfying the Tier I standards, the PSE is establishing listing criteria under Tier II. A Tier II listing generally signifies that a company has limited commercial operations, lower capitalization, and lacks a demonstrated earnings history. Tier II is intended to provide small companies with access to the capital markets and to supply liquidity to public investors within a regulated marketplace. A security that is listed on the NYSE, Amex, or NASDAQ/NMS may be listed under Tier II in reliance upon the listing requirements of the applicable exchange or association.

The numerical Tier II initial listing standards for common stock are lower than those for Tier I, but generally comparable to the current PSE listing criteria. The following are the new Tier II initial listing standards for common stock:

Description	Alt. No. 1	Alt. No. 2
Net Tangible Assets.	$2,000,000	
Net Worth		$8,000,000.
Net Income	100,000*	
Public Float (Shares).	500,000	1,000,000.
Market Value of Float.	1,500,000	2,000,000.
Minimum Bid	$3/share	$1/share.
Public Beneficial Holders.	500	500.
Operating History.	3 years	

*Demonstrated net earnings of at least $100,000 after taxes, excluding non-recurring income and extraordinary items, in the last fiscal year or in two of the last three fiscal years, or total tangible assets of $2,500,000.

The following are the current PSE listing standards for common stock:

Description	Alt. No. 1	Alt. No. 2
Net Tangible Assets.	$1,500,000	$2,000,000
Net Income	100,000	
Public Float (Shares).	750,000	750,000.
Market Value of Float.	2,250,000	2,250,000.
Minimum Bid	$1/share	$1/share.
Public Beneficial Holders.	750	750.

To list preferred stock and debt under Tier II, the issuer must meet the same net tangible asset and earnings requirements for Tier II common stock. For preferred stock, there must be at least 500,000 preferred shares publicly hold with an aggregate market value of at least $1,000,000 at least 250 public beneficial holders, and an operating history of at least three continuous years. A Tier II listing of bonds and debentures requires that, in addition to the net tangible asset and earnings requirements applicable to issuers of common stock, there is an aggregate market value and principal amount of $5,000,000 each, and at least 200 public beneficial holders., If the preferred stock or debt is convertible into a class of common stock, such class must meet the Tier II listing requirements.[16] Redeemable issues must provide for redemption pro rata or by lot.

The Exchange will not list warrants under the Tier II designation unless the common stock of the company or other security underlying the warrants is already listed, or will be listed concurrently with the warrants, on the PSE under the Tier II designation. For listing under Tier II, there must be at least 500,000 warrants publicly held by

[9] The Tier I and Tier II listing standards for warrants do not apply to warrants based on currency or market indices. The Exchange is creating a separate rule for such warrants that requires at least 1,000,000 publicly held warrants with a market value of at least $4,000,000, at least 400 public beneficial holders, and a term of 5 years. The issuer of warrants based on currency or market indices must have total assets of at least $100,000,000. All cash settlements are made in U.S. dollars.

[10] CVRs are unsecured obligations providing for a possible cash payment at maturity based on the value of an equity security issued by an affiliate of the issuer of the CVRs ("related security"). At maturity, the holder of a CVR would be entitled to a cash payment at maturity if the market price of the related security is lower than a predetermined target price. If the market price of the related security equals or exceeds the target price, the holder of the CVR would not be entitled to receive such a cash payment. *See* Securities Exchange Act Release No. 33843 (March 31, 1994), 59 FR 16666 (April 7, 1994).

[11] The trustee of a UIT interest must be a trust company or banking institution having substantial capital and surplus. Such trustee may not have an executive officer who is also an officer of the issuing sponsor nor shall the trustee and issuer be made under common control. No change in the trustee can be made without prior notice to, and approval of, the Exchange. In cases where an individual has been appointed as Trustee, a qualified trust company or banking institution must be appointed co-trustee.

[12] Before a UIT may be recommended, customers must be provided with a prospectus and an explanation of any special characteristics and risks attendant to trading UIT interests, and their suitability for such an investment must be determined. A prospectus must be provided to investors in connection with each transaction in a UIT interest unless the member organization has procedures to verify previous receipt of a current prospectus.

[13] If appropriate, the Exchange will distribute a circular to the membership providing guidance regarding member firm compliance responsibilities when handling transactions in the issue.

[14] If the issue is traded in thousand dollar denominations, there must be a minimum of 100 public beneficial holders.

[15] If the issue contains cash settlement provisions, settlement must be made in U.S. dollars, and if the issue contains redemption provisions, the redemption price must be at least $3.00 per unit.

[16] Current last sale information must be available with respect to the underlying security into which the security is convertible.

not less than 250 public beneficial holders.[17]

3. Corporate Governance and Disclosure Policies

The PSE is adopting corporate governance and disclosure policies for the first time. The provisions being adopted herein apply to both Tier I and Tier II securities, except that Tier II securities need not comply with the provision for an audit committee. Under corporate governance, the provisions include rules concerning conflicts of interest, independent directors, quorum, shareholder approval, annual meetings, and solicitation of proxies and consents. With respect to voting rights, the new rule prohibits the listing or continued listing of any common stock or other equity security of a domestic issuer that has the effect of nullifying, restricting or disparately reducing the per share voting rights of holders of an outstanding class of common stock. To be eligible for listing, preferred stock must give the holders the right to elect at least two members of the issuer's Board of Directors if the issuers should default in the payment of fixed dividends for two years.[18]

The new corporate disclosure policies incorporate an issuer's duty to disclose any news or information that might reasonably be expected to materially affect the market for its securities. The new rules provide guidance to listed companies in making appropriate public disclosure, and include information regarding consultation with the PSE Listings Department, internal handling of confidential corporate matters, and relationships between company officials and others. The new rules also provide guidelines regarding the content and preparation of public announcements. In addition, as a term of the listing agreement, listed companies are required to submit to the Exchange certain reports, notifications, and materials required to be filed by the Act. These requirements are described in detail in the new rules.

4. Maintenance Requirements and Delisting Procedures

The rule change also establishes numerical maintenance criteria, and delisting and suspension policies and procedures intended to ensure uniform treatment of issuers. Securities listed under the Tier I designation will not be granted waivers from the Exchange's numerical maintenance requirements. Any security that no longer meets the Tier I maintenance requirements, but meets the Tier II maintenance requirements, will be reclassified as a Tier II security. Tier II securities failing to meet the Tier II maintenance standards will not be granted waivers for continued listing except in cases where the security continues to be listed on either the NYSE, Amex, or NASDAQ/NMS, provided, however, that the Exchange determines that there is a reasonable basis for a waiver.

The quantitative maintenance standards for Tier I common stock are as follows: (1) At least 200,000 publicly held shares and a market value of at least $1,000,000; (2) at least 400 public beneficial holders, or at least 300 beneficial holders of 100 shares or more; (3) net worth of at least $2,000,000 if the issuer has sustained losses for continuing operations and/or net losses in two of the last three fiscal years, or $4,000,000 if losses in three of the last four years; and (4) a share bid price of at least $3. For Tier II, the common stock maintenance standards require at least 300,000 publicly held shares with a market value of at least $500,000, at least 250 public beneficial holders, total net tangible assets of at least $500,000 (or net worth of at least $2,000,000), and a share bid price of at least $1.[19]

The preferred stock maintenance standards require for Tier I securities the same net worth standards as common stock, at least 100,000 publicly held shares with a market value of at least $1,000,000, and at least 150 public beneficial holders. In addition, the issuer must not have sustained losses from continuing operations and/or net losses in the five most recent fiscal years. Tier II maintenance standards require that issuers of preferred stock meet the net tangible asset or net worth requirements for Tier II common stock, and have at least 250,000 shares publicly held by not less than 100 public beneficial holders. If the Tier I or Tier II preferred stock is convertible into a class of common stock, such class must meet the applicable Tier's maintenance requirements.

Tier I and Tier II bonds and debentures must maintain the same net worth standards as Tier I and Tier II common stock respectively, an aggregate market value and principal amount of at least $1,000,000 each, and at least 100 public beneficial holders. In addition, for Tier I debt, the issuer must not have sustained losses from continuing operation and/or net losses in the five most recent fiscal years. In the case of Tier I and Tier II warrants, the common stock of the company or other security underlying the warrant must meet the applicable Tier I or Tier II maintenance requirements.

Finally, Tier I CVRs and UITs must maintain an aggregate market value of at least $1,000,000. If the equity security to which the cash payment of a CVR or UIT at maturity is tied is delisted, the CVR or UIT shall also be suspended or delisted.[20]

The securities of a company will be subject to suspension and/or withdrawal from listing and registration as a listed issue if the Exchange finds that the listed company fails to meet the quantitative maintenance requirements discussed above, or fails to comply with the Exchange's listing policies or agreements.[21] Whenever the Exchange staff determines that a security is to be removed from the list, the issuer will be given an opportunity to present to the Equity Listing Committee any reasons why the security should not be delisted. A decision by the Equity Listing Committee to delist a security may be appealed to a Board Committee or a committee appointed by the Board of Governors for such purpose.[22]

[17] These standards do not apply to warrants based on currency or market indices. See *supra* note 9.

[18] In addition, any change in the rights, privileges or preferences of preferred stock holders requires at least a two-thirds vote of the preferred class, voting as a class. The creation of any additional class of preferred stock senior to or equal in preference to the issue to be listed requires at least a favorable majority vote of the preferred class, voting as a class.

[19] The Exchange may waive the Tier I and II share bid price requirements upon consideration of market conditions, the issuer's capitalization, the number of outstanding and publicly held shares, and any other factors the Exchange deems appropriate.

[20] The Exchange will consider the suspension of trading in, or removal from listing of any UIT interest when, in its opinion, further dealing in such interests appear unwarranted under any of the following circumstances: (1) the UIT interest has more than 60 days remaining until termination and there are less than 50 record and/or beneficial holders of shares, units, or trading components thereof for 20 or more consecutive trading days; or (2) there has been failure on the part of the UIT and/or sponsor to comply with the Exchange's listing policies or agreements; or (3) such other event occurs or condition exists that, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

[21] Other factors the Exchange will consider include, among others, the issuance of an independent public accountant's disclaimer opinion on financial statements required to be certified, and losses which are so substantial that, in the opinion of the Exchange, it appears questionable as to whether a company will be able to continue operations. In addition, the Exchange would examine a company that has depleted, sold or otherwise disposed of its principal operating assets, or substantially discontinued the business that it conducted at the time it was listed, or the liquidation of the company has been authorized.

[22] If a security is delisted, the Exchange must submit an application to the Commission to strike the security from listing and registration. A copy of such application will be provided to the issuer in accordance with Section 12 of the Act.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 6.[23] The Commission believes that the proposal is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest.

The development and enforcement of adequate standards governing the initial and continued listing of securities on an exchange is an activity of critical importance to financial markets and the investing public. Listing standards serve as a means for a self-regulatory organization to screen issuers and to provide listed status only to *bona fide* companies with sufficient float, investor base and trading interest to maintain fair and orderly markets. Once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange's standards for market depth and liquidity. For the reasons set forth below, the Commission believes that the proposed rule change will provide the PSE with greater flexibility in determining which securities warrant inclusion on the Exchange, without compromising the benefits that the Exchange's listing standards offer to investors.

The Commission notes that most of the PSE's new listing standards are substantially similar to the rules of existing national securities exchanges and the Nasdaq National Market and, therefore, finds that these standards are equally acceptable for the PSE. To the extent that PSE's proposed rules do differ from those of existing national securities exchanges and the Nasdaq National Market, the Commission finds them also to be consistent with the Act.

In addition to the quantitative standards, the other qualitative requirements, such as the establishment of audit committees, voting rights, shareholder approval, and disclosure policies, ensure that companies trading on the PSE will adequately protect the interests of public shareholders. The commission also notes that because extensive listing and maintenance standards are being adopted, only companies suitable for exchange listing are eligible for trading on the PSE.

Finally, the Commission believes that inclusion of a security for listing on an exchange should not depend solely on meeting quantitative criteria, but should also entail an element of judgement given the expectations of investors and the imprimatur of listing on a particular market.[24] The Commission believes that this rule provides the necessary flexibility to determine whether to list an issuer, while ensuring that certain minimum standards must be met. Thus, the Commission believes that the new listing and maintenance standards strike the appropriate balance between protecting investors and providing a marketplace for issuers satisfying the disclosure requirements under the federal securities laws. The new standards will provide important guidance to the PSE review process, and will alert issuers seeking listing on the PSE, as well as current PSE issurers, of the Exchange's specific standards.

IV. Conclusion

For the reasons stated above, the Commission believes the rule change is consistent with the Act and, therefore, has determined to approve it. The rule change provides enhanced listing standards for PSE listed securities which provide greater protection of investors and the public interest.

The Commission does not believe that the rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[25] that the proposed rule change (SR–PSE–93–12) is approved.

For the Commission, by the Division of Market Regulations, pursuant to delegated authority.[26]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18575 Filed 7–29–94; 8:45am]

BILLING CODE 8010–01–M

[23] 15 U.S.C. 78f (1988).

[24] See, e.g., *In the Matter of Siver Shield Mining and Milling Company*, Securities Exchange Act Release No. 6214 (March 18, 1960) ("use of the facilities of a national securities exchange is a privilege involving important responsibilities under the Exchange Act"); *In the Matter of Consolidated Virginia Mining Co.*, Securities Exchange Act Release No. 6192 (February 26, 1960) (same).

[25] 15 U.S.C. 78s(b)(2) (1988)

[26] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–34430; File No. SR–OCC–90–10]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Temporarily Approving Proposed Rule Change Relating to Put Margin Credit Program

July 22, 1994.

On September 5, 1990, The Options Clearing Corporation ("OCC") filed a proposed rule change (File No. SR–OCC–90–10) with the Securities and Exchange Commission ("Commission") pursuant to Section 19(b) of the Securities Exchange Act of 1934 ("Act").[1] Notice of the proposal appeared in the **Federal Register** on December 6, 1990, to solicit public comment from interested persons.[2] No comments were received. This order temporarily approves the proposed rule change through October 31, 1995.

I. Description of the Proposal

The proposed rule change adds a new Paragraph (e) ("Put Margin Credit") to OCC's existing Rule 604 ("Forms of Margin") to implement OCC's Put Margin Credit ("PMC") Program. The PMC program will maximize the margin credit that OCC can give to its clearing members where they hold long positions in put options on individual stocks[3] and deposit the underlying stock with OCC. The proposed PMC Program combines such stock and option positions to generate greater clearing margin credits than either position could provide individually in either OCC's existing clearing margin system or in its valued securities program.[4] Specifically, the PMC Program will allow clearing members who are carrying long put option positions in a market-maker's or specialist's account or in a stock market-maker's or stock specialist's account and who have deposited with and pledged to OCC the underlying securities with respect to such options to direct OCC to treat the options and underlying securities as a combined position for margin purposes.[5] OCC then will pair such directing clearing members' long put option positions with the underlying stocks in an amount

[1] 15 U.S.C. 78s(b) (1988).

[2] Securities Exchange Act Release No. 28658 (November 29, 1990), 55 FR 50438.

[3] Only American-style options are eligible for the PMC Program. Letter from Stuart C. Harvey, Jr., OCC, to Thomas Etter, Staff Attorney, Commission, (October 26, 1990).

[4] OCC Rule 604(d).

[5] Clearing members deposit the underlying securities with OCC through its valued securities program.

deliverable upon exercise of such put options.

Because the combined option/stock position can never be worth less than the option's exercise price, which will be realized if the underlying stock is delivered pursuant to an exercise of the put option, OCC can prudently give clearing margin credit for the combined position equal to 100% of the exercise price. On the other hand, the combined position theoretically can be worth more than the exercise price if the market value of the stock substantially exceeds the exercise price of the option. Accordingly, OCC will give margin credit for the combined position equal to the greater of the exercise price of the option or the maximum loan value given to the stock alone under OCC's valued securities program.[6]

In order to avoid any double counting, options that are included in the PMC Program will generate no margin credit pursuant to OCC Rule 601 in calculating the clearing margin requirement for the account. Similarly, the underlying securities that are included in the PMC Program will not receive any additional credit under the valued securities program during the time they are included in the PMC Program.

Because under certain circumstances long put options can provide more margin credit if they are spread against short option positions than if they are included in the PMC Program, the decision as to whether or not to include long put option positions in the PMC Program will be made by the clearing members. Clearing members will be permitted to make this decision on a daily basis.

Finally, underlying stocks that are included in the PMC Program will not be counted in the valued securities program's 10% concentration limitation.[7] The 10% limitation is intended to prevent a clearing member from fulfilling a large percentage of its margin requirement with a concentration of any particular stock. This limitation is to protect OCC from loss should OCC be forced to convert stock margin deposits to cash at a time when the value of the stock is decreasing in value. Because a combined position in the PMC Program will never be worth less than the exercise price of the put option regardless of the market value of the underlying stock, OCC believes that application of the 10% limitation is unwarranted in the PMC Program.

II. Discussion

The Commission believes the proposal is consistent with the purposes and requirements of Section 17A of the Act.[8] In particular, the Commission believes the proposal meets the requirements of Sections 17A(b)(3) (A) and (F) which require, among other things, that a clearing agency's rules be designed to safeguard securities and funds in its custody or control or for which it is responsible.[9] The Commission believes that OCC's PMC program, while structured to insure that OCC fulfills its statutory obligation to safeguard securities and funds in its custody or control, will enable OCC clearing members to reduce their financing needs through the margin credits given their long put option/underlying stock positions.

One of the major problems that arose during the October 1987 and October 1989 market breaks was a generalized cash squeeze for OCC's clearing members. In particular, OCC clearing members that were utilizing OCC's pledge program [10] to pledge long call option positions to banks as collateral for loans were faced with repaying the loans as the value of their long calls rapidly declined. At the same time, clearing members that had stocks pledged as collateral for loans and letters of credit or were lenders of such securities in stock loan transactions had to use substantial amounts of their cash to reduce outstanding loans or to pay for the return of loaned stock as the value of their collateral fell.

During these same periods, many of OCC's clearing members held in their market-maker's or specialist's accounts substantial long put positions that were rapidly increasing in value. At that time, many banks were reluctant to accept long put options as collateral for loans. Although clearing members received clearing margin credit from OCC for their long put positions, the clearing margin credit calculated by OCC's clearing margin system did not reflect the full value of put options that were held in combination with the underlying stocks.

OCC believes the PMC Program will be helpful in addressing the liquidity squeeze that can occur in a declining market. OCC anticipates that in some situations clearing members will have reduced needs to borrow from commercial banks in order to meet their clearing margin requirements at OCC. The PMC program will allow OCC to internalize a portion of its clearing members' financing requirements by maintaining control over deposited margin collateral that has a known and fixed market value. Because OCC monitors the financial condition and portfolio risk of each of its clearing members through its risk reduction systems,[11] the Commission believes that the PMC program could facilitate effective use of long put option and long stock positions deposited for margin purposes.

During the first twelve months of the temporary approval period, OCC will monitor such things as the number of participants in the PMC Program, such participants' margin savings and the average percentage of participants' total margin requirements reduced by the program. In addition, OCC will review its risk reduction systems, specifically TIMS and ConMon, to insure that OCC is able to determine and protect against any undue risk arising from the PMC program. Before the end of the temporary approval period, OCC will submit a written report to the Commission setting forth the results of its review of the PMC Program.

III. Conclusion

For the reasons discussed in this order, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the above-mentioned proposed rule change (File No. SR–OCC–90–10) be, and hereby is, temporarily approved through October 31, 1995.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.[12]

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[6] Presently, the maximum loan value under the valued securities program is 60% of the stocks current market value.

[7] OCC Rule 604(d)(1) sets forth that equity issues of any one issuer shall not be valued at an amount in excess of 10% of the margin requirement for the account in which such securities are deposited.

[8] 15 U.S.C. 78q–1 (1988).

[9] 15 U.S.C. 78q–1(b)(3) (A) and (F) (1988).

[10] OCC Rule 614(a).

[11] Among other risk reduction systems, OCC's Theoretical Intermarket Margin System ("TIMS") and Concentration Monitoring System ("ConMon") are designed to evaluate and manage the market risks and to set margin requirements for equity and non-equity option positions of OCC's clearing members. TIMS uses the Cox-Rubenstein binomial options pricing model to determine the liquidating value of an option portfolio given a theoretical "worst case" market scenario. ConMon is designed to address risks resulting from concentrated, undiversified portfolios of options that may not be covered by OCC's margin methodology. Essentially, the ConMon system uses TIMS methodology to analyze the theoretical values of each members's positions in the event of an abnormally large market movement and relates the resulting theoretical gain or loss to the member's net worth and capital. A member's margin requirement may be increased as a result.

[12] 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18579 Filed 7–29–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34435; File No. SR–PSE–92–48]

Self-Regulatory Organizations; Pacific Stock Exchange, Inc.; Order Approving Proposed Rule Change, Relating to Requirements That Market Makers Fill Incoming Orders or Update Existing Markets

July 22, 1994.

On December 22, 1992, the Pacific Stock Exchange, Inc. ("PSE" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend PSE rules to expressly require its market makers and lead market makers to respond to orders, represented in a trading crowd at the currently disseminated bid or offer, either by satisfying the order or by updating the existing market in the subject series.

The proposed rule change was published for comment in Securities Exchange Act Release No. 31962 (March 8, 1993), 58 FR 13661 (March 12, 1993). No comments were received on the proposed rule change.

The proposal amends PSE Rule 6.37 to require PSE market makers or lead market makers to either execute an order, at the quote they are currently disseminating, in its entirety or update their quotes (by either raising their bids or lowering their offers) to reflect that the previously disseminated quote is no longer available.[3] The amendment also requires that market makers and lead market makers maintain these updated quotes for a reasonable time period, which, unless specific market changes occur, is defined as two minutes.[4]

Further, the proposal amends PSE Rule 10.13 to make the failure to comply with the obligation to trade or update quotes in response to an order a violation of the PSE's Minor Rule Plan. As a violation of the PSE's Minor Rule Plan, a member could be fined $100, $200, or $500 for a first, second, or third violation, respectively. The Exchange represents that such fines would be recommended, but not required, and repeated or aggravated violations could entail formal disciplinary action.

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).[5] Specifically, the Commission finds that requiring PSE market makers and lead market makers to execute orders or update their markets facilitates transactions in securities, protects investors and the public interest, and promotes fair competition among options markets by reducing the likelihood that an outdated quote from one options market will hinder the execution of an order on another options market by making such execution appear to be at an inferior price (*i.e.*, a "trade-through").

Currently, in light of the expansion in the multiple trading of options, the options exchanges have either implemented or are working to implement systems upgrades which will prevent orders that are identified as potential "trade-troughs" from being automatically executed and will re-route these orders to the appropriate market maker or specialist at each exchange for nonautomated execution. Further, to attract order flow, many market makers and specialists from the different options exchanges have represented to their customers that they will execute the orders they receive at the best price available at any of the five options exchanges. The current proposal, therefore, will, consistent with Section 6(b)(5) of the Act, facilitate options transactions by encouraging PSE market makers to keep their markets up-to-date. This, in turn, should reduce the likelihood that outdated quotes will cause orders on other exchanges, that could be automatically executed, to be re-routed for non-automated handling. it also should reduce the likelihood that outdated quotes will cause orders executed on other exchanges at current market prices to appear to be executed at inferior prices. The Commission further notes that, concurrently with approval of this proposal, it is approving similar proposals by the American Stock Exchange ("AMEX"), Chicago Board Options Exchange ("CBOE"), New York Stock Exchange ("NYSE") and the Philadelphia Stock Exchange ("PHLX").[6]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR–PSE–92–48) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18577 Filed 7–29–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34439; File No. SR–PTC–94–03]

Self-Regulatory Organizations; Participants Trust Company; Notice of Filing of Proposed Rule Change Eliminating the Deliverer's Security Interest and Adding a Participant's Intraday Collateral Lien

July 25, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on June 23, 1994, the Participants Trust Company ("PTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change (File No. SR–PTC–94–03) as described in Items I, II, and III below, which Items have been prepared primarily by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will amend PTC's Rules and Procedures by deleting provisions providing a Deliverer's Security Interest ("DSI") and adding a new Section 2A to Rule 3 of Article II

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[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1993).

[3] The Commission understands this provision to allow an exchange, upon receipt of a market or marketable limit order, to execute less than the total number of contracts contained in the order, but the exchange then becomes obligated to update its quotation if it is not willing to transact with any more of the order at the same price. For example, if as a result of displaying a more competitive offer, an exchange is sent an order to buy 50 contracts that was originally received by another exchange, it may buy fewer than 50 contracts at its quoted price, but must then revise its quotation to reflect that the price is no longer available.

[4] Commentary .09 to PSE Rule 6.37 provides that a reasonable period of time is presumed to be two minutes. The Commentary further provides, however, that the revised market can be changed before the two minutes are up if there is: (a) a change in the market quote in the underlying security or a change in the size of the market quoted; or (b) a quote change of ¼ of a point (or twice the minimum price differential), in another options series on the same underlying security, resulting from a customer order. Finally, the Commentary provides that two floor officials may grant exemptions from the trade or update requirements contained in Rule 6.37 if the individual situation warrants such action.

[5] 15 U.S.C. 78f(b)(5) (1988).

[6] *See* Securities Exchange Act Release No. 34431, 34432, 34433, and 34434, (July 22, 1994), respectively.

[7] 15 U.S.C. 78s(b)(2) (1988).

[8] 17 CFR 200.30–3(a)(12) (1993).

[1] 15 U.S.C. 78s(b)(1) (1988).

of PTC's Rules, with conforming changes made elsewhere in PTC's Rules and Procedures, providing for a Participants Intraday Collateral Lien ("PICL").[2]

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 the Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to amend PTC's Rules and Procedures to eliminate the DSI and to add a PICL as described below.

Background

DSI was a basic element of PTC's clearing and settlement mechanism as formulated by the Mortgage Backed Securities Clearing Corporation ("MBSCC"), the predecessor to PTC.[3] The DSI is in essence a lien on securities which are transferred versus payment granted in favor of the delivering participant.

The Board of Governors of the Federal Reserve System ("Fed"), the Federal Reserve Bank of New York ("FRBNY"), and the Commission have expressed reservations about DSI since PTC's inception. In its letter of March 27, 1989, approving PTC's application for membership in the Federal Reserve System, the Fed required as a condition of approval that PTC undertake to "(i) evaluate the impact of its DSI on its loss allocation and netting policies and (ii) propose modifications to the FRBNY to insure that the DSI does not impede the operation of these policies or of the policies of the Board of Governors of the Federal Reserve System concerning loss allocation and netting."

In addition, the Commission in its order approving PTC as a clearing agency under Section 17A of the Act stated, "Furthermore, PTC will make a number of operational and procedural changes. * * * [T]hose changes include * * * eliminating the deliverer's security interest and replacing it with a substitute * * * ."[4]

PTC has been engaged in discussions with the staff of the FRBNY and the Commission on the DSI issue since March 1989, and various proposals for the modification or replacement of DSI have been made. The proposed rule change is a result of the continued discussions with PTC's regulators and is intended to address the concerns of the FRBNY and the Commission.

Transfers Versus Payment in PTC's System

Each PTC Participant holds its securities on deposit at PTC in one or more master accounts, each comprised of one or more processing subaccounts. The subaccounts can include a proprietary account, a proprietary seg account, an agency account, an agency seg account, a pledgee account, and a limited purpose account. Each proprietary account, agency account and pledgee processing account has a PTC transfer account associated with it for the intraday receipt of securities delivered or pledged versus payment pending transfer to the intended receiving account at settlement. Securities in the transfer account are owned by PTC intraday pending settlement and may be liquidated or pledged by PTC if at settlement the intended recipient defaults on the payment of its end-of-day debit balance.

Each processing account and associated transfer account has a payment record ("cash balance") associated with it to which debits and credits are posted throughout the day. When securities are transferred versus payment to the transfer account associated with the account of the receiving participant, the contract price of the securities is debited from the cash balance of the applicable account of the receiving participant, and is credited to the cash balance of the applicable account of the delivering participant.

Securities in the transfer account may be redelivered intraday by the receiving participant or may be withdrawn. A redelivery versus payment results in debits and credits to the appropriate accounts of the new receiving participant and the redelivering participant, respectively. A redelivery fee or a withdrawal of securities in the transfer account by the initial receiving participant requires under PTC's Rules that the participant "prefund" by depositing to PTC's participant fund excess cash in the amount of the contract value of the securities.

At the end of the processing day, participants wire the amount of their debit balances to PTC's settlement account. From the settlement account, PTC then wires funds due to participants having end-of-day credit balances.

DSI

Under current PTC Rules, the delivering participant which delivers or pledges securities versus payment from one of its processing accounts (but not a redelivery from a transfer account associated with a processing account) is granted a DSI in the securities. The DSI is extinguished upon settlement at which time the securities are transferred from the applicable transfer account to the receiving account of the receiving participant.

The current PTC Rules provide that the DSI is extinguished with respect to securities that are subsequently redelivered free or withdrawn and continues in prefunding associated with the free redelivery or withdrawal. With respect to securities that are redelivered versus payment from a transfer account, the DSI continues in favor of the initial delivering participant and the redelivering participant is not granted a DSI and does not acquire any rights in the securities other than the right to redirect their delivery subject to PTC's Rules. The securities continue to be owned by PTC, subject to the DSI, so long as they remain in a transfer account.

PICL

Under the proposed rule change, DSI will be eliminated. In order to provide appropriate protection to participants with intraday credit balances with respect to their intraday credit exposure, such participants will be granted a security interest (*i.e.*, the "Participants Intraday Collateral Lien" Or "PICL") in securities in transfer accounts. PTC's granting of the PICL will be subject to certain material restrictions on the exercise of the PICL and limitations on the amount of collateral available to satisfy secured claims, as described below.

Participants with intraday credit balances provide liquidity in PTC's settlement system. For example, major clearing banks as triparty custodians or as lenders utilize PTC's system to return collateral to their dealer-customers early in the day. For such securities deliveries, the delivering banks receive an intraday credit to their cash balances

[2] The text of the proposed new Section 2A to Rule 3 of Article II of PTC's Rules is attached as Exhibit A.

[3] PTC purchased the Depository Division of MBSCC from the Midwest Stock Exchange in March 1989. See Securities Exchange Act Release No. 26671 (March 31, 1989), 54 FR 13266 (order granting registration as a clearing agency).

[4] *Id.*

pending payment in cash at PTC's end-of-day settlement. This intraday credit exposure is inherent in PTC's system. The addition of PICL is proposed to minimize the intraday credit risk to participants with credit balances in a manner that is consistent with the policies of the Fed.

Description of PICL

The PICL is restricted in application to PTC's failure to achieve systemwide settlement and its insolvency or seizure by an order of a regulatory agency or court. Under PTC's rules, insolvency requires the determination of an appropriate regulatory agency or court and does not permit PTC itself to trigger an insolvency proceeding.

The PICL terminates upon PTC's achieving settlement and with respect to securities that are pledged to achieve settlement pursuant to the procedures set forth in PTC's Rules and Procedures. In addition, the PICL attaches to securities in the transfer accounts but terminates with respect to any such securities that are transferred free or withdrawn intraday or that are delivered to participants after an event of default. In such situations, the PICL continues in prefunding or in other amounts paid in connection therewith as proceeds.

The PICL secures a participant's PICL credit balance, which is the amount by which its credit balances exceed its debit balances adjusted to eliminate the amount of any credits made with respect to (i) principal and interest payments and (ii) certain funds transfers between participants made pursuant to Article II, Rule 15 ("Funds Transfers" of PTC's Rules.

The PICL is structured as a perfected security interest under Sections 8–313(1)(i) and 8–321 of the New York Uniform Commercial Code.[5] For purposes of such perfected security interests, PTC's Rules and Participants Agreements are the required security agreements, PTC's records are the description of the collateral, and participants' transfers of securities versus payment to the receivers' transfer accounts or retransfers of securities out of transfer accounts against a PTC credit constitute the value given by the secured party.

Application of PICL

Upon PTC's failure to settle and its insolvency or seizure by order of a regulatory agency or court order (together, an event of default under the proposed PICL rule), participants whose credit balances equal or exceed their debit balances ("credit Ps") will have an intraday security interest in all securities in PTC transfer accounts in the amount of their PICL credit balances (*i.e.*, their net credit balance) as such balance exists from time to time during the day. Participants whose debit balances exceed their credit balances ("debit Ps") are credited with their security deliveries if they pay the amount of such excess. If they do not so pay, such securities will remain in the transfer accounts for the benefit of credit Ps. Credit Ps will receive: (1) Their securities deliveries; and (2) their *pro rata* share of (a) cash proceeds from Debit Ps which do pay their debits and prefunding payments with respect to transfer account securities that were transferred free or withdrawn intraday and (b) sales proceeds of the transfer accounts securities (*i.e*, proceeds of securities of debit Ps which do not pay their net debit to PTC). P&I will be distributed to participants net of any debit balances owing to PTC.

Effect of PICL on PTC Settlement Procedures

The PICL will have no effect on PTC's settlement process. The PICL will be extinguished upon settlement, which occurs upon the payment of all debit balances by the applicable participants or in the event of participant default in payment of debit balances, upon application of the default provisions of Article II, Rule 6 ("Failure of Participants to Meet Cash Settlement Obligations") and Procedure IV of PTC's Rules and Procedures ("Procedure for Financing Settlement Defaults"). PTC maintains a committed line of credit in the amount of $2 billion for the purpose of achieving settlement in the event of participant default, and no participant is permitted to incur a net debit in excess of its net debit monitoring level, which is an amount which is calculated by reference to each participant's net capital but can never exceed $2 billion.

The participant default procedures include a provision permitting the pledge of certain securities in the transfer accounts for the purpose of obtaining funds to achieve settlement. The PICL terminates with respect to such securities upon such pledge.

PTC believes that because the proposed rule change provides for the safeguarding of securities and funds in PTC's custody and control and, in general, protects investors and the public interest it is consistent with Section 17A of the Act and the rules and regulations thereunder applicable to PTC.

B. Self-Regulatory Organization's Statement on Burden on Competition

PTC 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

At this time, PTC has neither solicited nor received comments on this proposed rule change. PTC, however, has issued an Administrative Bulletin to Participants describing and soliciting comment on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five 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 ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, 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 in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of PTC. All submissions should refer to file number SR–PTC–94–03 and should be submitted by August 22, 1994.

[5] The PICL will have comparable results under the proposed revisions to UCC Articles Eight and Nine as promulgated by the National Conference of Commissioners on Uniform State Laws and The American Law Institute.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

Exhibit A—Text of Proposed Rule Change

Section 2A of Rule 3 of Article II of PTC's Rules

Insert a new Section 2A of Rule 3 of Article II after Section 2 thereof, as follows:

Sec. 2A: *Participants Intraday Collateral Lien*

(a) Definitions. For purposes of this Section 2A:

(i) "Event of Default" means the concurrence of

(A) a failure of the Corporation to achieve the cash settlement of all transactions processed through the Corporation pursuant to Section 3 of Rule 2 of this Article II, and

(B) either of

(x) a determination by any governmental agency that regulates the Corporation that the Corporation is insolvent and/or the appointment of a receiver, liquidator, assignee, trustee, sequestrator or similar official for the Corporation or for any substantial part of its property, or

(y) the entry of a decree or order by a court having jurisdiction in the premises adjudging the Corporation to be insolvent or approving a petition filed by a party other than the Corporation for reorganization, arrangement, adjustment or composition with respect to the Corporation or any substantial part of its property or ordering the winding up or liquidation of its affairs.

(ii) "Participants Intraday Collateral Lien" (hereinafter referred to as "PICL") means the security interest in Securities and proceeds thereof granted by the Corporation pursuant to Subsection (b) hereof.

(iii) "PICL Credit Balance" means

(A) the aggregate Credit Balances of the Accounts of a Participant or Limited Purpose Participant, as such aggregate Credit Balances exist from time to time, minus

(B) the aggregate Debit Balances of the Accounts of such Participant as such aggregate Debit Balances exist from time to time, minus

(C) the sum of:

(x) the aggregate amount of principal and interest payments credited to the Cash Balances of all such Accounts pursuant to Section 1 of Rule 2 of Article III; and

(y) the aggregate amount of funds transferred to the Cash Balances of all such Accounts pursuant to Rule 15 of this Article II, except funds transferred from one master account of a Participant or Limited Purpose Participant to another Master Account of such Participant or Limited Purpose Participant pursuant to such Rule.

(iv) "PICL Proceeds" means the sum of

(A) amounts received pursuant to Section 1(b)(ii)(B) of Rule 13 of this Article II or Subsection (d)(i)(B) hereof, plus

(B) the proceeds received pursuant to Subsection (d)(ii) hereof upon the liquidation of Securities then subject to PICL

(b) Grant of PICL.

(i) In consideration of

(A) the transfer of Securities Versus Payment by a Delivering Participant or Limited Purpose Participant to the Corporation pursuant to Section 1(b) of this Rule 3 and Section 1(a)(iii) of Rule 13 of this Article II, and

(B) the transfer of Securities Versus Payment by the Corporation and a Receiving Participant or Limited Purpose Participant to the Transfer Account associated with the Account of another Participant pursuant to Section 3(c) of this Rule 3 and Section 1(a)(iii) of Rule 13 of this Article II; and

(ii) To secure

(A) to the extent of any PICL Credit Balance of a Participant or Limited Purpose Participant the obligation of the Corporation to make a payment to such Participant or Limited Purpose Participant pursuant to Section 3 of Rule 2 of this Article II with respect to transactions processed through the Corporation, and

(B) The obligation of the Corporation to deliver Securities to a Participant pursuant to Subsection (d)(i)(A) or (B) hereof:

(iii) The Corporation hereby grants a PICL to each such Delivering Participant or Limited Purpose Participant and each such Receiving Participant or Limited Purpose Participant.

(iv) The PICL shall be granted pursuant to the UCC and, for purposes thereof, these Rules and each Participants Agreement together shall be a written security agreement, records generated by the Corporation pursuant to these Rules and the Procedures reflecting transfers of Securities Versus Payment shall be the description of the Securities contained in such agreement, and the consideration referred to in subsection (i) hereof shall constitute the giving of value by Participants and Limited Purpose Participants. The PICL of a Participant or Limited Purpose Participant shall attach to Securities that are credited to Transfer Accounts pursuant to Section 2 of this Rule 3 as and when and for so long as a Participant has a PICL Credit Balance; *provided, however,* that the PICL shall terminate in respect of Securities which are withdrawn from a Transfer Account pursuant to Section 3(a) of this Rule 3, transferred from a Transfer Account not Versus Payment pursuant to Section 3(b) of this Rule 3, or delivered pursuant to Subsection (d)(i)(A) or (B) hereof, but any prefunding or other payments made in connection therewith pursuant to Section 1(b)(ii)(B) of Rule 13 of this Article II or Subsection (d)(i)(B) hereof shall constitute "proceeds" within the meaning of the UCC and the PICL shall continue in such proceeds pursuant to the UCC.

(c) Termination of PICL.

The PICL shall terminate in respect of:

(i) Securities and proceeds thereof which are pledged by the Corporation pursuant to Section 1 of Rule 6 of this Article II and/or Procedure IV of the Procedures to finance the cash settlement of transactions processed through the Corporation pursuant to Section 3 of Rule 2 of this Article II;

(ii) Securities and proceeds thereof upon the cash settlement of all transactions processed through the Corporation pursuant to Section 3 of Rule 2 of this Article II; and

(iii) Securities which are withdrawn, transferred or delivered pursuant to the proviso in the last sentence of Subsection (b)(iv) hereof.

(d) Event of Default Procedure.

Upon an Event of Default:

(i) Notwithstanding the third paragraph of Section 3 of Rule 2 of this Article II and Section 3(d) of this Rule 3,

(A) Securities in Transfer Accounts associated with Accounts of Participants whose aggregate Credit Balances equal or exceed their aggregate Debit Balances shall be credited to the applicable Accounts of such Participants;

(B) Securities in Transfer Accounts associated with Accounts of Participants whose aggregate Debit Balances exceed their aggregate Credit Balances shall be credited to the applicable Accounts of such Participants upon and in respect of their payment to the Corporation or its legal representative of the amount of such excess; and

(C) principal and interest received by the Corporation on behalf of a Participant shall be distributed as promptly as possible by the Corporation or its legal representative to the Participant, net of any Debit Balances or other amounts due to the Corporation from the Participant pursuant to these Rules and the Procedures.

(ii) The Corporation, or its legal representative, as agent for Participants and Limited Purpose Participants with a PICL Credit Balance, shall liquidate the Securities then subject to the PICL in the manner provided in Section 4 of Rule 6 of this Article II; and

(iii) Each Participant and Limited Purpose Participant with a PICL Credit Balance shall receive, in full satisfaction of its PICL, its *pro rata* share of the PICL Proceeds based upon the proportion that its PICL Credit Balance bears to the aggregate PICL Credit Balances of all Participants and Limited Purpose Participants.

(e) Intraday transfers subject to PICL.

Notwithstanding anything else contained in these Rules, except as described in Subsection (c) hereof, all transfers of Securities from any Transfer Account shall be subject to the PICL.

[FR Doc. 94–18584 Filed 7–29–94; 8:45 am]

BILLING CODE 8010–01–M

[Releases No. 34–34434; File No. SR–PHLX–94–30]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change, Relating to Quotation Guarantees, Including a Requirement That Specialists and Registered Options Traders ("ROT's") Fill Incoming Orders or Update Existing Markets

July 22, 1944.

On June 1, 1994, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") submitted to the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b) of the Securities Exchange Act of

1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend PHLX rules to expressly require its specialists and registered options traders ("ROT's") in a trading crowd to respond to non-public orders represented in the trading crowd at the currently disseminated bid or offer, either by satisfying the order or by updating the existing market in the subject series.

The proposed rule change was published for comment in Securities Exchange Act Release No. 34158 (June 3, 1994), 59 FR 30074 (June 10, 1994). No comments were received on the proposed rule change.

The proposal amends PHLX Rule 1015 to require PHLX specialists and ROT's to either execute an order at the quote they are currently disseminating or to update their quotes (by either raising their bids or lowering their offers) to reflect that the previously disseminated quote is no longer available.[3] The amendment also includes language prohibiting the trading crowd from immediately redisplaying the previously disseminated market quote, unless warranted by a change in market conditions.

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).[4] Specifically, the Commission finds that requiring PHLX specialists and ROT's to execute orders or update their markets facilitates transactions in securities, protects investors and the public interest, and promotes fair competition among options markets by reducing the likelihood that an outdated quote from one options market will hinder the execution of an order on another options market by making such execution appear to be at an inferior price (*i.e.*, a "trade-through").

Currently, in light of the expansion in the multiple trading of options, the options exchanges have either implemented or are working to implement systems upgrades which will prevent orders that are identified as potential "trade-throughs" from being automatically executed and will re-route these orders to the appropriate market maker or specialist at each exchange for non-automated execution. Further, to attract order flow, many market makers and specialists from the different options exchanges have represented to their customers that they will execute the orders they receive at the best price available at any of the five options exchanges. The current proposal, therefore, will, consistent with Section 6(b)(5) of the Act, facilitate options transactions by encouraging the PHLX trading crowd to keep their markets up-to-date. This, in turn, should reduce the likelihood that outdated quotes will cause orders on other exchanges, that could be automatically executed, to be re-routed for non-automated handling. It also should reduce the likelihood that outdated quotes will cause orders executed on other exchanges at current market prices to appear to be executed at inferior prices. The Commission further notes that, concurrently with approval of this proposal, it has approved similar proposals by the American Stock Exchange ("AMEX"), Chicago Board Options Exchange ("CBOE"), New York Stock Exchange ("NYSE") and the Pacific Stock Exchange ("PSE").[5]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[6] that the proposed rule change (SR–PHLX–94–30) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18580 Filed 7–29–94; 8:45 am]

BILLING CODE 8010–01–M

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[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1993).

[3] The Commission understands this provision to allow an exchange, upon receipt of a market or marketable limit order, to execute less than the total number of contracts contained in the order, but the exchange then becomes obligated to update its quotation if it is not willing to transact with any more of the order at the same price. For example, if as a result of displaying a more competitive offer, an exchange is sent an order to buy 50 contracts that was originally received by another exchange, it may buy fewer than 50 contracts at its quoted price, but must then revise the quotation to reflect that its price is no longer available.

[4] 15 U.S.C. 78f(b)(5) (1988).

[5] See Securities Exchange Act Release No. 34431, 34432, 34433, and 34435, (July 22, 1994), respectively.

[6] 15 U.S.C. 78s(b)(2) (1988).

[7] 17 CFR 200.30–3(a)(12) (1993).

[Investment Company Act Release No. 20425; 811–3549]

CIMCO Money Market Trust; Notice of Application

July 25, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for deregistration under the Investment Company Act of 1940 (the "Act").

APPLICANT: CIMCO Money Market Trust.

RELEVANT ACT SECTION: Order requested under section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring it has ceased to be an investment company.

FILING DATE: The application was filed on June 6, 1994 and amended on July 19, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on August 22, 1994, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street NW., Washington, D.C. 20549. Applicant, 2000 Heritage Way, Waverly, IA 50677.

FOR FURTHER INFORMATION CONTACT: Marianne H. Khawly, Law Clerk, at (202) 942–0562, or C. David Messman, Branch Chief, at (202) 942–0564 (Division of Investment Management, Officer of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicant's Representations

1. Applicant is a registered open-end, diversified, management investment company under the Act and was organized as a business trust under the laws of the Commonwealth of Massachusetts. On August 23, 1982, applicant filed a notification of registration on form N–8A pursuant to section 8(a) of the Act and registration statement on form N–1A under section 8(b) of the Act and under the Securities Act of 1933. The registration statement became effective on September 16, 1983 and applicant's initial public offering commenced on that date.

2. Pursuant to written consent on October 28, 1993, applicant's Board of Trustees determined that it was advisable and in the best interest of applicant and its shareholders that applicant terminate its existence as a

Massachusetts business trust, liquidate any assets and that the proceeds from the liquidation be returned to applicant's shareholders. The Trustees recommended termination of the Trust because the small asset size of the Trust, the small number of shareholders, and the low level of market interest rates meant that the Trust could not produce a competitive yield.

3. Applicant's Declaration of Trust provides that applicant may be terminated by an instrument in writing signed by a majority of the Trustees and the holders of a majority of the shares. On October 28, 1993, Century Life of America, (the "sponsor"), as holder of a majority of applicant's shares, executed an instrument in writing terminating the Trust.

4. On November 1, 1993, a letter was sent to all shareholders notifying them of the decision the Trustees made on October 28, 1993 to terminate the Trust. Distribution to Century Life of America was delayed so that any loss caused by sale of assets prior to maturity would be borne by the sponsor rather than by individual shareholders. Shareholders other than the sponsor were sent checks for the full value of their accounts on December 1, 1993. That distribution totalled $1,980,440. Between December 14 and December 29, the Trust's remaining assets, totalling $6,206,672, were distributed to the sponsor.

5. All expenses incurred in connection with applicant's liquidation were borne by the sponsor. Such expenses, totalling approximately $25,000, included postage and administrative expenses.

6. As of the date of the application, applicant has no assets, debts, or liabilities; had no shareholders; and is not a party to any litigation or administrative proceeding. Applicant is neither engaged in nor proposes to engage in any business activities other than those necessary for the winding-up of its affairs.

7. Applicant terminated its existence as a business trust under Massachusetts law on February 28, 1994.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94-18576 Filed 7-29-94; 8:45 am]

BILLING CODE 8010-01-M

[Investment Company Act Rel. No. 20426; 812-8982]

PIMCO Funds, et al.; Notice of Application

July 26, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 ("Act").

APPLICANTS: PIMCO Funds, Pacific Investment Management Company ("PIMCO"), and Pacific Equities Network ("PEN").

RELEVANT ACT SECTIONS: Exemption requested under section 6(c) from sections 18(f), 18(g), and 18(i).

SUMMARY OF APPLICATION: Applicants seek a conditional order under section 6(c) of the Act to permit PIMCO Funds and any open-end investment companies established in the future for which PIMCO (or an entity controlling, controlled by, or under common control with PIMCO) acts as investment adviser, or for which PEN (or an entity controlling, controlled by, or under common control with PEN) serves as principal underwriter (collectively with PIMCO Funds, the "Funds"), to offer two classes of shares representing interests in the same portfolio of securities.

FILING DATE: The application was filed on May 5, 1994, and amended on July 7, 1994. Applicants have agreed to file an additional amendment during the notice period. This notice reflects the changes to be made by such additional amendment.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving 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 22, 1994, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificant of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request such notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, D.C. 20549. Applicants: PIMCO Funds and PIMCO, 840 Newport Center Drive, Suite 360, Newport Beach, California 92660; PEN, 700 Newport Center Drive, Newport Beach, California 92660.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Senior Attorney at (202) 942-0583, or Barry D. Miller, Senior Special Counsel, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. PIMCO Funds is an open-end management investment company organized as a Massachusetts business trust. PIMCO Funds currently offers seventeen separate investment portfolios (the "Portfolios"), each with its own investment objective and policies.

2. PIMCO, an indirect wholly owned subsidiary of Pacific Mutual Life Insurance Company, acts as investment adviser to PIMCO Funds. PEN, an indirect subsidiary of Pacific Mutual Life Insurance Company, is PIMCO Funds' distributor.

3. To broaden its potential shareholder base, PIMCO Funds proposes to offer a second class of shares with respect to each Portfolio. Each such class would evidence an interest in one of the Portfolios and, except for class designation, the allocation of certain expenses, voting rights, and exchange privileges, would be identical in all respects to shares of the original outstanding class of shares of PIMCO Funds, which would be designated the "Institutional Class" or "Class A." The new class of shares would be designated the "Administrative Class," or "Class B." Since shares of each class of a Portfolio would evidence interest in a single investment portfolio, each class of a Portfolio would have or be subject to the same investment objective, policies, and restrictions as the other class of the same Portfolio. Differences in the expense allocation between the two classes would occur because the second class would incur expenses as a result of being offered in connection with a distribution adopted pursuant to rule 12b-1 under the Act (a "12b-1 Plan") or a non-rule 12b-1 administrative services plan (an "Administrative Services Plan"), or with a combination of these.

4. Class A shares would be offered solely to pension and profit sharing plans, employee benefit trusts, endowments, foundations, corporations, other institutions, and high net worth individuals. There would be no sales charge imposed on the purchase and redemption of shares, and no 12b-1

fees. There would be a significant minimum initial investment (which is currently $500,000 for PIMCO Funds) required to purchase Class A shares. As with the currently outstanding shares of the Portfolios, Class A shares could be offered through registered broker-dealers, qualified pension and profit-sharing plans and other qualified financial intermediaries ("Service Organizations") that may offer the Funds or their Portfolios to their customers. Service Organizations would receive no compensation from the Funds or the Portfolios for the provision of related shareholder account maintenance and support functions. These Service Organizations would recover the expenses of providing services to their customers by charging either the investor or, in the case of a pension or profit-sharing plan, the plan itself or its employer sponsor directly for such services.

5. Class B shares would be offered to customers of Service Organizations that typically are compensated by service or distribution fees paid by the mutual funds offered to their customers rather than by transaction or other fees paid directly by such customers. The service fees paid by this class could be in the nature of a distribution fee payable pursuant to a 12b–1 Plan, or in the nature of an administrative services fee paid in connection with an employee benefit or retirement plan, or in a combination of the two types of plans.

6. In the case of a service fee payable pursuant to a 12b–1 Plan, a Fund or a Portfolio thereof would enter into agreements with certain Service Organizations providing for the performance of certain services, some of which could be construed as distribution assistance.[1] Under a 12b–1 Plan, a Portfolio typically would pay PEN or the Service Organization for such services. The expense of such payments by a Fund or a Portfolio would be borne entirely by the Class B shareholders. Any 12b–1 Plan adopted by a Fund or a Portfolio will comply with both rule 12b–1 and the Rules of Fair Practice of the National Association of Securities Dealers, Inc. Services provided in accordance with the terms of a 12b–1 Plan would not be duplicative of any services currently provided or to be provided to a Fund or its Portfolios by its administrator, distributor, or transfer agent.

7. Under an Administrative Services Plan, a Fund or a Portfolio would enter into agreements with Service Organizations in which each organization would agree to provide certain services to its clients, members, or customers who purchase shares of the class.[2] The provision of services under Administrative Services Plans would not be duplicative of any services currently provided or to be provided to a Fund or a Portfolio by its administrator, distributor, or transfer agent. Each Portfolio would pay a Service Organization for its services in accordance with the terms of its particular Administrative Services Plan, and the expense of such payments would be borne entirely by the beneficial owners of the Class B shares.

8. The net asset value of all outstanding shares representing interests in a Portfolio would be computed on the same days and at the same times. For purposes of computing net asset value, the gross income of a Portfolio would be allocated to each class on the basis of the relative net assets of each class. The following expenses would be subtracted from gross income on the basis of net assets of each class of the respective Portfolio: (a) expenses incurred by the Fund as a registered series investment company and not attributable to a particular Portfolio or to a particular class of shares thereof ("Fund Expenses"), and (b) expenses incurred by a particular Portfolio but not attributable to any particular class of such Portfolio's shares ("Portfolio Expenses"). Further, in addition to expenses incurred under a 12b–1 or Administrative Services Plan, expenses specifically attributable to a particular class ("Class Expenses"), as set forth in condition 1 below, would be allocated directly to that particular class, rather than on the basis of the relative net assets of the two classes.

9. Another difference between Class A shares and Class B shares will be the exchange privileges applicable to such shares. Class A shares of a Portfolio will be exchangeable only for Class A shares of other Portfolios, and Class B shares of a Portfolio will be exchangeable only for Class B shares of other Portfolios. The exchange privileges applicable to shares of the two classes will comply with rule 11a–3 under the Act.

Applicants' Legal Analysis

1. Applicants request an exemptive order to the extent that the proposed issuance and sale of two classes of shares with respect to a Fund or a Portfolio might be deemed: (a) to result in a "senior security" within the meaning of section 18(g) of the Act, and thus to be prohibited by section 18(f)(1) of the Act; and (b) to violate the equal voting provisions of section 18(i) of the Act.

2. Applicants state that section 18 is intended to redress abuses such as excessive borrowing and the issuance of excessive amounts of senior securities (which increase the speculative nature of junior securities), and the operation of investment companies without adequate assets or reserves. Applicants note that the proposed arrangement does not involve borrowing and does not affect the Portfolios' existing assets or reserves. Nor will the proposed arrangement increase the speculative character of the shares of a Portfolio, since all of the income and expenses of that Portfolio (with the exception of certain 12b–1 Plan payments, Administrative Services Plan payments, and Class Expenses) will be allocated between the classes of shares based on the relative net assets of each class.

3. Under the proposed arrangement, mutuality of risk will be preserved with respect to all of the shares of each Portfolio. Further, since all shares of a Portfolio will be redeemable at all times, no class will have distribution or liquidation preferences with respect to particular assets. Because the similarities (and, with respect to 12b–1 Plan payments, Administrative Services Plan payments, Class Expenses and associated voting rights, dissimilarities) of the shares of each class will be fully disclosed in the prospectus for each class of a Portfolio, investors will not be given misleading impressions as to the safety or risk of the shares, and the nature of the shares will not be rendered speculative.

4. Applicants believe that the proposed allocation of expenses and voting rights in the manner described is equitable and would not discriminate against any group of shareholders.

[1] These services may include, but are not limited to, providing facilities to answer questions from prospective investors about the Fund and its Portfolios; receiving and answering correspondence, including requests for prospectuses and statements of additional information; preparing, printing and delivering prospectuses and shareholder reports to prospective shareholders; complying with federal and state securities laws pertaining to the sale of Fund shares; and assisting investors in completing application forms and selecting dividend and other account options. Service Organizations may also provide their endorsement of the Fund to their clients, members, or customers as an inducement to invest in the Fund.

[2] Such services could include receiving, aggregating and processing shareholder orders; furnishing shareholder subaccounting; providing and maintaining elective shareholder services such as check writing and wire transfer services; providing and maintaining pre-authorized investment plans; communicating periodically with shareholders; acting as the sole shareholder of record and nominee for shareholders; maintaining account records for shareholders; answering questions and handling correspondence from shareholders about their accounts; issuing confirmations for transactions by shareholders; and performing similar account administrative services.

Investors purchasing Class B shares offered in connection with a 12b–1 Plan or Administrative Services Plan would bear the costs associated with the related services and, with respect to any 12b–1 Plan, would also enjoy exclusive shareholder voting rights with respect to matters affecting such plan. Conversely, investors purchasing Class A shares, which would not be covered by such plans, would not be burdened with such expenses or enjoy such voting rights.

Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. Each class of shares will represent interests in the same portfolio of investments of a Portfolio, and be identical in all respects, except as set forth below. The only differences between the classes of shares of a Portfolio will relate solely to: (a) the impact of the disproportionate Administrative Services Plan payments, 12b–1 Plan payments, and Class Expenses, which will be limited to (i) transfer agent fees as identified by the transfer agent as being attributable to a specific class, (ii) printing and postage expenses related to preparing and distributing materials such as shareholder reports, prospectuses, and proxies to the current shareholders of a specific class, (iii) Blue Sky registration fees incurred by a class, (iv) SEC registration fees incurred by a class, (v) the expense of administrative personnel and services as required to support the shareholders of a specific class, (vi) litigation or other legal expenses relating solely to one class, and (vii) Trustees' fees incurred as a result of issues relating to one class; (b) voting rights as to matters exclusively affecting one class of shares; (c) exchange features; and (d) class designation differences. Any additional incremental expenses not specifically identified above that are subsequently identified and determined to be properly allocated to one class of shares shall not be so allocated until approved by the Commission pursuant to an amended order.

2. The trustees of the Funds, including a majority of the independent trustees, will approve the offering of two classes of shares (the "Dual-Class System"). The minutes of the respective meetings of the trustees regarding the deliberations of the trustees with respect to the approvals necessary to implement the Dual-Class System will reflect in detail the reasons for the trustees' determination that the proposed Dual-Class System is in the best interests of the Funds and their shareholders.

3. On an ongoing basis, the trustees of a Fund, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor the existence of any material conflicts among the interests of the various classes of shares. The trustees, including a majority of the independent trustees, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. PIMCO as adviser, and PEN as distributor, will be responsible for reporting any potential or existing conflicts to the trustees. If a conflict arises, the adviser and the distributor at their own cost will remedy such conflict up to and including establishing a new registered management investment company.

4. The initial determination of the Class Expenses that will be allocated to a particular class and any subsequent changes thereto will be reviewed and approved by a vote of the trustees of the relevant Fund, including a majority of the trustees who are not interested persons of that Fund. Any person authorized to direct the allocation and disposition of monies paid or payable by a Fund to meet Class Expenses shall provide to the trustees of such Fund, and the trustees shall review at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made.

5. Any Administrative Services Plans will be adopted and operated in accordance with the procedures set forth in rule 12b–1(b) through (f) as if the expenditures made thereunder were subject to rule 12b–1, except that shareholders need not enjoy the voting rights specified in rule 12b–1.

6. The trustees of the Funds will receive quarterly and annual statements concerning distribution and shareholder servicing expenditures complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time to time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify any distribution or servicing fee charged to that class. Expenditures not related to the sale or servicing of a particular class will not be presented to the trustees to justify any fee attributable to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent trustees in the exercise of their fiduciary duties.

7. Dividends paid by a Portfolio with respect to each class of its shares, to the extent any dividends are paid, will be calculated in the same manner, at the same time, on the same day, and will be in the same amount, except that payments made by Class B under its 12b–1 or Administrative Services Plan, and any Class Expenses will be borne exclusively by that class.

8. The methodology and procedures for calculating the net asset value and dividends and distributions of the classes and the proper allocation of expenses among the classes has been reviewed by an expert (the "Expert"), who has rendered a report to applicants, which has been provided to the staff of the Commission, that such methodology and procedures are adequate to ensure that such calculations and allocations would be made in an appropriate manner. On an ongoing basis, the Expert, or an appropriate substitute Expert, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to the Fund that the calculations and allocations are being made properly. The reports of the Expert will be filed as part of the periodic reports filed with the Commission pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the Expert with respect to such reports, following request by the Fund (which the Fund agrees to provide), will be available for inspection by the Commission staff upon written request to the Fund by a senior member of the Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director, and any Regional Administrators, or Associate and Assistant Administrators. The initial report of the Expert is a "report on policies and procedures placed in operation" and ongoing reports will be "reports on policies and procedures placed in operation and tests of operating effectiveness" as defined and described in Statement of Auditing Standards No. 70 of the American Institute of Certified Public Accountants ("AICPA"), as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

9. Applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends and distributions of the two classes of shares and the proper allocation of expenses between the classes of shares, and this representation has been concurred with by the Expert in the initial report referred to in condition 8 above, and will be concurred with by the appropriate substitute Expert on an ongoing basis at least annually in the ongoing reports

referred to in condition 8 above. Applicants will take immediate corrective measures if this representation is not concurred in by the Expert, or appropriate substitute Expert.

10. The prospectus of each Fund of Portfolio will contain a statement to the effect that any person entitled to receive compensation for servicing Fund shares may receive different compensation with respect to one particular class of shares over another in the Fund.

11. The Distributor will adopt compliance standards as to when each class of shares may appropriately be offered to particular investors. Applicants will require all persons selling shares of the funds to agree to conform to such standards.

12. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the trustees with respect to the Dual-Class System will be set forth in guidelines to be furnished to the trustees.

13. The Funds will disclose the expenses, performance data, distribution arrangements, services, fees, and exchange privileges (if any) applicable to both classes in every prospectus, regardless of whether both classes are offered through each prospectus. Each Portfolio will disclose the respective expenses and performance data applicable to all classes of shares of the Portfolio in every shareholder report. The shareholder reports will contain, in the statement of assets and liabilities and statement of operations, information related to the Portfolio as a whole generally and not on a per class basis. Each Portfolio's per share data, however, will be prepared on a per class basis with respect to each class of shares of such Portfolio. To the extent that any advertisement or sales literature describes the expenses or performance data applicable to any class of shares, it will also disclose the respective expenses and/or performance data applicable to the other class of shares. The information provided by applicants for publication in any newspaper or similar listing of a Portfolio's net asset value or public offering price will present each class of shares separately.

14. Applicants acknowledge that the grant of the requested exemptive order will not imply Commission approval, authorization of, or acquiescence in any particular level of payments that the applicants may make pursuant to any rule 12b–1 or administrative services plan, in reliance on the exemptive order.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–18585 Filed 7–29–94; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF TRANSPORTATION

Aviation Proceedings; Agreements Filed During the Week Ended July 22, 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: 49666.

Date filed: July 19, 1994.

Parties: Members of the International Air Transport Association.

Subject: TC2 Reso/P 1597 dated June 14, 1994 r–1 to r–7; TC2 Reso/P 1599 dated June 14, 1994 r–8 to r–14; TC2 Reso/P 1601 dated June 14, 1994 r–15 to r-32.

Proposed Effective Date: Sept. 1/Sept. 15/Oct. 1/Nov. 1/Nov.2, 1994.

Phyllis T. Kaylor

Chief, Documentary Services Division

[FR Doc. 94–18597 Filed 7–29–94; 8:45 am]

BILLING CODE 4910–62–P

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended July 22, 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: 46532.

Date filed: July 18, 1994.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: August 15, 1994.

Description: Third Amendment to Application of LTU Lufttransport-Unternehmen GmbH. & Co. KG pursuant to Section 402 of the Act and Subpart Q of the Regulations, to include authority for scheduled service between any point or points in the Federal Republic of Germany and New York, Miami, San Francisco, Los Angeles, Atlanta, Bangor, Fort Myers, and Orlando, and beyond, and provide such other and further relief as the Department may deem proper.

Docket Number: 49670.

Date filed: July 20, 1994.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: August 17, 1994.

Description: Application of Jetstream International Airlines, Inc., pursuant to Section 401(d)(1) of the Act and Subpart Q of the Regulations, applies for a certificate of public convenience and necessity authorizing interstate and overseas scheduled air transportation of persons, property and mail.

Docket Number: 49672.

Date filed: July 20, 1994.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: August 17, 1994.

Description: Application of American Airlines, Inc., pursuant to Section 401 of the Act and Subpart Q of the Regulations, applies for renewal and amendment of its certificate for Route 576, issued by Order 89–12–43, December 11, 1989, authorizing scheduled foreign air transportation of persons, property, and mail between Chicago, Illinois, and Glasgow/Prestwick, Scotland.

Phyllis T. Kaylor,

Chief, Documentary Services Division.

[FR Doc. 94–18598 Filed 7–29–94; 8:45 am]

BILLING CODE 4910–62–P

Federal Railroad Administration

[BS–AP–No. 3273]

Buffalo & Pittsburgh Railroad, Inc.; Public Hearing

The Buffalo & Pittsburgh Railroad, Incorporated has petitioned the Federal Railroad Administration (FRA) seeking approval of the proposed discontinuance and removal of the signal system, on the single main track, between Macklin, milepost 282.4 and Eidenau, milepost 303.5, near Butler, Pennsylvania, on the Butler Branch.

This proceeding is identified as FRA Block Signal Application Number 3273.

The FRA has issued a public notice seeking comments of interested parties and has conducted a field investigation in this matter. After examining the carrier's proposal, letters of protest, and field report, the FRA has determined that a public hearing is necessary before a final decision is made on this proposal.

Accordingly, a public hearing is hereby set for 10 a.m. on Wednesday, August 24, 1994, in City Council Chambers, on the Third Floor, of the City Building, located at 140 West North Street, Butler, Pennsylvania. Interested parties are invited to present oral statements at the hearing.

The hearing will be an informal one and will be conducted in accordance with Rule 25 of the FRA Rules of Practice (49 CFR 211.25), by a representative designed by the FRA.

The hearing will be a nonadversary proceeding and, therefore, there will be no cross-examination of persons presenting statements. The FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those persons wishing to make brief rebuttal statements will be given the opportunity to do so in the same order in which they made their initial statements. Additional procedures, if necessary for the conduct of the hearing, will be announced at the hearing.

Issued in Washington, D.C. on July 25, 1994.

Phil Olekszyk,

Acting Deputy Associate Administrator for Safety Compliance and Program Implementation.

[FR Doc. 94–18594 Filed 7–29–94; 8:45 am]

BILLING CODE 4910–06–P

Petition for a Waiver of Compliance

In accordance with 49 CFR 211.9 and 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance with certain requirements of Federal railroad safety regulations. The individual petitions are described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested and the petitioner's arguments in favor of relief.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket No. HS–94–1) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590.

Communications received before August 29, 1994 will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) in Room 8201, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590.

The waiver petitions are as follows:

Midwest Coal Handling Company, Incorporated (MWCL) FRA Waiver Petition Docket No. HS–94–1

The MWCL seeks an exemption under section 5(e) of the Hours of Service Act so it may permit certain employees to remain on duty not more than 16 hours in any 24-hour period. The MWCL operates over 4 miles of leased track and has trackage rights over 8 miles of CSX track. The MWCL's primary function is to deliver coal and limestone to the TVA Paradise Steam Plant in Drakesboro, Kentucky.

The petitioner asserts it employs only seven employees, four of which are presently laid off and needs the exemption to fulfill its obligation to its customers.

Issued in Washington, DC on July 25, 1994.

Grady C. Cothen, Jr.,

Acting Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 94–18593 Filed 7–29–94; 8:45 am]

BILLING CODE 4910–06–P

[Waiver Petition Docket Numbers H–94–3 and H–94–4]

Petition for Waiver for Test Program National Railroad Passenger Corporation (Amtrak)

In accordance with 49 CFR Part 211, notice is hereby given that Amtrak submitted two related petitions, dated May 26, 1994 and June 7, 1994, respectively, for waivers of compliance with specific requirements of certain parts of Title 49 of the Code of Federal Regulations to conduct two separate test programs to evaluate the curving performance of a passenger trainset under high-speed and curving conditions.

The State of New York has embarked on a multi-year program to develop high-speed rail service between Buffalo and New York City. The State is actively pursuing the upgrading or elimination of rail crossings; existing rolling stock is being modified to run at higher speeds; and, improvements are being made to the right-of-way in preparation for this service. A major short-term goal of this program is to evaluate the curving performance of a modified Amtrak RTL turboliner passenger trainset and Amtrak has petitioned FRA to conduct two separate test and demonstration programs.

The program is being partially funded by FRA under Section 1036(c) of the Intermodal Surface Transportation Efficiency Act for a Technology Demonstration Program; significant funding is also being provided by the State of New York and Amtrak.

Waiver Petition H–94–3, dated June 7, 1994

Should petition H–94–3 be approved, Amtrak expects to schedule no more than 25 test and demonstration runs on two test zones between September 1, 1994 and January 31, 1995. The test zones over which these tests will be run are Conrail's Hudson Line, track 2 between CP 125 and CP 141 (approximate mileposts 125.5 to 140.5), and Conrail's Chicago Line, single track between milepost 149 and CP 156 (approximate milepost 156.4). The tracks are presently FRA Class 6. In 1983, FRA recognized Amtrak as the party responsible for compliance with the Federal Track Safety Standards for segments of Conrail's Hudson and Chicago Lines that include the two test zones.

To accomplish the tests and demonstrations, Amtrak is requesting FRA to temporarily waive 49 CFR 213.9(c), "Classes of track: operating speed limit," to allow the test trainset to operate at a maximum speed of 125 mph, and 49 CFR 213.57(b), "Curves; elevations and speed limitations," to allow operation at up to five inches of cant deficiency.

In order to reach and sustain 125 mph in one proposed test zone, Amtrak advises that a curve at milepost 135, track 2, is being realigned to ease its curvature; spirals are being lengthened; and superelevation is being increased to six inches. Amtrak advises that both zones will be resurfaced. Despite this track work, Amtrak still anticipates the need to operate on some curves *at cant deficiencies as high as five inches* and requests a waiver for cant deficiency.

The track safety standards in 49 CFR 213.57(b) prescribe a speed limit, not distinguishing between freight and passenger rolling stock, at which trains may operate over curved track as a function of curve radius (curvature) and installed superelevation.

In the general case, for any combination of curvature and superelevation, there is a specific ("balanced") speed at which the effect of centrifugal force is canceled, resulting in passenger insensitivity to actual curve negotiation. This is an ideal outcome for passenger trains that usually operate considerably faster than freight trains and consequently would demand greater superelevation to produce the balanced effect. The track standards permit the operation of trains on curves at speeds producing a conservative underbalance ("cant deficiency") in line with historic industry practice. (A more detailed discussion of cant deficiency can be found in 52 FR 38035, October 13, 1987).

Amtrak has indicated that its geometry car will be run over the test zones in the month before the commissioning tests begin and will be run bi-monthly during the test program. Amtrak advises that all defects will be corrected before the 125 mph operation begins or is allowed to continue.

Amtrak states that, during the high-speed runs where speeds exceed 110 mph, each private and public crossing will be physically barricaded and monitored by a guard in advance of the arrival of each test train. Amtrak indicates that radio contact will be maintained with the guards and that the adequacy of the present signal spacing will be verified before the program begins.

When the test program is completed in January 1995, Amtrak advises the track speed will return to 110 mph and three inches of cant deficiency will be observed.

Waiver Petition H–94–4, Dated May 26, 1994

Should petition H–94–4 be approved, pending right-of-way improvements and the initiation of the test program requested under petition H–94–3 on the Hudson and Chicago Lines in New York State, Amtrak expects to demonstrate the modified RTL turboliner trainset on the Northeast Corridor between Washington and New York on those tracks where Amtrak is presently operating equipment at 125 mph. Amtrak expects to schedule no more than 25 test and demonstration runs between September 1, 1994 and January 31, 1995 on the Northeast Corridor. To demonstrate this trainset, Amtrak is asking FRA to waive 49 CFR 213.9(c), "Classes of track: operating speed limit," to allow this trainset to operate at 125 mph. Petition H–94–4 does not request relief from the requirements of 49 CFR 213.57(b) relating to cant deficiency on curves.

Modified RTL Turboliner Trainset

Amtrak advises that both power units of one RTL turboliner trainset are being retrofitted with higher horsepower Makila turbines to allow faster accelerations and higher speeds and the hydraulic transmissions and control system are being modified to accommodate the increased horsepower.

FRA's Approach

FRA's approach to ensuring safety if the two petitions are granted would be to require that sufficient instrumentation be installed on the trainset to enable comparison of equipment behavior during testing to predetermined derailment criteria and, also, to previously tested equipment of similar types known to be safe. FRA would require that attainment of maximum target curving speeds be in increments permitting a step-by-step analysis of applied forces and dynamic responses during and at the conclusion of each test run. The decision to go to the next level of cant deficiency or speed would be based on this analysis process and be subject to the approval of the on-board FRA test monitor.

Public Comment

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., FRA Docket Nos. H–94–3 and H–94–4) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. Communications received within 30 days of publication of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) in Room 8201, Nassif Building, 400 Seventh Street SW., Washington, D.C. 20590.

Issued in Washington, D.C. on July 25, 1994.

Grady C. Cothen, Jr.,

Acting Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 94–18595 Filed 7–29–94; 8:45 am]

BILLING CODE 4910–06–P

National Highway Traffic Safety Administration

Research and Development Programs Meeting

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: This notice announces a public meeting at which NHTSA will describe and discuss specific research and development projects and requests suggestions for agenda topics.

DATES AND TIMES: The National Highway Traffic Safety Administration will hold a public meeting devoted primarily to presentations of specific research and development projects on September 13, 1994, beginning at 1:30 p.m. and ending at approximately 5:00 p.m. The deadline for interested parties to suggest agenda topics is 4:15 p.m. on August 17, 1994. Question may be submitted in advance regarding the Agency's research and development projects. They must be submitted in writing by September 6, 1994 to the address given below. If sufficient time is available, questions received after the September 6 date will be answered at the meeting in the discussion period. The individual, group or company asking a question does not have to be present for the question to be answered. A consolidated list of the questions submitted by September 6 will be available at the meeting and will be mailed to requesters after the meeting.

ADDRESSES: The meeting will be held at the Ramada Inn, near Detroit Metro Airport, 8270 Wickham Rd., Romulus, MI 48174. Suggestions for specific R&D topics as described below and questions for the September 13, 1994, meeting relating to the Agency's research and development programs should be submitted to George L. Parker, associate Administrator for Research and Development, NRD–01, National Highway Traffic Safety Administration, Room 6206, 400 Seventh St. SW, Washington, DC 20590. The fax number is 202–366–5930.

SUPPLEMENTARY INFORMATION: NHSTA intends to provide detailed presentations about its research and development programs in a series of quarterly public meetings. The series

started in April, 1993. The purpose is to make available more complete and timely information regarding the Agency's research and development programs. This seventh meeting in the series will be held on September 13, 1994.

NHTSA requests suggestions from interested parties on the specific agenda topics. NHTSA will base its decisions about the agenda, in part, on the suggestions it receives by close of business at 4:15 p.m. on August 17, 1994. Before the meeting, it will publish a notice with an agenda listing the research and development topics to be discussed. NHTSA asks that the suggestion be taken from the list below and that they be limited to six, in priority order, so that the presentations at the September 13 R&D meeting can be most useful to the audience. Please note that almost all of these topics have been discussed at the previous six meetings to some extent and that presentations at the seventh meeting will be reports on current status, results, and plans.

Specific Crashworthiness R&D topics are:

Improved frontal crash protection,
Advanced glazing research,
Highway traffic injury studies,
Head and neck injury research,
Lower extremity injury research,
Thorax injury research,
Human injury simulation and analysis,
Crash test dummy component development,
Vehicle agressivity and fleet compatibility,
Upgrade side crash protection,
Upgrade seat and occupant restraint systems,
Child safety research, and
Electric and alternate fuel vehicle safety.

Specific Crash Avoidance R&D topics are:

Truck crashworthiness/occupant protection,
Truck tire traction,
Portable data acquisition system for crash avoidance research,
Systems to enhance EMS response (automatic collision notification),
Vehicle motion environment,
Crash causal analysis,
Guidelines for crash avoidance warning devices,
Longer combination vehicle safety,
Drowsy driver monitoring,
Driver workload assessment, and
Performance guidelines for IVHS systems (approach).

Specific topics from the National Center for Statistics and Analysis are:

National safety belt use survey,
New data elements for FARS and NASS,
Special crash investigations program regarding air bag performance,
Pedestrian special NASS data collection project, and
Critical Outcome Data Evaluation System (CODES)—Linkage of databases on police accident reporting and medical outcomes.

Questions regarding research projects that have been submitted in writing not later than close of business on September 6, 1994, will be answered as time permits. A transcript of the meeting, copies of materials handed out at the meeting, and copies of the suggestions offered by commenters will be available for public inspection in the NHTSA Technical Reference Section, Room 5108, 400 Seventh Street, SW, Washington, DC 20590. Copies of the transcript will then be available at 10 cents a page, upon request to NHTSA Technical Reference Section. The Technical Reference Section is open to the public from 9:30 a.m. to 4:00 p.m.

NHTSA will provide technical aids to participants as necessary, during the NHTSA Industry Research and Development Meeting. Thus any person desiring assistance of "auxiliary aids" (e.g. sign-language interpreter, telecommunications devices for deaf persons (TDDS), readers, taped texts, braille materials, or large print materials and/or a magnifying device), please contact Barbara Coleman on 202/366–1537 by COB September 6, 1994.

FOR FURTHER INFORMATION CONTACT: Dr. Richard L. Strombotne, Special Assistant for Technology Transfer Policy and Programs, Office of Research and Development, 400 Seventh Street, SW, Washington, DC 20590. Telephone: 202–366–4730. Fax number: 202–366–5930.

Issued July 27, 1994.

Ralph J. Hitchcock,

Director, Office of Crashworthiness Research.

[FR Doc. 94–18633 Filed 7–29–94; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. 93–79; Notice 4]

Child Seating Systems Manufactured by Fisher-Price, Inc.; Public Proceeding Scheduled

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of public meeting.

SUMMARY: NHTSA will hold a public meeting on August 17, 1994 at 9:00 a.m. regarding an appeal by Fisher-Price of the agency's denial of its petition for an exemption from the recall requirements of the National Traffic and Motor Vehicle Safety Act on the ground that the failure of certain child seating systems manufactured by Fisher-Price to comply with the Federal safety standard on child restraint flammability is inconsequential as it relates to motor vehicle safety.

FOR FURTHER INFORMATION CONTACT: Chris Flanigan, Office of Rulemaking, NHTSA (202–366–4918).

SUPPLEMENTARY INFORMATION: On September 16, 1993, Fisher-Price, Inc., of East Aurora, N.Y., notified the National Highway Traffic Safety Administration (NHTSA) that, pursuant to section 151(2) of the National Traffic and Motor Vehicle Safety Act (recently recodified as 49 U.S.C. 30118(c)(2)), it had determined that it had manufactured child seats that failed to comply with the minimum requirements for flammability set forth in Federal Motor Vehicle Safety Standard No. 213, *Child Restraint Systems*, 49 CFR 571.213. Fisher-Price took this action six months after NHTSA had notified the company that fabric taken from its child sets had exceeded the maximum limit established by Standard No. 213 for the protection of children (Agency file NCI 3270).

Concurrently, Fisher-Price filed a petition asking NHTSA for a determination that its failure to comply with the child seat flammability requirements was inconsequential as it relates to motor vehicle safety so as to relieve it of the obligation to notify purchasers of the flammability failure and to remedy the flammability problem. This petition was filed pursuant to former section 157 of the Act (now 49 U.S.C. 30118(d) and 30120(h)) and 49 CFR Part 556. Notice of the petition was published on November 9, 1993 (58 FR 59511). NHTSA denied the petition on March 22, 1994.

On March 25, 1994, after it received a copy of the NHTSA order denying the petition, Fisher-Price obtained a temporary restraining order in the U.S. District Court for the Western District of New York, restraining NHTSA and the Office of the Federal Register from publishing the denial or otherwise publicizing it. *Fisher-Price, Inc. v. NHTSA, et al.*, Civ. No. 94–CV–0227C(H). The restraining order was vacated on April 28, 1994, and the denial published on May 5, 1994 (59 FR 23253). On May 6, Fisher-Price appealed the denial and asked for a public meeting. Notice of the appeal was published on June 16, 1994 (59 FR 30957).

Pursuant to Fisher-Price's request, a public proceeding will be held at 9:00 a.m. on Wednesday, August 17, 1994 in Room 9230, Department of Transportation Building, 400 Seventh Street, SW, Washington, DC, at which time Fisher-Price and all other interested persons will be afforded an opportunity to present data, views, and arguments on the issue of whether the failure of these child seats to meet the flammability requirements of Standard No. 213 is inconsequential as it relates to motor vehicle safety.

Interested persons are invited to participate through written or oral presentations. Persons wishing to make oral presentations are requested to notify Chris Flanigan, Office of Rulemaking, National Highway Traffic Safety Administration, Room 5320, 400 Seventh Street, SW, Washington, DC 20590, 202–366–4918, before the close of business on August 9, 1994. Written comments must be submitted to the same address on or before August 11, 1994.

The agency's investigative file (NCI 3270) and litigation file in this matter are available for public inspection during working hours (9:30 a.m. to 4:00 p.m.) in its Technical Reference Library, Room 5108, 400 Seventh Street, SW, Washington, DC 20590.

Authority: 49 U.S.C. §§ 30118, 30120; delegation of authority at 49 CFR 1.50(a) and 49 CFR 501.8.

Issued on: July 26, 1994.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 94–18628 Filed 7–27–94; 11:38 am]

BILLING CODE 4910–59–M

Sunshine Act Meetings

Federal Register
Vol. 58, No. 146
Monday, August 1, 1994

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

FEDERAL ENERGY REGULATORY COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: July 25, 1994, 59 FR 37811.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10:00 a.m., July 27, 1994.

CHANGE IN THE MEETING: The following Docket Number has been added on the Agenda scheduled for July 27, 1994:

Item No., Docket No., and Company

CAG–21
RP94–87–000 *et al.*, Natural Gas Pipeline Company of America

Lois D. Cashell,

Secretary.

[FR Doc. 94–18731 Filed 7–28–94; 10:46 am]

BILLING CODE 6717–01–M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

TIME AND DATE: 10:00 a.m., Wednesday, August 3, 1994.

PLACE: 6th Floor, 1730 K Street, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. *Peabody Coal Co.*, Docket No. KENT. 93–295. (Issues include whether the judge correctly found that Peabody's violation of 30 CFR § 77.370(a)(1) was not significant and substantial.)

2. *Pyramid Mining, Inc.*, Docket No. KENT. 93–184. (Issues include whether the judge correctly concluded that Pyramid did not violate 30 CFR § 77.1505.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(e).

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653–5629 / (202) 708–9300 for TDD Relay / 1–800–877–8339 for toll free.

Dated: July 27, 1994.

[FR Doc. 94–18804 Filed 7–28–94; 3:46 pm]

BILLING CODE 6735–01–M

UNITED STATES INTERNATIONAL TRADE COMMISSION

TIME AND DATE: August 3, 1994 at 2:30 p.m.

PLACE: Room 101, 500 E Street S.W Washington, DC 20436

STATUS: Open to the public.

1. Agenda for future meeting.
2. Minutes.
3. Ratification List.
4. Inv. Nos. 701–TA–362 and 731–TA–707–710 (Preliminary) (Certain Seamless Pipes from Argentina, Brazil, Germany and Italy)—briefing and vote.
5. Inv. No. 701–TA–312 (Third Remand) (Softwood Lumber from Canada)—briefing and vote.
6. Outstanding action jackets: none.

In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

CONTACT PERSON FOR MORE INFORMATION. Donna R. Koehnke, Secretary, (202) 205–2000.

Issued: July 27, 1994.

Donna R. Koehnke,

Secretary.

[FR Doc. 94–18730 Filed 7–28–94; 10:45 am]

BILLING CODE 7020–02–P

federal register

Monday
August 1, 1994

Part II

International Trade Commission

19 CFR Parts 210 and 211
Unfair Practices in Import Trade; Final Rule

INTERNATIONAL TRADE COMMISSION

19 CFR Parts 210 and 211

Final Rules for Investigations and Related Proceedings Concerning Unfair Practices in Import Trade

AGENCY: U.S. International Trade Commission.

ACTION: Final rules.

SUMMARY: The Commission has adopted final rules of practice and procedure for investigations and related proceedings under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337).[1] These rules were adopted in response to public comments requesting changes in the interim rules, the need to revise certain interim rules to more accurately reflect actual Commission practice, and the need for Commission rules concerning matters that are not currently provided for in the interim rules. In addition, some provisions of the final rules were adopted in response to public comments on the proposed rules that were published on November 5, 1992.

The final rules will be codified in 19 CFR part 210 and will replace the interim rules that currently appear in 19 CFR parts 210 and 211. Part 211 will be removed from title 19 of the Code of Federal Regulations.

EFFECTIVE DATE: August 31, 1994. The final rules will be applicable to all investigations and related proceedings under section 337 of the Tariff Act that are instituted after August 31, 1994. These rules will also be applicable to the following kinds of written submissions that are filed after August 31, 1994: complaints requesting the institution of a section 337 investigation; motions for temporary relief; and motions, complaints, or petitions requesting the institution of related proceedings.

FOR FURTHER INFORMATION CONTACT: P. N. Smithey, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–205–3061. Hearing-impaired individuals can obtain information on the final rules by contacting the Commission's TDD terminal at 202–205–1810.

SUPPLEMENTARY INFORMATION:

Rulemaking Analysis

Like the interim rules that they are replacing, the final rules are not major rules for purposes of Executive Order 12291 of February 17, 1981. As required by the Regulatory Flexibility Act, the Commission also certifies that the final rules will not have a significant adverse impact on small business entities.

Background

The current rules in parts 210 and 211 were adopted on an interim basis in 1988 to implement the amendments to section 337 of the Tariff Act of 1930 (Tariff Act) (19 U.S.C. § 1337) that were effected by the Omnibus Trade and Competitiveness Act of 1988, Public Law No. 100–418, 102 Stat. 1107 (1988) (Omnibus Trade Act).[2] The interim rules in part 210 contain procedures for adjudicative investigations under section 337 of the Tariff Act. The interim rules in part 211 establish procedures for advisory opinions and the enforcement, modification, or revocation of remedial or consent orders issued under section 337.

The final rules were promulgated in accordance with the Administrative Procedure Act (APA).[3] A notice soliciting public comment on proposed final rules was published in the **Federal Register** on November 5, 1992.[4] The Commission received only one set of comments, from the International Trade Commission Trial Lawyers Association (ITCTLA). The Commission took those comments into account before promulgating the final rules. (The ITCTLA's comments on the proposed rules are summarized and the Commission's responses are provided in the section-by-section analysis of the final rules, which appears elsewhere in this notice.[5])

Interested persons will note that each final Commission rule based on Rule 11, 26, or 37 of the Federal Rules of Civil Procedure (FRCP) differs from the correspondingly numbered proposed Commission rule that was published on November 5, 1992. The FRCP were amended on December 1, 1993.[6] The amendments covered FRCP provisions that the Commission is required by law to follow (such as FRCP 11 and 37), as well as some that the Commission has chosen to follow (FRCP 26(e) and (g)). The Commission accordingly revised the relevant proposed rules to correspond to the FRCP amendments, before adopting the proposed rules as final rules.

The Commission noted that the APA does not require that the exact text of a proposed rule be published for comment before the proposed rule is adopted as a final rule. A description of the subject and issues involved in the rule is sufficient.[7] The Commission concluded that the notice of proposed final rulemaking published on November 5, 1992, contained a description of the subjects and issues involved that was sufficient to cover the revised provisions.[8][9]

Overview of the Final Rules

Interested persons will note first that the organization of the final rules differs from that of the interim rules. To enable readers to readily determine which final rule is replacing a particular interim

[1] The term "related proceeding" is defined in final rule 210.3, which appears elsewhere in this notice.

[2] See 53 FR 33043 (Aug. 29, 1988) and 53 FR 49118 (Dec. 6, 1988).

[3] 5 U.S.C. § 553.

[4] 57 FR 52830 (Nov. 5, 1992).

[5] The ITCTLA's comments included (1) suggestions for revising various proposed rules, (2) expressions of the ITCTLA's approval of certain proposed rules, (3) identification of typing errors in certain proposed rules, and (4) suggestions for nonsubstantive editing. All ITCTLA comments were duly considered by the Commission before it decided on the content of the final rules. For the most part, however, the section-by-section analysis of the final rules in this notice focuses on ITCTLA comments which advocated revision of particular proposed rules.

[6] 146 *Federal Rules Decisions* 401–728 (1993).

[7] The APA states that a notice of proposed rulemaking shall include "either the terms or substance of the proposed rule *or a description of the subjects and issues involved*." 5 U.S.C. § 553(b)(3) [emphasis added].

[8] In that notice, the preamble to each of the proposed rules at issue—namely, proposed rule 210.4(b), 210.25, 210.27(c) and (d), 210.33(c), and 210.70(c)—provided a description of the subject matter and the issues involved. *See* 57 FR at 52831–52832, 52840, 52843, and 52861.

For example, the preamble to proposed rule 210.25 indicated that the text of that rule was based on the content of proposed final rules 210.4(b), 210.27(d), 210.33(c), and 210.34(c). *Id.* at 52840. The preamble to proposed rules 210.70(c) indicated that the text of that rule was based in part on the content of proposed final rule 210.4(b). Id. at 52861.

The preamble to proposed rules 210.4(b), 210.27(d), and 210.33(c) alerted interested persons that those rules had been specifically drafted to correspond to the FRCP 11, 26(g), and 37, respectively. *See* 57 FR at 52831–52832, 52840, 52842–52843. Similarly, the preamble to proposed final 210.70(c) advised the public that the Commission intended for that rule to incorporate (by reference) the standard of conduct imposed by FRCP 11. *Id.* at 52860–52861.

The preamble to proposed rule 210.27(c) noted that rule was based on FRCP 26(e). 57 FR at 52840. (Proposed rule 210.27(c) is the same as interim rule 210.30(d) and its predecessor, 19 CFR 210.30(d) (1988).) The text of proposed rule 210.27(c) (and its predecessors) came directly from FRCP 26(e), as it read prior to December 1, 1993.

In the case of proposed rules 210.4(b) and 210.33(c), the preamble also noted that 19 U.S.C. § 1337(h) requires the Commission to follow FRCP 11 and 37 in the promulgation of Commission rules governing sanctions for abuse of process or "abuse of discovery" (i.e., failure to make or cooperate in discovery, as described in FRCP 37). 57 FR at 52831–52832 and 52842–52843.

[9] The discussion in the present notice focuses on the differences between the proposed rules and the final rules. For the most part, this notice does not discuss the substance of—or the reasons for—the FRCP amendments. Persons who are interested in the FRCP amendments and the reasons therefor should consult 146 *Federal Rules Decisions* 401–728 (1993) and the 1993 Committee Notes to the FRCP.

rule or which interim rule is the basis, in whole or part, for a particular final rule, the Commission has provided distribution and derivation tables elsewhere in this notice.

The final rules also differ substantively from the interim rules in many respects. New and noteworthy aspects of the final rules are summarized below, according to the subpart in which they appear.

Subpart A—Rules of General Applicability. Provisions based on amended FRCP 11 permit the Commission to impose monetary sanctions for abuse of process. Also included are new specifications for written submissions and prescribed deadlines for filing nonconfidential copies of certain confidential submissions.

Subpart B—Commencement of Preinstitution Proceedings and Investigations. Parties may be allowed to assist the Commission in obtaining personal jurisdiction over a nonparticipating respondent. If the Commission Secretary is unable to obtain proof that copies of the complaint and notice of investigation were served on a particular respondent by certified mail, a party who wishes the Commission to have personal jurisdiction over that respondent may attempt to make personal service on that respondent, with leave from the presiding administrative law judge (ALJ), and may file proof of such service with the Commission Secretary (if the attempt is successful).

Subpart C—Pleadings. The complainant has a duty to supplement the complaint if a change in a material pleaded fact or law occurs after the complaint is filed and before the investigation is instituted.

Subpart D—Motions. Default will be limited to the statutory grounds: (1) a respondent's failure to properly respond to the complaint and notice of investigation or failure to otherwise appear to answer the complaint and notice;[10] or (2) a finding of default as a sanction for abuse of process or failure to make or cooperate in discovery.[11] Failures to act other than the statutory forms of default may result in adverse inferences and the issuance of findings of fact, conclusions of law, determinations, and orders adverse to the party who failed to act. This applies to complainants as well as respondents, and can ultimately result in adverse determinations on violation of section 337 and the issuance of remedial orders.

The final rules in subpart D also provide that the permanent relief phase of an investigation may be designated "more complicated" by order of the presiding ALJ or the Commission. The ALJ's order is final, but aggrieved party may appeal to the Commission. The timing of the order determines the procedure for appeal.

Subpart E—Discovery and Compulsory Process. Most of the final rules in subpart E do not provide deadlines for various discovery activities. Such deadlines are to be set by the presiding ALJ. The final rules in subpart E also correspond more closely to the relevant FRCP than the interim rules did.

A signature and certification requirement based on FRCP 26(g) is imposed for all discovery requests, responses, and objections. Monetary sanctions may be imposed for violation of that requirement. Monetary sanctions comparable to those available under certain provisions of FRCP 37 may be imposed for failure to make or cooperate in discovery.

There also is a new reporting requirement concerning requests for disclosure of confidential information covered by an administrative protective order (APO) issued by the Commission or the presiding ALJ. Persons who receive such information under an APO must notify the Commission immediately upon learning that the information is the subject of a subpoena, a judicial or administrative order (other than an order of a court reviewing a Commission decision), a discovery request, or an agreement requiring disclosure of the information to persons who may not be entitled to see it under the Commission's APO or the Commission's rules. A failure to report may result in a sanction or other action by the Commission.

Subpart F—Prehearing Conferences and Hearings. The final rules in subpart F are essentially the same as the interim rules. However, the final rule defining the record codifies longstanding Commission practice by including all briefs as part of the administrative record of an investigation or a related proceeding.

Subpart G—Determinations and Actions Taken. The ALJ must issue a recommended determination (RD) on remedy and bonding by the respondents, within 14 days after issuing an initial determination (ID) on violation of section 337. (This means that the parties will address remedy and bonding while the investigation is before the ALJ, as well as after the investigation returns to the Commission. The ALJ accordingly may order discovery on those issues.) The Commission will consider the RD (as well as submissions from the parties, other agencies, and the public) in making final determinations on remedy and bonding by the respondents.

The proposed rules published on November 5, 1992, contained a new procedure for processing IDs on violation of section 337. That procedure has not been incorporated into the final rules. IDs on violation will be processed in the same manner that they were processed under the interim rules, although the Commission may decide to implement the new procedure at a future date. IDs on matters other than violation of section 337 (or temporary relief) will also be processed in the manner that they were processed under the interim rules.

Subpart H—Temporary Relief. There is a new method of calculating the amount of a complainant's temporary relief bond. The interim rules provided that the bond was likely to be an amount within 10 to 100 percent of the sales revenues and licensing royalties from the domestic product at issue. The final rules use a tiered schedule of fixed bond amounts based on complainant's sales revenues and licensing royalties from the intellectual property right at issue.

The grounds for modifying, reversing, or setting aside a temporary relief ID in whole or part are no longer limited to errors of law or policy reasons. Such action also may be taken on the basis of errors of material fact in the ID.

Temporary relief bond forfeiture proceedings will no longer be initiated automatically whenever the Commission makes a negative final determination in whole or part on the complaint of a complainant who was granted temporary relief. Instead, forfeiture proceedings will be initiated only upon the Commission's own initiative or upon the filing of a motion by a respondent or a Commission investigative attorney (IA) within 30 days after service of the Commission's negative determination on violation. The standard of conduct the Commission will use in determining whether the complainant's bond should be forfeited will be the amended FRCP 11 standard which is codified in final rule 210.4(c).

If the complainant prevails upon appeal of the Commission's determination on violation of section 337, the appropriate amount of any temporary bond that was forfeited by the complainant will be forthcoming as a matter of procedure. The complainant thus will not have to file a motion or petition to obtain the refund.

[10] *See* 19 U.S.C. § 1337(g)(1).

[11] *See* 19 U.S.C. § 1337(h).

Subpart I—Enforcement Procedures and Advisory Opinions. Reporting requirements may be imposed for exclusion orders as well as cease and desist orders. Moreover, formal proceedings for the enforcement of a remedial or consent order may be instituted on the Commission's own initiative or in response to the filing of a complaint by the complainant in the original investigation, the complainant's successor in interest (if any), or the Commission's Office of Unfair Import Investigations (OUII). An ALJ's decision in a formal enforcement proceeding must be an ID instead of an RD. The ID will become the determination of the Commission in 90 days if the Commission does not order a review or extend the period for determining whether to order a review.

The final rules in subpart I also clarify that the Commission has the authority to seek judicial enforcement of sanctions orders, and that the Commission need not give notice to any person when it seeks judicial enforcement of an exclusion order, a cease and desist order, a consent order, or a sanctions order—except as required by the court in which the civil action is initiated.

Finally, the final rules governing advisory opinions codify Commission practice by: (1) affording all persons (instead of just respondents) the right to seek such opinions; (2) limiting such opinions to whether a course of action would violate a particular remedial order (rather than whether it would violate section 337); (3) requiring the party requesting an advisory opinion to fully state its request in its first submission to the Commission, since the Commission does not wish to issue seriatim advisory opinions to the same requester on the same subject; and (4) stating positively that advisory opinion proceedings are not subject to the APA.

Section-By-Section Analysis of the Final Rules

Many of the final rules set forth in this notice are identical—or virtually identical [12]—to the correspondingly numbered proposed rules published on November 5, 1992. Those final rules are listed below.

210.1–210.3
210.5–210.9
210.10(b) and (c)
210.11–210.15
210.16(a), (b), and (c)(2)
210.17–210.20
210.21(a)–(c)(3) and (d)
210.22(a) and (c)
210.23
210.24(a)(1), (a)(3), (b)(1), (b)(3), and (c)
210.26
210.27(a)
210.28 and 210.29
210.30(a) and (c)
210.31
210.32(a)–(d), (f), and (g)
210.34
210.35(a)–(c)
210.36(a)–(c) and (e)
210.37(a), (c), (d), (f) and (g)
210.38(b)–(d)
210.39–210.41
210.42(a)(2), (b), (c), (e)–(g), (h)(3)–(h)(5), and (i)
210.43(a), (c), and (d)
210.46(b)
210.47–210.49
210.50(b)(1) and (2)
210.51
210.52(b)–(d) and (f)
210.53 and 210.54
210.55(a)
210.56–210.57
210.59–210.69
210.70(a), (b) and (e)
210.71(b)–(d)
210.72 and 210.73
210.74(b)
210.75(a) and (b)
210.76–79

The ITCTLA did not make substantive comments on the proposed version of each of the aforesaid rules, and the Commission found no reason to change the proposed version on its own initiative before adopting it as a final rule. The commentary that preceded the proposed version of the aforesaid rules accordingly constitutes the preamble to the final version of those rules.[13]

Most of the final rules that are discussed below were the subject of a comment by the ITCTLA. The substance of some of those rules also differs substantively from the text of the relevant proposed rule. The changes were made in response to an ITCTLA comment or on the Commission's own initiative after reconsideration of the proposed rule.

The commentary in the notice published on November 5, 1992, which preceded the proposed version of the rules discussed below, constitutes part of the preamble to the final version of these rules (along with the discussion below), to the extent that such commentary is not inconsistent with the discussion below.[14]

Subpart A—Rules of General Applicability

Section 210.4

Final rule 210.4 governs written submissions filed by parties or proposed parties in connection with a section 337 investigation or a related proceeding under part 210.

Paragraph (a). Paragraph (a) of proposed rule 210.4 listed the required information that must appear on the front of written submissions filed in connection with a section 337 investigation. The ITCTLA commented that the final rule should also provide that the front page of a complaint must contain the name of the complainant. The Commission noted that Commission rule 201.8(e) already imposes such a requirement.[15] The Commission has repeated that requirement, however, in paragraph (a)(1) of final rule 210.4.

Paragraph (b). Section 337(h) of the Tariff Act authorizes the Commission to issue sanctions for abuse of process in section 337 proceedings to the extent provided in FRCP 11.[16] Proposed rule 210.4(b) was the Commission analog to FRCP 11, and was based on FRCP 11(a) as it read prior to December 1, 1993.

On December 1, 1993, FRCP 11 was amended for the following purposes:

- to broaden the scope of the obligation that attorneys and pro se litigants have to refrain from conduct that frustrates the aims of FRCP 11 as amended (i.e., to secure the just, speedy, and inexpensive determination of every action);
- to place greater restraints on the imposition of sanctions and thus reduce the number of motions for sanctions; and
- to remove from the ambit of FRCP 11 all discovery requests, responses, objections, and motions that are subject to the provisions of FRCP 26–37.[17]

Paragraph (b) of final rule 210.4, is based on amended FRCP 11(a), and imposes a signature requirement for every written submission filed by a party or a proposed party to an investigation or a related proceeding under part 210. This paragraph replaces the signature requirement in paragraph (b)(1) of proposed rule 210.4, which was based on FRCP 11(a) as it read prior to December 1, 1993. Unlike the proposed rule, the final rule makes the signature requirement applicable to "every pleading, *written* motion, and other paper of a party or proposed party." [Emphasis added.]

The ITCTLA commented that paragraph (b) of the final rule should also provide that the telephone number of the attorney or party who signs each submission must be included on the document. The Commission agreed. Such a requirement appears in amended FRCP 11(a), and thus appears in paragraph (b) of final rule 210.4.

[12] Nonsubstantive editorial changes account for minor differences between some of the final rules and the correspondingly numbered proposed rules.

[13] See the section-by-section analysis of the proposed rules, which appeared in 57 FR at 52830–52864.

[14] *Id.*

[15] See 19 CFR 201.8(e) (1993).

[16] 19 U.S.C. § 1337(h).

[17] *See* 146 F.R.D. 583, 584, and 405.

Paragraph (c). Paragraph (c) of final rule 210.4 is based on amended FRCP 11(b). Paragraph (c) states that by presenting a pleading, written motion, or other paper to the presiding ALJ or the Commission, an attorney or unrepresented party or proposed party is certifying the truth, veracity, and good faith of the submission. This paragraph replaces the certification provision in paragraph (b)(1) of proposed rule 210.4, which was based on FRCP 11 as it read prior to December 1, 1993. The final rule differs from the proposed rule in several important respects.

First, the certification is not made solely by *signing* a pleading, written motion, or other paper. In the final rule, the certification occurs in the *presentation* of a pleading, written motion, or other paper to the presiding ALJ or the Commission, whether that presentation is by signing, filing, submitting, or later advocating the document to the ALJ or the Commission.

Second, the certification provisions are more explicit in the final rule. Separate standards are provided for legal arguments, for "allegations and other factual contentions," and for "denials of factual contentions."

Third, the certification provisions of the final rule do not apply to discovery requests, responses, objections, or motions that are subject to provisions of final rules 210.27 through 210.34 (i.e., *Subpart E—Discovery and Compulsory Process).*[18]

Paragraph (d). Paragraph (d) of final rule 210.4 provides sanctions for violation of the certification requirement, and is based on amended FRCP 11(c). This paragraph replaces paragraphs (b)(1) through (b)(4) of proposed rule 210.4, which were based on FRCP 11(a) as it read prior to December 1, 1993.

Paragraph (d) of final rule 210.4 is similar to paragraph (b)(2) of proposed rule 210.4, since paragraph (d) provides that a representation need not be frivolous in its entirety in order for an ALJ or the Commission to determine that the certification provision has been violated. If any portion of a representation is found to be false, frivolous, misleading, or otherwise in violation of paragraph (b), a sanction may be imposed. In determining whether paragraph (b), has been violated, the ALJ or the Commission will consider whether the representation or disputed portion thereof was objectively reasonable under the circumstances.

Paragraph (d)(1)(i) of final rule 210.4 contains new prerequisites to the filing of a motion for sanctions. The movant must first serve the motion on the nonmoving parties. The party or person against whom sanctions are being sought then has seven days (or such other period as the ALJ or the Commission may prescribe) to withdraw or correct the challenged paper, claim, defense, contention, allegation, or denial.[19] If withdrawal or correction does not occur within the prescribed period, the movant is then free to file the motion for sanctions. The motion must be filed separately, however, from the party's other motions (if any).

Paragraph (d)(1)(ii) of final rule 210.4 provides that an ALJ or the Commission may initiate a sanctions inquiry sua sponte, by issuing an order describing the specific conduct that appears to violate the certification provisions and directing an attorney, law firm, or party to show cause why it has not violated the relevant provisions.

The final rule also contains new provisions governing the imposition of sanctions. The stated purpose of the FRCP 11 sanctions authority is to deter, rather than to compensate.[20] That policy is recited in paragraph (d)(2) of final Commission rule 210.4, since section 337(h) of the Tariff Act states that the Commission may impose sanctions for abuse of process to the extent authorized in FRCP 11. Paragraph (d)(2) of final rule 210.4 thus provides that each sanction must be limited to "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Sanctions may be imposed upon the attorneys, law firms, or parties that have violated the certification provisions of paragraph (b) or are responsible for the violation. (Paragraph (d)(1)(i) of final rule 210.4 provides that in the absence of exceptional circumstances, a law firm is jointly responsible for violations committed by its partners, associates, and employees.)

Paragraph (d)(2) of the final rule also imposes certain limitations on the kinds of sanctions that may be imposed. Appropriate sanctions may consist of or include "directives of a nonmonetary nature."[21] The preferred monetary sanction is the payment of a penalty to the Commission, rather than costs and attorney's fees. Cost and fee sanctions may be ordered, however, "if imposed on motion and warranted for effective deterrence." Paragraph (d)(2) also indicates that a cost and fee award may consist of "some or all" of the reasonable attorney's fees and other expenses incurred as a direct result of a violation of the certification provisions.[22]

There are additional limitations on the Commission's ability to impose monetary sanctions. Paragraph (d)(2)(ii) of final rule 210.4 states that monetary sanctions cannot be imposed on a *party* for violation of the certification provisions concerning the truth, veracity, and good faith of *legal arguments* presented to the ALJ or the Commission. (The party's attorneys are to be monetarily responsible for violations of that sort.) Paragraph (d)(2)(iii) provides that monetary sanctions also cannot be ordered on the Commission's own initiative, unless—

1. a show cause order was issued before the investigation or related proceeding is terminated, in whole or relevant part, as to the party or proposed party which is, or whose attorneys are, to be sanctioned; and

2. such termination is the result of (a) a motion to withdraw the complaint, motion, or petition that was the basis for the investigation or related proceeding, (b) a settlement agreement, or (c) a consent order agreement.[23]

[18] The certification requirement in amended FRCP 11(c) also does not apply to the "disclosures" mandated by amended FRCP 26. Final rule 210.27—which is the Commission analog to amended FRCP 26—does not currently contain provisions on mandatory disclosures. See the discussion in this notice concerning final rule 210.27.

[19] Amended FRCP 11(c)(1)(A) allows 21 days for such withdrawals or corrections. The Commission concluded, however, that 21 days is too lengthy a period for investigations and related proceedings under part 210, in light of the statutory and/or administrative time constraints.

[20] FRCP 11(c)(2), as amended; 146 F.R.D. at 422–423. *See also* 146 F.R.D. at 587–588.

[21] The Committee Notes to FRCP 11 as amended cite the following examples: "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; * * * referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc." *See* 146 F.R.D. at 587.

[22] That provision is based on amended FRCP 11(c)(2), 146 F.R.D. at 423. *See also* 146 F.R.D. at 587–589. The Commission notes that the relevant provisions of FRCP 11(c)(2) specifically state that costs and attorney's fees are to be awarded "to the movant." FRCP 11(c)(1)(A) and the Committee Notes indicate, however, that such awards can be made to the party who prevails on the motion for sanctions—regardless of whether that party is the movant or the target of the motion. 146 F.R.D. at 422 and 591.

[23] This provision is based on amended FRCP 11(c)(2)(B), which provides that monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claim made by or against the party which is, or whose attorneys are, to be sanctioned. The Committee Notes explain that—Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders

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Furthermore, the sanctions in such a case must be limited to a penalty payable to the Commission.[24]

Paragraph (d)(2)(i) of final rule 210.4 states that the United States, the Commission, and IAs are exempt from monetary sanctions for signing and filing a written submission in violation of the certification provision of paragraph (b).

Paragraph (d)(2)(iv) provides that monetary sanctions imposed to compensate the Commission for expenses incurred by an IA or OUII will include reimbursement for some or all costs reasonably incurred as a direct result of the violation, but will not include attorneys' fees. Paragraph (d)(2)(iv) thus covers cases in which OUII is awarded monetary sanctions on the basis of a motion by OUII, as well as cases in which OUII is found to be entitled to monetary sanctions because it successfully defended against another party's motion for nonmonetary sanctions.

The ITCTLA noted that an IA is a party to a section 337 investigation, that he or she is subject to the same professional and ethical standards as members of the private bar, and that there is no basis to assume, as proposed rule 210.4(b)(3) does, that IAs are less likely to engage in unethical conduct than are members of the private bar. The ITCTLA argued further that since the Commission has the authority to self-initiate section 337 investigations, exempting IAs from monetary sanctions for abuse of process would deny respondents in such investigations the rights that would be available to respondents in investigations initiated in response to the complaint of a private party.

The ITCTLA added that it is fundamentally unfair to exempt IAs from cost and fee sanctions for violations of rule 210.4(b)1(1), but allow them to recover costs for violations by other parties. The ITCTLA urged the Commission either to subject IAs to liability for monetary sanctions or to draft the final rules to prohibit IAs from receiving monetary compensation for violations by other parties.

The Commission disagrees with the ITCTLA's arguments. The Commission notes first that any monetary sanction constituting reimbursement for costs incurred by an IA as a result of another party's abuse of process would be paid to the Commission—not to the IA or OUII. (Similarly, if the Commission were to abandon the rule exempting IAs from liability for monetary sanctions, any such sanction imposed against an IA for an action taken within the scope of his or her employment would probably be paid by the Commission.)

Furthermore, the amount that the Commission would collect on an IA's behalf as a sanction for abuse of process by another party is not likely to be substantial. Paragraph (d) of final rule 210.4 indicates that a sanction imposed for violation of this section shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and that a penalty rather than costs and attorney's fees is the preferred monetary sanction. Moreover, paragraph (d)(2)(iv) provides that monetary sanctions awarded on motion by an IA or OUII will include reimbursement for some or all costs reasonably incurred by the movant as a direct result of the violation, but will not include attorneys' fees (i.e., OUII's personnel costs). The Commission is thus not likely to recover substantial sums (on an IA's or OUII's behalf) in the application of final rule 210.4.

The Commission also believes that a rule permitting monetary sanctions to be levied against IAs is unnecessary. As amended FRCP 11 and the Committee Notes indicate, the sanction authority is to deter abuses of process, rather than to compensate persons aggrieved by such abuses.[25] IAs are subject to adverse personnel action for malfeasance or misconduct involving abuse of process in the performance of their duties. The Commission believes that the threat of such action is an effective and sufficient deterrent.

The Commission also notes that subjecting IAs to monetary sanctions could have serious programmatic implications. The threat of monetary sanctions for actions taken in the course of an IA's ordinary duties would affect his or her ability to serve as a neutral and impartial advocate of the public interest. IAs take positions on the substantive issues in an investigation. An IA's position in a given investigation may be adverse to one or more of the private parties (i.e., the complainant(s), the respondent(s), and/or any non-government intervenor(s)). The actual or potential threat of a motion for monetary sanctions during the course of an investigation or related proceeding could be used as a means to intimidate IAs and to pressure them into taking a position favorable to a particular party.

The Commission notes further that the resources that IAs can devote to a particular investigation or related proceeding are limited. If IAs are forced to deal with motions for monetary sanctions against them, their ability to deal with the substantive issues in the case would be impaired.

The Commission notes finally that adopting a final rule which does not exempt IAs (and other Commission employees) to liability for monetary sanctions would create certain ethical and practical problems for the Commission. For example, Commission determinations on whether to assess monetary penalties against a Commission employee would raise a number of conflict of interest issues. If an ALJ were to issue an order or an RD granting a motion for monetary sanctions, that decision would be subject to review by the Commission, even though the Commission itself might ultimately be responsible for paying the amount awarded.[26] Thereafter, if the Commission did not indemnify the IA or otherwise pay the amount awarded, the Commission might have to bring an enforcement action in U.S. district court against one of its own employees in order to collect the award.[27]

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will ordinarily be issued only in situations that are akin to a contempt of court, this rule does not provide a 'safe harbor' to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what if any sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred. 146 F.R.D. at 592.

[24] Although this provision authorizes the Commission or the ALJ to issue an order requiring payment of a monetary penalty, the Commission may collect the money but cannot keep it. In the absence of a statute providing otherwise, an official or agent of the United States Government having custody or possession of "public money" that is not for current expenditure must promptly deposit it into the Treasury or a depository designated by the Secretary of the Treasury without deduction for any charge or claim. 31 U.S.C. § 3302. The term "public money" is not defined in that statute. The regulations implementing that provision specifically refer, however, to a federal agency's processes for the collection of "monies owed to or received by" the agency and for the expeditious crediting and availability of such monies to the Treasury. *See* 31 CFR 206.4(a) (1993). These regulations would appear to cover a monetary penalty payable to the Commission pursuant to a sanction order issued under paragraph (d)(1)(A) of final rule 210.4.

[25] Amended FRCP 11(c)(2); 146 F.R.D. at 422–423. *See also* 146 F.R.D. at 587–588. *See also* the Committee Notes to the 1983 Amendment, which indicate that the imposition of sanctions under FRCP 11 is to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims and defenses." The Commission notes further that one of the reasons that FRCP 11 was amended on December 1, 1993, was to place greater restraints on the imposition of sanctions and thus reduce number of motions for sanctions. *See* 146 F.R.D. 583, 584, and 405.

[26] See final rule 210.25 regarding the processing of motions for monetary sanctions for abuse of process.

[27] It is also possible that the IA might be entitled to independent legal representation at the Commission's expense.

In view of the aforesaid legal and policy arguments against subjecting the Commission and its attorneys from liability for monetary sanctions for abuse of process, the Commission has drafted paragraph (d)(2)(i) of final rule 210.4 to exempt the Commission, its employees, and the United States from liability for such sanctions.

Paragraph (d)(3) of final rule 210.4 is based on amended FRCP 11(c)(3). Paragraph (d) thus provides that when sanctions are imposed, the Commission or the ALJ must describe the conduct determined to constitute a violation of 210.4(b) certification provision and must explain the basis for the sanction imposed.

Paragraph (e). Paragraph (e) of final rule 210.4 is based on amended FRCP 11(d). Paragraph (e) provides that paragraphs (b) through (d) of final rule 210.4 do not apply to discovery requests, responses, objections, or motions that are subject to provisions of sections 210.27 through 210.34.[28] (Certification standards and sanctions that apply to discovery requests, responses, objections, or motions are found in final rule 210.27(d).)

Paragraph (f). Paragraph (f) of final rule 210.4 is based on paragraph (c) of proposed rule 210.4, which imposed specifications and other requirements for written submissions in section 337 investigations.

Paragraph (f)(1)(i) of proposed rule 210.4 is based on paragraph (c)(1)(i) of proposed rule 210.4, which contained spacing and print-size requirements for written submissions that are addressed to the Commission in a section 337 investigation or a related proceeding. As the preamble to the proposed rule explained,[29] the Commission is of the view that spacing and print-size requirements are necessary and appropriate to prevent evasion of the intended effect of the page limitations in proposed rules 210.66 (c) and (e)(2) by utilizing unusually small spacing in submissions.[30] The specific requirements imposed in paragraph (c)(1)(i) of proposed rule 210.4 were identical to those applied to briefs filed in the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in appeals from Commission determinations under section 337.[31,32]

Paragraph (f)(1)(i) of the final rule contains an additional provision. The Federal Circuit rule in question now provides that "[t]ext and footnotes shall be in the same size type."[33] The Commission accordingly has inserted that requirement in paragraph (f)(1) of final rule 210.4. Requiring text and footnotes to be in the same size type will aid in preventing evasion of the intended effect of the page limitations in proposed rules 210.66 (c) and (e)(2) by utilizing unusually small spacing in footnotes.

Paragraph (f)(3) of final rule 210.4 is based on paragraph (c)(3) of proposed rule 210.4. The proposed rule provided that if certain specified types of submissions contain confidential business information, the submitter must file and serve nonconfidential copies of the submission within 10 business days after filing the confidential version of the submission.

The ITCTLA commented that the prescribed filing period for nonconfidential copies should be shortened to five days. The ITCTLA explained that in order to obtain information and assistance in preparing responses to pleadings, motions, and other papers in a section 337 investigation, an attorney often needs to show the document in question to persons who are employed by the party the attorney represents but are not signatories to the Commission's APO. In the ITCTLA's opinion, a Commission rule imposing a 10-business day filing deadline for sanitized copies of confidential submissions would prevent the attorney from doing this, since the public version of the document in question would not be available until after a response is due.[34] The ITCTLA thus believed that having a 10-day deadline for the submission of nonconfidential copies of confidential pleadings, motions, and other papers would seriously impair the party's ability to prepare an adequate response.

The Commission believes that several factors militate against reducing the prescribed filing period to five days. It may be particularly difficult, for example, for parties with limited resources to comply with a five-day deadline. Moreover, in a case where consultation with opposing parties or third parties is necessary in order to prepare the nonconfidential copies of particular confidential submissions, it may be difficult for any party to meet such a deadline, even if the party has substantial resources.

While the ITCTLA's concerns about consultation with clients who can only see public versions has merit, the Commission also notes that there are many important submissions (such as petitions for review or responses to petitions for review) that must be filed within five days after service or issuance of a particular document. Thus, in many instances, the filing of a public version on the fifth day will not allow for consultation in advance of the preparation of the submission due on that date. Additionally, the Commission is concerned that the shorter the time afforded to create public versions, the more likely it will be that such public versions will be characterized by wholesale redactions that will not facilitate consultation with those who are not signatories to the APO, and that requests for extensions of time will be numerous.

The Commission accordingly has not adopted a five-day filing period for mandatory nonconfidential copies of certain confidential submissions. Paragraph (f) of final rule 210.4 does provide, however, that the prescribed period for filing such copies is 10 *calendar* days (instead of 10 business days).

The last aspect of proposed rule 210.4 that elicited comments from the ITCTLA was paragraph (c)(3), which listed the kinds of confidential submissions that are subject to the mandatory nonconfidential copy requirement. Item (iv) on that list was "the evidentiary record," i.e., "the exhibits offered by a party or a proposed party that are accepted as evidence of record."

The ITCTLA objected to item (iv). The ITCTLA noted that the evidentiary record in section 337 investigations is often quite voluminous. In such a case, the process of reviewing, redacting, and copying of the redacted parts of the record would be extremely expensive and burdensome, and may result in the production of documents that are virtually incomprehensible as a result of the redactions.

The ITCTLA noted further that even though the proposed rule imposed the burden of preparing the public versions on the party submitting the evidence, exhibits frequently consist of

[28] Amended FRCP 11(d) also states that amended FRCP 11 does not apply to "disclosures" covered by amended FRCP 26 and 37. Final rules 210.27 and 210.33—which are the Commission analogs to amended FRCP 26 and 37—do not currently contain provisions on mandatory disclosures. See the discussion in this notice concerning final rules 210.27 and 210.33.

[29] 57 FR at 52832.

[30] *See, e.g.*, Inv. No. 337–TA–304, *Certain Pressure Transmitters* (Commission denied motion to strike respondent's abnormally-spaced written comments on the ID concerning temporary relief, as the interim rules did not impose spacing requirements).

[31] *See* Fed. Cir. R. 32(a) (1990).

[32] The specifications in paragraph (c)(1)(i) of proposed rule 210.4 did not apply to written submissions that are addressed to an ALJ. Paragraph (c)(1)(ii) of proposed rule 210.4 allowed the ALJ to impose any specifications he deems appropriate for written submissions addressed to the ALJ.

[33] *See* Fed. Cir. R. 32(a) (effective June 1, 1993).

[34] Responses to motions, for example, are generally due within 10 calendar days after service of the motion. *See* proposed rule 210.15(c) and final rule 210.15(c).

confidential documents produced in discovery by opposing parties. Hence, the task of preparing public versions would most likely fall on the opposing party, i.e., the party which produced the document, instead of the party designating the document for use in evidence. In the ITCTLA's opinion, this would be quite burdensome and could lead to abuses intended to gain a tactical advantage over the opposing parties at the time of the evidentiary hearing, when time is of paramount importance.

The ITCTLA accordingly argued that it would be preferable for the final rule to follow the current practice, which is to designate each separate exhibit confidential or nonconfidential in its entirety.

The Commission agrees and has omitted item (iv) from the list in paragraph (f)(3) of final rule 210.4.

Paragraph (g). Paragraph (g) of final rule 210.4 is the same as paragraph (d) of proposed rule 210.4, which discusses service of written submissions in investigations and related proceedings under part 210.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

Section 210.10

Paragraph (a). Paragraph (a)(5) of proposed rule 210.10 stated that a complainant has the right to withdraw its section 337 complaint at any time before the Commission votes on whether to institute an investigation in response to the complaint.

In final rule 210.10, paragraph (a)(5) has been divided into paragraphs (a)(5)(i) and (a)(5)(ii).

The new paragraph (a)(5)(i) states that the complainant may withdraw the complaint as a matter of right at any time before the Commission votes on whether to institute an investigation. It also provides, however, that if the complaint is being withdrawn pursuant to a settlement agreement, confidential and nonconfidential copies of the agreement must be filed with the Commission along with the notice of withdrawal.

The new paragraph (a)(5)(ii) contains a provision from the proposed rule, which states that if a motion for temporary relief was filed in addition to the complaint, the motion must be withdrawn along with the complaint, and the complainant must serve copies of the notice of withdrawal on all proposed respondents and the embassies that were served with copies of the complaint and motion pursuant to final rule 210.54.

Subpart D—Motions

Section 210.16

Final rule 210.16 governs default in section 337 investigations, specifically, the forms of default provided for in sections 337 (g) and (h) of the Tariff Act—i.e., (1) failure to respond or to otherwise appear to answer the complaint and notice of investigation, and (2) a finding of default as a sanction for abuse of process under final rule 210.4 (the Commission analog to FRCP 11) or failure to make or cooperate in discovery under final rule 210.33 (the Commission analog to FRCP 37).

Paragraph (c)(1). Paragraph (c)(1) of proposed rule 210.16 indicated that the Commission could issue a limited remedial order directed to a respondent, on the basis of that respondent's failure to respond to the complaint and notice of investigation in the manner required under the Commission rules or to otherwise fail to appear to answer the complaint and notice of investigation. The point at which such relief would be issued was not specified.

The November 5, 1992, preamble to this rule explained that the Commission believed it necessary and appropriate to retain the flexibility to issue limited remedial orders immediately after the respondent is found to be in default, or after the Commission has adjudicated the violation issues, and that the choice would depend on the facts and circumstances involved. It was noted that in most cases, the Commission would be likely to defer decisions on issuing default relief pending the adjudication of any defenses by participating respondents that may have a bearing on the public interest factors. The preamble went on to say, however, that the Commission was particularly interested in receiving comment from interested persons on whether the final rule should specify the point at which a default remedy should be issued.[35]

The ITCTLA commented that the final rule should not specify a time at which a default remedy may be issued and that a decision on the point of issuance should be made on the basis of the facts.

The preamble to proposed rule 210.16(c)(1) had noted that there may be cases in which time is of the essence and the complainant should not be forced to wait until the end of the investigation to obtain relief against defaulting respondents. The preamble also had noted that there may be cases in which the rapid issuance of limited relief is not critical and it would be more appropriate to wait until the end of the investigation.[36] The ITCTLA concurred.

The ITCTLA suggested that immediate relief should be provided if the complainant is suffering substantial injury from increased importations of the merchandise of a defaulting respondent. The ITCTLA went on to say, however, that immediate relief should not be granted against a defaulting respondent that is a distributor or manufacturer of the foreign merchandise imported or sold by a participating respondent, since the distributor's violation of section 337 would depend on the finding with regard to the manufacturer.

The Commission believes that the ITCTLA's second hypothetical is incorrect. No finding of violation, on the merits, would be required in order for the Commission to issue a limited remedial order against the defaulting distributor. If the distributing respondent defaulted in the manner described in the statute, the Commission would be required to "presume the facts alleged in the complaint to be true."[37] (It therefore would not matter whether a violation had—or had not been—proven with respect to the participating respondent that manufactured the defaulting respondent's imported merchandise.) In such a case, the only justification the Commission could have, as a matter of law, for properly denying relief would be the likely adverse impact on one or more of the statutory public interest factors.[38]

The Commission did not alter paragraph (c)(1) of proposed rule 210.16 before adopting it as a final rule. The final rule thus does not specify the point at which the Commission may issue a limited remedial order directed to a respondent, on the basis of that respondent's failure to respond to the complaint and notice of investigation in the manner required under the Commission rules or to otherwise fail to appear to answer the complaint and notice of investigation.

[35] *See* 57 FR at 52837.

[36] *Id.*

[37] *See* 19 U.S.C.1337(g)(1).

[38] Section 337(g)(1) provides that "[T]he Commission *shall* presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that [respondent] unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued." [Emphasis added]. 19 U.S.C. 1337(g)(1).

Section 210.21

Proposed rule 210.21 provided for termination of investigations on the basis of settlement agreements or consent orders.

Paragraph (c)(3). Paragraph (c)(3) of proposed rule 210.21 recited the required content of a consent order stipulation. Before adopting paragraph (c)(3) as a provision of final rule 210.21, the Commission revised paragraph (c)(3)(i)(B) by adding a requirement that the consent order stipulation in an intellectual property-based investigation must state that each signatory to the stipulation who was respondent in the investigation will not seek to challenge the validity of the intellectual property right(s), in any administrative or judicial proceeding to enforce the consent order. The Commission made this change to be consistent with its ruling in Investigation No. 337–TA–357, *Certain Sport Sandals and Components Thereof.*[39]

Sections 210.22 and 210.24

Proposed rule 210.22 established procedures for designating the permanent relief and/or the temporary relief phase of an investigation "more complicated." Paragraph (b) of proposed rule 210.22 provided that the permanent relief phase of an investigation could be designated "more complicated" by order of the presiding ALJ or the Commission.

Proposed rule 210.24 established the procedure for obtaining Commission review of various interlocutory orders issued by an ALJ (including orders declaring the permanent relief phase of an investigation "more complicated").

Paragraph (a)(2) of proposed rule 210.24(a)(2) stated that parties aggrieved by an ALJ's order designating the permanent relief phase of a "more complicated" could file an application for interlocutory review by the Commission, without first having to obtain leave from the ALJ.

The ITCTLA commented that the aforesaid proposed rules are beneficial in light of "the importance of timely adjudication in section 337 investigations and due to the purely injunctive nature of relief."

The Commission agrees. Paragraph (b) of proposed rule 210.22 and paragraph (a)(2) of proposed rule 210.24(a)(2) have been adopted as final rules without any substantive changes.

Another aspect of proposed rule 210.24 concerning interlocutory appeals also drew comment from the ITCTLA. Paragraph (b)(2) of that rule provided that parties aggrieved by an ALJ's order granting or denying confidential treatment could file an application for interlocutory review with the Commission only if leave is granted by the ALJ.

The ITCTLA commented that interlocutory appeals of confidentiality orders could be beneficial in certain circumstances in light of the importance of maintaining the confidentiality of information, and that paragraph (b)(2) of proposed rule 210.24 strikes the proper balance between the possible importance of determinations relating to confidential treatment and the unwieldiness of interlocutory appeals, by requiring the ALJ to grant leave to appeal the order. The ITCTLA also expressed the hope, however, that such leave would not be given as a matter of course.

The Commission agrees with the ITCTLA that the authority to grant leave to seek interlocutory appeals of orders granting or denying confidential treatment under paragraph (b)(2) of the final rule should be used judiciously. Paragraph (b)(2) of final rule 210.24 is substantively the same as the proposed rule.

Section 210.25

Proposed rule 210.25 addressed the filing and adjudication of motions for sanctions for abuse of process, abuse of discovery, failure to make or cooperate in discovery, or violation of an APO. Proposed rule 210.25 established several procedures for the adjudication of such motions, depending on when the motion was filed and whether it was addressed to the Commission or the ALJ.

The Commission drafted final rule 210.4(b)–(f) to conform to the December 1, 1993, amendments to FRCP 11. The text of final rule 210.25 has been drafted to be consistent with those provisions of final rule 210.4. In paragraph (a) of final rule 210.25, a separate sentence has been inserted concerning the appropriate time to file a motion for sanctions, in view of the prerequisites that will apply to certain types of motions (e.g., prior service of the motion on the parties, or a good faith attempt to resolve the dispute before seeking action by the ALJ or the Commission).

The Commission also made two other changes throughout final rule 210.25. First, the wording reflects the fact that the Commission rules for part 210 apply to investigations and related proceedings and that sanctions may be requested in related proceedings as well as in investigations. Second, the rule discusses referring a sanctions motion to *an* ALJ (instead of *the* ALJ) because the identity of the presiding ALJ usually is not known when the Commission order making the assignment is issued.

The wording of final rule 210.25 also incorporates suggestions made by the ITCTLA. For example, paragraph (f) of proposed rule 210.25 pertained to motions that were filed with the ALJ, and permitted him to defer issuing a ruling on the motion until 90 days after the issuance of an ID on violation of section 337. The second sentence of that paragraph reads as follows:

> His [i.e., the ALJ's] ruling on the motion for sanctions must be in the form of a recommended determination and shall be issued no later than 90 days after issuance of the aforesaid initial determination on violation of section 337 or termination of the investigation.

The ITCTLA commented that the foregoing sentence should be revised to read as follows:

> *If the administrative law judge defers his adjudication in such a manner,* his ruling on the motion for sanctions must be in the form of a recommended determination and shall be issued no later than 90 days after his ID on violation of section 337 or termination of the investigation. [Emphasis added.]

The Commission has made that change in paragraph (f) of the final rule 210.25. The changed language accurately states what the Commission actually intended for the proposed rule to provide.

The ITCTLA also commented that allowing the ALJ 90 days from issuance of the ID on violation of section 337 to issue an RD on sanctions "could be problematic in that it could lead to decisions on sanctions issuing simultaneously with the Commission's decision."

The Commission notes first that 90 days is the maximum time that the ALJ

[39] In that investigation, the presiding ALJ issued an ID granting a joint motion by the complainant and one respondent for termination of the investigation as to that respondent on the basis of a settlement agreement, consent order agreement, and proposed consent order. Although the motion was granted, the ID expressed concern that the proposed consent order might not prevent the respondent from challenging the validity of the patent in controversy in any future proceeding to enforce the consent order.

The Commission reviewed the ID and remanded it to the ALJ for clarification of the parties' intent concerning their stipulation of patent validity. Specifically, the Commission noted that it would not approve the issuance of a consent order which permitted the possibility of a challenge to patent validity, by a respondent who had signed the order, in an agency or judicial proceeding concerning enforcement of the order. The Commission thus instructed the ALJ to "advise the parties that, if they wish to terminate the investigation on the basis of a consent order, the stipulated findings in the proposed consent order should make clear that the stipulation concerning the patent's validity will become void only if the patent is found to be invalid by a court or agency in a final decision that is no longer subject to appeal *and* is unrelated to enforcement of the consent order." [Emphasis in the original.] [Commission] Order at 1 (June 13, 1994).

can take to issue the RD. If the circumstances allow it, the ALJ is free to issue the RD in fewer than 90 days. (The Commission encourages its ALJs to do so whenever possible).

The Commission also does not foresee any problem with the 90 day deadline as long as the proposed sanction discussed in the motion and the RD is not one that, if granted, would have a bearing on the merits of the Commission determination on violation of section 337. The likelihood of that occurring is not high, since ALJs usually include affirmative sanction rulings of that sort in the ID on violation, or issue them prior to the ID but make reference to them in the ID. Even if there were a case in which the grounds for an evidentiary sanction do not become apparent until the ALJ adjudicates the sanction motion in an RD issued 90 days after the ID on violation, the final rules contain procedures that would address the difficulties. If the sanction is one that would have a bearing on the issues of violation, remedy, the public interest, and/or bonding by respondents, the Commission could designate the investigation "more complicated," if that designation had not previously been applied, to give the Commission time to consider the RD in connection with its final determinations on those issues. If that were not an option, the Commission could make its final determinations on violation, remedy, the public interest, and bonding without taking the sanction RD into account. The Commission could then process the RD and reconsider the aforesaid determinations if necessary, sua sponte or in response to motions under final rules 210.47 and 210.48 ("*Petitions for Reconsideration*" and "*Disposition of Petitions for Reconsideration*") or final rule 210.76 ("*Modification or Rescission of Exclusion Orders, Cease and Desist Orders, and Consent Orders*").

If the sanction RD concerns a sanction that would not have a bearing on the issue of violation, remedy, the public interest, or bonding (e.g., a monetary sanction for failure to make or cooperate in discovery), the Commission sees no problem with the issuance of the sanction RD coinciding with the Commission determinations on those issues.

The ITCTLA's final comment concerning proposed rule 210.25 pertained to the third sentence in paragraph (f), which read as follows:

> To aid the Commission in determining whether to adopt a recommended determination granting or denying cost or attorney's fee sanctions, any party may file written comments with the Commission 14 days after service of the recommended determination.

The ITCTLA commented that the foregoing sentence should be revised to read:

> To aid the Commission in determining whether to adopt a recommended determination, any party may file written comments with the Commission fourteen (14) days after service of the recommended determination.

The ITCTLA explained that this change was necessary because the wording of the proposed rule improperly restricted a party's ability to appeal orders pertaining to sanctions other than costs or attorneys fees. The Commission agrees and has made the requested change in the final rule.

Subpart E—Discovery and Compulsory Process

Section 210.27

Proposed rule 210.27 covered the permissible methods and subject matter of discovery, time constraints on discovery, and supplementation of responses to discovery requests.

Paragraph (b). Paragraph (b) of proposed rule 210.27 addressed the permissible subject matter of discovery. It was based on portions of subdivision (b)(1) of FRCP 26 as it read prior to December 1, 1993.

On December 1, 1993, subdivision (b) of FRCP 26 was amended to provide U.S. district courts with broader discretion to have greater control of and to impose additional restrictions on the scope and extent of discovery.[40] A new paragraph (5) was also added to require a party to notify other parties if it is withholding materials otherwise subject to disclosure under FRCP 26 or pursuant to a discovery request because the party is asserting a claim of "privilege or work product protection."[41]

The Commission decided against having paragraph (b) of final rule 210.27 match amended subdivision (b) of FRCP 26. The Commission noted first that it is not required by law to follow FRCP 26 concerning the permissible scope and limits of discovery (as it is in the case of the Commission rules providing sanctions for abuse of process or discovery in accordance with FRCP 11 or 37). The Commission also was of the opinion that incorporating the amended FRCP provisions into the Commission rule was not necessary at this time, since proposed rule 210.27 is—and the current practice of the ALJs are—largely consistent with the provisions of those amendments. The Commission also recognized that some aspects of the FRCP amendments could be problematic if applied in section 337 proceedings.[42] The Commission thus concluded that wholesale adoption of the amended subdivision (b) of FRCP 26 would be ill-advised, while partial adoption of its provisions would be likely to delay the Commission's adoption of final rules.

The Commission notes, however, that a presiding ALJ can issue his own ground rules to supplement the part 210 discovery rules, and that such ground rules may incorporate provisions of FRCP 26 or other Federal Rules, as the ALJ deems appropriate.

In addition to considering whether to revise paragraph (b) of proposed rule 210.27 to be consistent with amended subdivision (b) of FRCP 26, the Commission also considered whether to revise paragraph (b) in response to a comment by the ITCTLA.

Paragraph (b) of the proposed rule stated that the scope of discovery for the temporary relief phase of an investigation would be governed by proposed rule 210.61. Paragraph (b) also expressly allowed discovery on the issues of remedy and bonding by the respondents in connection with the permanent relief phase of an investigation.

The ITCTLA commented that because the public interest is an issue, the final rule should specifically provide for discovery on the public interest in certain circumstances. The ITCTLA went on to say that to avoid overbreadth, the ALJ should be given discretion not only to determine whether such discovery should be taken, but also to limit the discovery in whatever manner is appropriate.

The Commission does not think it necessary to make the changes the ITCTLA advocated. As the preamble to proposed rule 210.27 explained, serious questions as to whether the granting of permanent relief would have an adverse impact on the public interest arise relatively infrequently. Moreover, the scope of evidence and information that conceivably could be categorized as relevant to the public interest is potentially so vast as to make discovery and findings by the ALJ concerning the public interest impracticable. For those

[40] *See* 146 F.R.D. at 436–440 and 638–639.

[41] *See* 146 F.R.D. at 639–640.

[42] For example, subdivision (b)(4)(C) of amended FRCP 26 would require the Commission to reimburse the private parties' experts for deposition testimony and other discovery requested by OUII. The Commission also noted that subdivision (b)(3) of amended FRCP 26 provides that non-parties may obtain transcripts of their testimony, but does not indicate who would bear the costs of those additional transcripts (which usually cost about $800 per day of testimony).

reasons, paragraph (b) of proposed rule 210.27 did not require ALJs to allow discovery, to take evidence, or to make findings or recommendations to the Commission concerning the public interest in connection with the grant or denial of permanent relief. The Commission notes, however, that it has the option to order an ALJ to take evidence and make findings on the public interest in appropriate cases.[40]

Paragraph (b) of final rule 210.27 does not differ substantively from the corresponding paragraph of the proposed rule. The final rules maintain the practice employed under the interim rules—i.e., of generally prohibiting the ALJ from addressing the public interest, in the absence of an express order from the Commission directing the ALJ to order discovery on the public interest in a particular investigation. See final rule 210.50(b)(1).

Paragraph (c). Paragraph (c) of proposed rule 210.27 pertained to the supplementation of a response to a discovery request, and corresponded to subdivision (e) of FRCP 26 as it read prior to December 1, 1993.

On December 1, 1993, subdivision (e) of FRCP 26 was amended to provide that the duty to supplement applies to disclosures required by the amended subdivision (a) of FRCP 26. The amended subdivision (e) also clarifies that the obligation to supplement formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not generally to deposition testimony.[41]

Because the Commission did not draft paragraph (a) of final rule 210.27 to incorporate the amended subdivision (a) of FRCP 26 concerning mandatory disclosures, the Commission also did not draft paragraph (c) of final rule 210.27 to cover such disclosures.

The ITCTLA commented that paragraph (c) of final rule 210.27 should be drafted to broaden the duty to supplement discovery responses. The ITCTLA explained that—

> On a fast track, as parties develop their cases and muster their evidence, it is likely that relevant material is later discovered which was within an earlier discovery request but not found previously despite a diligent search. Thus, the duty to supplement should be imposed on the party in possession of the information. At a minimum, the rule should require parties to supplement their responses prior to hearing, without exception.

The Commission decided that paragraph (c) of final rule 210.27 should match subdivision (e) of FRCP 26 by clarifying that the obligation to supplement formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not generally to deposition testimony. Paragraph (c)(1) of final rule 210.27 specifically provides that a party who has responded to a request for discovery with a response is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the ALJ *or* in the circumstances outlined in the rule. The presiding ALJ can therefore issue ground rules to either supplement or replace the requirements set forth in the rule.

Paragraph (d). Paragraph (d) of proposed rule 210.27 was based on subdivision (g) of FRCP 26 as it read prior to December 1, 1993. Paragraph (d) thus imposed signature and certification requirements for discovery requests, responses, and objections. Those requirements were similar to the signature and certification requirements imposed by FRCP 11 as it read prior to December 1, 1993, and in paragraph (b) of proposed Commission rule 210.4. Paragraph (d) of proposed rule 210.27 also provided for cost and fee sanctions like those authorized in FRCP 37 prior to December 1, 1993, and in paragraph (c) of proposed Commission rule 210.33.

As the 1992 preamble to proposed rule 210.27 explained, FRCP 26 was not cited in section 337(h) as one of the Federal Rules that the Commission is to use as a standard for imposing cost and fee sanctions in section 337 investigations. Section 337(h) does state, however, that the Commission may by rule prescribe sanctions for abuse of discovery to the extent authorized by FRCP 37,[42] and FRCP 26 is derived from FRCP 37. The Commission decided that it was appropriate for the proposed rules to include a provision based on paragraph (g) of FRCP 26, as the Commission has the authority to adopt any rules it deems necessary to carry out its functions and duties,[43] and the ALJs had advised the Commission that there was a need for a Commission rule based on paragraph (g) of FRCP 26.

On December 1, 1993, subdivision (g) of FRCP 26 was amended to make the signature, certification, and sanction provisions applicable to disclosures required by subdivision (a) as amended. The sanction provisions were also amended to be consistent with provisions of FRCP 37.[44]

Since the Commission did not draft paragraph (a) of final rule 210.27 to cover disclosures, the Commission also did not draft paragraph (d) of that rule to make the signature, certification, and sanction provisions applicable to disclosures. The changes that the Commission did make in paragraph (d) of the proposed rule before adopting it as a final rule are described below.

First, the Commission revised the wording of the certification requirement in paragraph (d) to correspond more closely to the wording and substance of subdivision (g) of FRCP 26, as amended. For example, the certification provision was revised so that it no longer states that the signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection.

The Commission also changed the cross-references in paragraph (d). The revised paragraph (d) provides that a discovery response, request, or objection must be consistent with rule 210.5 and other relevant rules. The revised paragraph does not refer to Commission rule 201.8.[45] The Commission also revised paragraph (d) to omit a reference to "§ 210.4."[46] The Commission added a new paragraph (d)(1), however, containing provisions like those in paragraph (a) of proposed rule 210.4.[47]

The sanction provisions of paragraph (d) were modified as well. Among other things, paragraph (d) was revised to indicate that a violation occurs and a sanction may be imposed when a request, response, or objection is certified *without substantial justification*, which is the standard used in subdivision (g) of FRCP 26 as amended. The sanction provisions also do not include a reference to "proposed

[40] *See* 19 CFR 201.4(b) (1993) regarding waiver of Commission rules and final rule 210.50(b) concerning the ALJ's ability to take evidence, hear argument, and make findings concerning the public interest.

[41] *See* 146 F.R.D. at 442–443 and 641.

[42] 19 U.S.C. § 1337(h).

[43] *See* 19 U.S.C. § 1335.

[44] *See* 146 F.R.D. at 444–447 and at 644. The Committee Notes also point out that FRCP 11, as amended, does not apply to such violations. *Id.* at 644.

[45] Rule 201.8 (19 CFR 201.8) imposes requirements for the *filing* of documents. Responses to discovery requests are not normally filed with the ALJ or the Commission.

[46] The signature, certification, and sanction provisions of rule 210.4 are based on FRCP 11, and FRCP 11 as amended no longer applies to disclosures and discovery requests, responses, objections, or motions covered by FRCP 26.

[47] Paragraph (a) of proposed rule 210.4 was not based on FRCP 11, and simply stated that the front page of every written submission must contain a caption setting forth the name of the Commission, the title of the investigation or related proceeding, and the docket number or investigation number, if any, assigned to the investigation or related proceeding.

parties."[48] Finally, the revised paragraph (d) also omits a reference to the possible imposition of a fine as a sanction for violation of the certification requirement.[49]

Section 210.30

Proposed rule 210.30 concerned requests for the production of documents and things and entry upon land.

Paragraph (b). Paragraph (b) of proposed rule 210.30 outlined the procedure for making, serving, and responding to requests for the production of documents and things and entry upon land. Paragraph (b) also provided that the presiding ALJ would determine the deadline for responding.

The ITCTLA commented that instead of leaving the response time to the discretion of the ALJ, there should be a minimum response period provided in the rule, which the ALJ has the authority to extend, but not diminish.

The Commission notes that the proposed discovery rules contained no prescribed deadlines because the Commission had deferred to Chief ALJ Saxon's view that discovery deadlines in each investigation should be established by the presiding ALJ and not by Commission rule. The ITCTLA did not offer any justification for the Commission to insert a deadline in paragraph (b) of the final rule. The Commission thus has not made the change that the ITCTLA requested; paragraph (b) of final rule 210.30 does not differ substantively from the corresponding paragraph of the proposed rule.

Section 210.32

Proposed rule 210.32 governed the issuance of subpoenas.

Paragraph (e). Paragraph (e) of proposed rule 210.32 was the same as the corresponding paragraph of interim rule 210.35 and discussed ex parte rulings on applications for subpoenas. Paragraph (e) provided that applications for the issuance of the subpoenas can be made ex parte, and, if so made, such applications and rulings thereon must remain ex parte unless otherwise ordered by the ALJ.

The ITCTLA commented that it is not clear whether the ex parte applications are discoverable by any party or person who wishes to try to quash the subpoena. The ITCTLA believes that final rule 210.32 should expressly provide that such applications are discoverable by any party or person seeking to quash the subpoena if it is actually issued.

The Commission did not modify paragraph (e) in the manner the ITCTLA advocated. The Commission intends for paragraph (e) of final rule 210.32 to correspond to the FRCP 34 on the issuance of subpoenas. FRCP 34 does not contain a provision of the sort that the ITCTLA has requested. The issues of whether and when applications for subpoenas are discoverable by parties and subpoenaed persons accordingly will be left to the discretion of the presiding ALJ.

Section 210.33

Proposed rule 210.33 was based on FRCP 37 as it read prior to December 1, 1993, which provided sanctions for failure to make or cooperate in discovery.

Paragraph (a). Paragraph (a) of proposed rule 210.33 pertained to the filing of motions for orders compelling discovery. Paragraph (a) was based on the first sentence in subdivision (a) of FRCP 37, as it read prior to December 1, 1993.

On December 1, 1993, subdivision (a) of FRCP 37 was amended to be consistent with amended subdivision (a) of FRCP 26 (which requires disclosures of certain matters without a discovery request). It was also amended to provide that—

- a party dissatisfied with the disclosures made by an opposing party may move for an order to compel disclosure;
- litigants must seek to resolve discovery disputes by informal means before filing a motion with the court;
- evasive or incomplete disclosures and responses to interrogatories and production requests will be treated as failures to disclose or respond; and
- monetary sanctions can be imposed if the disclosure or requested discovery is provided after the motion to compel is filed with the court but before a hearing is held on the motion (except that a party may not be awarded its expenses for filing a motion that could have been avoided by conferring with opposing counsel).[50]

The Commission decided against incorporating provisions of subdivision (b) of amended FRCP 37 into paragraph (a) of final rule 210.33 at this time. Paragraph (a) of final rule 210.33 is therefore the same as paragraph (a) of the proposed rule.

The Commission notes, however, that a presiding ALJ can issue his or her own ground rules to supplement the part 210 discovery rules (and hence those ground rules may require that a movant must certify that there have been good faith efforts to resolve a discovery dispute by informal means prior to the filing of a motion to compel discovery). A presiding ALJ's ground rules also can provide that an evasive or incomplete disclosure, answer, or response will be treated as a failure to respond as provided in amended FRCP 37(a)(3).

Paragraph (b). Section 337(h) gives the Commission express authorization to impose sanctions for "abuse of discovery" to the extent provided in FRCP 37.[51] Paragraph (b) of proposed rule 210.33 addressed non-monetary sanctions for failure to make or cooperate in discovery. Paragraph (b) was based on the non-monetary sanction provisions of FRCP 37(b) (as well as paragraph (b) of interim rule 210.36, which listed various kinds of sanctions that may be imposed if a party fails to comply with a discovery order).

The Federal Rule upon which paragraph (b) of proposed rule 210.33 was based—subdivision (b) of FRCP 37—was not amended on December 1, 1993. The Commission therefore did not consider making changes in paragraph (b) before adopting it as part of final rule 210.33.

Paragraph (c). Paragraph (c) of proposed rule 210.33 discussed monetary sanctions for failure to make or cooperate in discovery. It was based in part on subdivision (b)(2) of FRCP 37, which was not amended on December 1, 1993.

Subdivisions (c), (d), and (g) of amended FRCP 37 are also relevant to the question of monetary sanctions for failure to make or cooperate in discovery in section 337 investigations. Subdivision (c) authorizes cost and fee sanctions for failure to make the disclosures required by subdivision (a) of FRCP 26, as amended. Subdivision (c) also provides sanctions for false or misleading disclosures and refusals to admit.[52] Subdivision (d) authorizes cost and fee sanctions for a party's failure to attend its own deposition or to serve answers to interrogatories or responses to requests for inspection. (Subdivision (d) also provides that when a party fails to file any response to interrogatories or a FRCP 34 request, the discovering party is required to try informally to obtain such responses before filing a motion for sanctions.)[53] Subdivision (g) authorizes cost and fee sanctions if a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery

[48] Proposed parties do not usually participate in discovery. The inclusion of that reference in the proposed rule was an error.

[49] Unlike the amended FRCP 11, the amended paragraph (g) of FRCP 26 does not provide for the imposition of monetary penalties other than costs or attorney's fees.

[50] *See* 146 F.R.D. at 467–470 and 689–691.

[51] 19 U.S.C. § 1337(h).

[52] *See* 146 F.R.D. at 470–472 and 691–692.

[53] *See* 146 F.R.D. at 472–473 and 691–692.

plan as required by amended subdivision (f) of FRCP 26.[54]

The Commission has decided not to incorporate the provisions of subdivisions (a), (c), (d), and (g) of amended FRCP 37 into its final rules at this time. The only monetary sanctions available under paragraph (c) of final rule 210.33 will be those based on subdivision (b)(2) of amended FRCP 37 for failure to comply with an order to provide or permit discovery.

The Commission made several substantive revisions to paragraph (c), however. First, paragraph (c)(1) was revised by changing the citation to "Rule 37 of the Federal Rules of Civil Procedure" to "Rule 37(b)(2) of the Federal Rules of Civil Procedure." In addition, the language of paragraph (c)(1) was altered to conform more closely to that of subdivision (b)(2) of amended FRCP 37. The Commission added language indicating that monetary sanctions may not be awarded if the ALJ or the Commission finds that the uncooperative party's failure to comply with the order to provide or permit discovery was substantially justified or that other circumstances make an award of expenses unjust.

The Commission also deleted the references in paragraph (c)(1) to the imposition of an "appropriate monetary sanction" and the possibility of a fine being imposed in lieu of or in addition to cost and attorneys' fee sanctions. Unlike the sanction provisions of amended FRCP 11, the sanction provisions of amended FRCP 37 do not provide for monetary sanctions of any kind other than the payment of another party's costs and attorneys' fees.

The Commission also made some minor editorial changes in paragraph (c)(2) before adopting it as part of final rule 210.33.

Subpart F—Prehearing Conferences and Hearings

Section 210.35

Paragraph (d). Paragraph (d) of proposed rule 210.35 discussed prehearing orders, and stated that the ALJ's order shall control the subsequent course of the hearing, unless the ALJ modifies the order.

The ITCTLA commented that this provision gives the presiding ALJ wide latitude to modify his prehearing order. The ITCTLA believes, however, that while ALJs should have broad powers to modify pretrial orders, some sort of limit should be imposed. The ITCTLA accordingly requested that the last sentence of final rule 210.35 be drafted to state that the ALJ can modify his pretrial order for "good cause." The ITCTLA noted that "good cause" is the standard that Federal judges must apply in modifying scheduling orders under FRCP 16(b).

The Commission does not see a need for the change the ITCTLA has advocated. The Commission assumes that the ALJs will not abuse their power to modify a pretrial order and will only make modifications when good cause exists for the change. That being the case, revising the last sentence to add the "good cause" proviso would seem to be unnecessary.

Section 210.36

Paragraph (d). Paragraph (d) of proposed rule 210.36 described the rights of the parties at evidentiary hearings. It stated, among other things, that every party will have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

The ITCTLA commented that the reference to "all other rights essential to a fair hearing" is vague and unnecessary, and should be omitted from the final rule. The Commission does not agree and has retained that phrase in paragraph (d) of final rule 210.36.

Section 210.37

Paragraph (b). Paragraph (b) of proposed rule 210.37 discussed the admissibility of evidence. It stated, in pertinent part, that immaterial or irrelevant parts of an admissible document will be segregated and excluded as far as practicable. The ITCTLA commented that in the final rule, this sentence should be written in the disjunctive, not in the conjunctive—i.e., the word "or" should be used in place of the word "and." The Commission believes that change is appropriate and has made it in the final rule.

Paragraph (e). Paragraph (e) of proposed rule 210.37 discussed objections to evidence, and stated that objections to evidence shall be made in timely fashion and shall briefly state the grounds relied upon.

The ITCTLA commented that the word "timely" is too vague and, for that reason, the final rule should state that objections must be made when the evidence is offered.

The Commission intends for the presiding ALJ in each case to decide at what point objections to evidence should be made. The Commission therefore has not drafted paragraph (e) of final rule 210.37 to include the provision that the ITCTLA requested.

Section 210.38

Proposed rule 210.38 governed the reporting and transcription, correction, and certification of the administrative record of a section 337 investigation or related proceeding.

Paragraph (a). Paragraph (a) of the proposed rule identified the kinds of documents and materials that constitute such a record. Unlike paragraph (a) of the proposed rule, paragraph (a) of the final rule codifies longstanding Commission practice by indicating that all briefs and written statements are part of the record.

Subpart G—Determinations and Actions Taken

Section 210.42

Proposed rule 210.42 was the general rule concerning IDs.

Paragraph (a). Paragraph (a) of proposed rule 210.42 governed the issuance of an ID on "permanent relief," i.e., violation of section 337. The headings of the final rule differ from those in the proposed rule in the following manner:

1. The heading of paragraph (a)(1)(i) has been changed from *"On issues concerning permanent relief"* to *"On Issues concerning violation of section 337."* This change was made because IDs issued pursuant to this paragraph pertain solely to violation of section 337 of the Tariff Act and do not address the issue of permanent relief.

2. Paragraph (a)(1)(ii) has been given the heading *"Recommended determination on issues concerning permanent relief and bonding,"* as this paragraph requires the ALJ to issue, within 14 days after issuance of the violation ID, an RD on the issues of remedy and bonding by respondents.

The ITCTLA commented that apart from not detracting from the time allotted to the ALJ to adjudicate the question of a section 337 violation, there does not seem to be any justification for treating an ALJ's remedy and bonding decision differently from his decision on violation. The ITCTLA also believes that the only advantage to having the ALJ issue his remedy and bonding decision separately from the decision on violation is that the public gets an opportunity to comment on the remedy and bonding issues. The ITCTLA maintains, however, that such comment would be possible without utilizing the RD mechanism.

The ITCTLA accordingly suggested that—

1. final rule 210.42(a)(1)(ii) should require the ALJ to issue an ID on permanent relief

[54] *See* 146 F.R.D. at 473 and 692.

and bonding, instead of an RD, on the 14th day after issuance of the ID on violation of section 337;

2. processing of the ID should entail provision for petitions for review by parties and a 30-day deadline for comments on the ID by interested members of the public; and

3. the ID should have a 45-day effective date.

The Commission has not drafted paragraph (a)(1)(ii) of final rule 210.42 in the manner the ITCTLA has advocated. The Commission believes that having the ALJ issue an RD on remedy and bonding by respondents will give the Commission the greatest flexibility in reaching final determinations on those issues.[55]

The Commission did make one substantive change in paragraph (a)(1)(ii) of proposed rule 210.42 before adopting it as a final rule. That paragraph was revised to require an ALJ to issue an RD on remedy and bonding in *every* case (and not just those in which the ALJ has found a violation of section 337).

Paragraph (d). Paragraph (d) of proposed rule 210.42 described the required content of an ID. It stated, among other things, that an ID would become the determination of the Commission unless a party filed a petition for review of the ID "pursuant to § 210.43(a) or § 210.46(a) or the Commission, pursuant to § 210.44 of § 210.46(a)(6), orders on its own motion a review of the initial determination or certain issues therein." Since the Commission has determined not to adopt the procedure set forth in proposed rule 210.46(a), the cross-references to that rule have been omitted from paragraph (d) of final rule 210.42.

Paragraph (h). Paragraph (h) of proposed rule 210.42 listed the effective dates of various kinds of IDs.

Paragraph (h)(1) provided that an ID under proposed rule 210.42(a)(2) granting a motion to declassify confidential information would become the determination of the Commission within 45 days after service of the ID unless the Commission ordered a review. The ITCTLA commented that the final version of this rule should provide a 30-day effective date for the ID, because IDs on declassification of confidential information "[seem] more like the type of decision which becomes effective within thirty (30) days (like amendment of the complaint, etc.). The ITCTLA also suggested that the 30-day period be measured from the date of issuance of the ID, and not the date of service, to be consistent with proposed rules 210.43 (*"Petitions for Review of [IDs] on Matters Other Than Temporary or Permanent Relief"*) and 210.46 (*"Petitions for and Sua Sponte Review of [IDs] on Permanent or Temporary Relief"*).

The Commission notes that consistency in rules dealing with similar or related subject matter generally is desirable. In this case, however, the Commission does not think it necessary or desirable to revise the manner of measuring the effective date of an ID on declassification of confidential information. Calculating a prescribed period from the date of issuance of an ID (instead of the date of service) usually shortens the actual period. Expedited procedures are necessary, however, for IDs that must be processed before a statutory or regulatory deadline. Such urgency does not exist with respect to processing an ID concerning declassification of confidential information.

Paragraph (h)(2) of proposed rule 210.42 concerning IDs on permanent relief (i.e., violation of section 337) did not give an effective date for such IDs because they were to be processed in accordance with paragraph (a) of proposed rule 210.46, instead of being processed by the customary bifurcated process. Instead, paragraph (h)(2) simply stated that IDs on violation of section 337 would be processed in accordance with proposed rule 210.46.

Since the Commission has not adopted the procedure set forth in that proposed rule, paragraph (h)(2) of final rule 210.42 has been drafted to state that IDs on violation of section 337 have a 45-day effective date, unless the Commission orders otherwise or changes the deadline for determining whether to order a review. Paragraph (h)(2) also retains the provision from the corresponding paragraph of the proposed rule indicating that the findings and recommendations made by the ALJ in the RD on remedy and bonding by the respondents will be considered by the Commission in reaching determinations on those issues.

Section 210.43

Paragraph (b). Paragraph (b) of proposed rule 210.43 articulated (1) the standard for review and the grounds that must be asserted in a petition for review as justification for seeking review of specific issues, and (2) the consequence of a party's failure to petition for review of an issue decided adversely to the party. Like interim rule 210.54(b), upon which it was based, proposed rule 210.43(b) also stated that any issue not raised in the petition for review will be deemed to have been abandoned by the party and may be disregarded by the Commission in reviewing the ID.

In the preamble to paragraph (b) of proposed rule 210.43, the Commission noted that the Federal Circuit has construed paragraph (a)(2) of interim rule 210.54 to mean that parties who petition the Commission for review waive their right to raise additional or different issues in a subsequent appeal to the Federal Circuit, while parties who do not file petitions for review may raise all issues on appeal.[56] The Commission went on to say that while interim rule 210.54(a)(2) and proposed rule 210.43(b) permit the parties to elect to bypass Commission review, and may thereby reduce the effectiveness of the Commission's review procedures, some persons may feel that the interim rule and proposed rule 210.43(b) effectively discourage the filing of petitions for review.[57]

For those reasons, the Commission specifically requested public comment on whether it should adopt an *Alternative* provision to that in proposed rule 210.43(b) stating that: (1) A party is required to file a petition for review of an ID in which issues had been decided adversely to that party, in order to preserve the party's right to judicial review of any final Commission determination based on some or all of the same grounds as the ID; and (2) a party's failure to file a petition for review would be deemed to be abandonment of all issues decided adversely to that party in the ID.[58]

The ITCTLA commented that it does not favor the proposed rule as written—or the alternative provision discussed in the preamble. The ITCTLA explained that—

The ITCTLA feels that the problem with the present arrangement is that it encourages overly comprehensive petitions, not that it discourages a party from filing at all. The ITCTLA doubts whether the decision to file a petition for review is influenced significantly by the fact that, to avoid any waiver, a party must petition for review of every issue lost before the ALJ. Parties that do not seek review most likely have other

[55] A Commission decision on whether to accept or reject the recommendations in an RD is not governed by the same subject matter limitations and deadlines as a decision on whether to review an ID.

[56] *See Warner Brothers, Inc.* v. *U.S. International Trade Commission*, 787 F.2d 562, 564 (Fed. Cir. 1986). (The Federal Circuit rejected the Commission's argument that parties waive the right to challenge Commission determinations by failing to petition for review of adversely decided IDs.) *See also Allied Corporation* v. *U.S. International Trade Commission*, 850 F.2d 1573, 1580 (Fed. Cir. 1988), *cert. denied*, 109 S.Ct. 791 (1989) ("Allied abandoned review of the claim construction in the ALJ's 1984 ID by failing to raise the issue in its petition for review of that ID").

[57] 57 FR at 52846.

[58] *Id.*

motivations (e.g., lack of interest in review of the issues lost, insufficient funds, etc.)

Thus the only effect of the Commission's suggested alternative to the Proposed Rules would be to force parties which did not want to file a petition for review to do so or else waive their right to appeal to the Federal Circuit. It would not discourage overly comprehensive petitions, but instead would ensure that all petitions were indeed overly comprehensive.

The ITCTLA suggested a second alternative—namely, elimination of the provision that issues not raised in a petition for review are waived. The ITCTLA believes that if the final rule were written in that manner, only legitimate issues would be raised in petitions for review. The ITCTLA also is of the opinion that such a rule would not deprive parties of fair notice of what might be raised on appeal, since the present arrangement in which parties routinely file "kitchen sink" petitions does not provide such notice anyway.

The Commission has not drafted paragraph (b) of final rule 210.43 in the manner that the ITCTLA advocated.

Section 337 investigations are conducted—and determinations from such investigations are appealable—in accordance with the APA.[59] The Supreme Court has held that Federal courts do not have the authority to require a plaintiff to exhaust administrative remedies before seeking judicial review under the APA when neither the relevant statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. *Darby* v. *Cisneros*, 113 S.Ct. 2539 (1993).

The relevant provisions of section 337 do not mandate exhaustion as a prerequisite to judicial review.[60] The interim Commission rules also do not require a complainant to exhaust the available administrative remedies before seeking judicial review.[61] As the preamble to the proposed rules pointed out, the Federal Circuit previously decided that the Commission's interim rule 210.54(a)(2)—which is the same as proposed rule 210.43(b) on the issue of waiver—does not require an aggrieved party to file a petition for Commission review of an ID before seeking judicial review. *See Warner Brothers, Inc.* v. *U.S. International Trade Commission*, 787 F.2d 562, 564 (Fed. Cir. 1986).[62]

To ensure that the doctrine of exhaustion of administrative remedies can properly be applied to section 337 proceedings (in light of *Warner Brothers* and *Darby*), the Commission has drafted paragraph (b) of final rule 210.43 to provide that:

(1) any issue not raised in a petition for review will be deemed to have been abandoned by the petitioning party and may be disregarded by the Commission in reviewing the initial determination (unless the Commission chooses to review the issue on its own initiative under final rule 210.44); and

(2) a party's failure to file a petition for review of an ID shall constitute abandonment of all issues decided adversely to that party in the ID.

The Commission notes that its goal under section 337 is to issue the best decision possible in the time available. That goal is furthered by encouraging all parties (prevailing as well as non-prevailing) to petition for review of any and all errors they perceive in the ID on violation of section 337. The Commission believes that a Commission rule providing for a waiver will achieve the desired effects of (1) discouraging deliberate flouting of administrative processes, (2) protecting agency autonomy by affording the agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors, (3) aiding judicial review by promoting the development of facts during the agency proceedings, and (4) promoting judicial economy by reducing duplication.

Contingent Petitions

The ITCTLA suggested that the Commission consider whether to adopt a rule expressly providing for contingent petitions for review—i.e., petitions in which the petitioning party is satisfied with the ID, but would like to have the Commission review certain issues *if* the Commission decides to review issues raised by an opposing party. The ITCTLA claimed that permitting the filing of contingent petitions for review "might spare the Commission significant work, and appears to have no down side."

The Commission notes that it occasionally receives contingent petitions for review of IDs. Owing to the administrative deadlines governing the ID/discretionary Commission review process, contingent petitions must be processed in the same time and manner as non-contingent petitions. Paragraph (b) of final rule 210.43 accordingly clarifies this practice, by stating that any petition designated by the petitioner as a "contingent" petition for review shall be regarded as an ordinary (i.e., non-contingent) petition and shall be processed accordingly. The Commission thought that such clarification was necessary in light of the fact that a "contingent petition" is inconsistent with the requirement that all administrative remedies be exhausted before judicial review.

Section 210.44

Proposed rule 210.44 covered sua sponte Commission review of IDs on matters other than permanent or temporary relief. It bore the heading "Commission review on its own motion of IDs on matters other than permanent or temporary relief."

In view of the Commission's decision to retain the current manner of processing IDs on violation of section 337 and not to adopt the procedure set forth in proposed rule 210.46 (as discussed below), the heading of final rule 210.44 has been changed to "Commission review on its own motion of initial determinations on matters other than temporary relief."

Sections 210.45 and 210.46

Proposed rule 210.45 governed review of IDs on matters other than temporary or permanent relief. Paragraph (c) of proposed rule 210.45 described Commission decisions on review of an ID concerning a matter other than temporary or permanent relief. Paragraph (a)(7) of proposed rule 210.46 similarly described Commission decisions on review of an ID concerning permanent relief (i.e., violation of section 337). Paragraph (c) of proposed rule 210.45 and paragraph (a)(7) of proposed rule 210.46 were essentially the same as interim rule 210.56(c) ("*Determination on Review*").[63]

The ITCTLA commented that paragraph (c) of proposed rule 210.45 and paragraph (a)(7) of proposed rule 210.46 should be amended to provide that the Commission's determination *on review* is made according to the same standard found in proposed rule 210.43(b), i.e., the standard by which the Commission determines whether *to*

[59] *See* 19 U.S.C. § 1337(c).

[60] *Id.*

[61] *See* 19 CFR 210.54(a), 210.53(h), 210.56(c), and 210.71 (1993).

[62] In reaching that decision, the Federal Circuit noted that interim rule 210.54(a)(2) does not address situations where the petitioner appeals an ID of an ALJ directly to the court, without first petitioning for review. "As we read the current regulations", the Federal Circuit stated, "if a party does file a petition for review of the ID, any issue not raised therein 'will be deemed to have been abandoned.' " "There is no requirement", the Federal Circuit continued, "that a party file a petition for review or risk waiver of all adversely decided issues." 787 F.2d at 564.

[63] Interim rule 210.56(c) provides as follows:

(c) *Determination on review.* On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge and may make any findings or conclusions that in its judgment are proper based on the record in the proceeding.

19 CFR 210.56(c) (1993).

review an ID.[64] The ITCTLA believes that the proposed change is warranted because the ALJs are highly experienced triers of fact and thus are entitled to have their opinions accorded the same deference called for under the standard set forth in proposed rule 210.43(b).

The Commission views the ITCTLA's comment as an attempt to obtain reversal of the Commission opinion in Inv. No. 337–TA–324, *Certain Acid-Washed Denim Garments and Accessories*, which held that the standard which the Commission applies in reviewing an ID (as opposed to determining whether to review the ID) is a de novo standard.[65] The Commission therefore declines to revise paragraph (c) of proposed rule 210.45 and paragraph (a)(7) of proposed rule 210.46 in the manner that the ITCTLA suggested. (But see the discussion below concerning the Commission's decision not to adopt any part of proposed rule 210.46.)

In view of the Commission's decision to retain the current manner of processing IDs on violation of section 337 and not to adopt the procedure set forth in proposed rule 210.46 (as discussed below), the heading of final rule 210.45 has been worded to cover IDs on violation of section 337. The heading of proposed rule 210.45 was "Commission review on its own motion of initial determinations on matters other than temporary or permanent relief." The heading of final rule 210.45 is "Commission review on its own motion of initial determinations on matters other than temporary relief." The Commission also made a similar change in paragraph (a) of the final rule.

Section 210.46

Paragraph (a). Paragraph (a) of proposed rule 210.46 set forth a new procedure for the processing of an ID on permanent relief (i.e., violation of section 337) and the accompanying RD on remedy and bonding by the respondents. The ITCTLA suggested changing various aspects of the new process. The ITCTLA's comments will not be discussed here, as the Commission has determined not to adopt, at least at this time, the procedure set forth in paragraph (a) of proposed rule 210.46 for processing IDs on violation of section 337.[66]

Paragraph (a) of final rule 210.46 provides that IDs on violation of section 337 will be processed in the manner set forth in final rules 210.43 through 210.45.

The only provision that has been retained from paragraph (a) of proposed rule 210.46 is the one stating that the Commission will issue a notice setting deadlines for written submissions from the parties, other Federal agencies, and interested members of the public on the issues of remedy, the public interest, and bonding by the respondents. In those submissions, the parties may assert their arguments concerning the RD issued by the ALJ pursuant to final rule 210.42(a)(ii) on remedy and bonding by respondents.

An additional issue raised by the ITCTLA concerned paragraph (a)(7) of proposed rule 210.46. That paragraph indicated that the Commission would issue a notice, on or before the statutory deadline in each investigation, setting forth its determinations on all issues, including whether the Commission had affirmed, modified, reversed, or set aside the ID in whole or in part.

The ITCTLA commented that paragraph (a)(7) should be revised to include a provision dealing with review of motions for summary determination and motions to terminate an investigation. The ITCTLA noted that as the interim and proposed rules are currently written, an ALJ can issue an ID granting a motion for summary determination or a motion to terminate, but the only time limit that the Commission has is the deadline for concluding the investigation. The ITCTLA noted further that as a consequence of that omission and a deadlocked vote, the Commission did not rule on whether to reverse the ALJ's ID granting summary determination in Inv. No. 337–TA–334, *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, until seven months after the ID was issued. The ITCTLA added that the Commission reversed the ALJ, and that the parties were left with very little time to prepare for a hearing even though the case was declared "more complicated."

To ensure that this does not happen again, the ITCTLA suggested that the following text be added to the end of proposed rule 210.46(a)(7):

> In cases in which the initial determination results from the granting of a motion for summary determination under Rule 210.18 or a motion to terminate under Rule 210.21, the Commission will issue a notice stating whether the Commission has affirmed, modified, reversed, or set aside the initial determination in whole or part on or before the sixtieth day after the issuance of the ID.

The final rules do not contain a provision like that recommended by the ITCTLA. There has been no recurrence of delays of the sort that occurred in the *Condensers* investigation. The Commission thus does not believe it necessary for the final rules to impose a 60-day deadline for completing Commission review of IDs granting motions for summary determination or termination of an investigation in whole or part.

Rules Concerning Judicial Review

Interim rule 210.71 states that any person adversely affected by a final determination under section 337 can appeal to the Federal Circuit. The Commission omitted a comparable provision from the final rules on the grounds that it merely repeated what was set forth in the statute.

The ITCTLA commented that the final rules should contain provisions explaining when a determination is considered "final" and thus is ripe for appeal. The ITCTLA also wants the Commission to adopt rules stating that the period for filing an appeal begins to run for all issues at the same time. In the ITCTLA's opinion, such rules are needed in order to facilitate the Federal Circuit's consolidation of multiple appeals arising out of the same investigation, to prevent the parties from filing multiple notices of appeals because they are not certain how to calculate the deadline for filing, and to eliminate the need for the Federal Circuit "to sort out the mess."

The Commission believes that its promulgation of such rules would be ultra vires, would encroach upon the jurisdiction of the Federal Circuit, and

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[64] The standard set forth in proposed rule 210.43(b) was:

1. that a finding or conclusion of material fact is clearly erroneous;

2. that a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or

3. that the determination is one affecting Commission policy.

[65] The opinion stated in pertinent part as follows:

In our view, the standard for review provided in interim rule 210.56 is clear—the Commission may 'make any findings or conclusions that in its judgment are proper based on the record in the proceedings.' Thus, once a sufficient basis for review has been shown and review has been ordered, the Commission examines for itself the record on the issues under review. It makes findings on those issues it believes are appropriate, unconstrained by the 'clearly erroneous' standard of interim rule 210.54. Contrary to respondents' claim, there is in our view no basis for grafting the 'clearly erroneous' standard from interim rule 210.54—which governs whether there is a basis for review—onto interim rule 210.56—which controls the Commission's decision upon review.

Certain Acid-Washed Denim Garments and Accessories, Inv. No. 337–TA–324, USITC Publication 2576, Opinion of the Commission at 4–5 (Nov. 1992).

[66] The Commission has so far utilized the procedure set forth in paragraph (a) proposed rule 210.46 in one investigation, and will consider the experience gained in that case, when the Commission determines at a later date whether paragraph (a) of final rule 210.46 should be modified to incorporate some or all of the procedures set forth in the proposed rule.

would not have the desired effect since the Federal Circuit would not be bound by them. The final rules for part 210 thus do not contain provisions of the sort the ITCTLA advocated.

Section 210.50

Paragraph (a). Paragraph (a) of proposed rule 210.50 stated that when the Commission is considering whether to grant some form of permanent relief, the submissions from parties, other Federal agencies, and interested members of the public concerning the issues of remedy, the public interest, and bonding shall be filed by the deadlines specified in "the Commission notice issued pursuant to § 210.46(a)(5) of this part." Since the Commission has determined not to adopt paragraph (a)(5) of proposed rule 210.46, the appropriate cross-references is to paragraph (a) of that rule. A cross-reference to "§ 210.46(a)" accordingly appears in paragraph (a) of final rule 210.50.

Paragraph (a) of proposed rule 210.50 also provided that any written submissions that the Commission receives from other Federal agencies or interested members of the public concerning remedy, the public interest, or bonding by respondents would be available for public inspection in the Commission Secretary's Office. Unlike the interim rule upon which it was based, paragraph (a) of proposed rule 210.50 did not require that such submissions be served on the parties to the investigation.[67] The preamble also noted that the parties could contact the Commission staff to learn whether any non-party submissions were expected or had been filed and that they could readily obtain copies of the submission from the Secretary's Office.[68]

The ITCTLA commented that it is understandable that the Commission wishes to minimize the burden on nonparty submitters. The ITCTLA also speculated that eliminating the service requirement for such submissions might encourage more nonparties to file them. The ITCTLA also is of the opinion, however, that the Commission should be required to *notify* each party when a nonparty submission arrives, so that the parties will not be forced to unnecessarily monitor the Commission docket.

The Commission notes that the ITCTLA's argument presupposes that the parties (and/or their attorneys) would be entitled to see every nonparty submission that is filed. That may not be the case, however. The Commission occasionally receives written submissions from other agencies (such as the U.S. Customs Service) which contain information that is not to be disclosed to anyone other than the Commission and Commission staff who are assigned to the investigation.[69] The Commission also sometimes receives submissions from interested persons outside of the Federal government, who request that their submissions not be shown to the parties.

In addition, it would unduly burden the Docket Section staff of the Secretary's Office if those persons were required to monitor all remedy submissions and telephone each party when a nonparty submission is received.[70]

Paragraph (a) of final rule 210.50 thus does not contain the notification requirement that the ITCTLA requested.

Subpart H—Temporary Relief

Section 210.52

Proposed rule 210.52 concerned the filing and content of motions for temporary relief.

Paragraph (a). Paragraph (a) of proposed rule 210.52 stated that a complaint requesting temporary relief must be accompanied by a motion for such relief containing information relevant to the four factors the Commission considers in determining whether to grant temporary relief. Paragraph (a) of proposed rule 210.52 also explained that in determining whether to grant temporary relief, the Commission would apply the standards the U.S. Court of Appeals for the Federal Circuit uses in determining whether to affirm lower court decisions granting preliminary injunctions and that the motion for temporary relief must contain a detailed statement of specific facts bearing on the factors the Federal Circuit would consider.

The ITCTLA commented that the proposed rule did not accurately reflect what the test is, and that the final rule should indicate that the motion for temporary relief must contain a detailed statement of specific facts "bearing on the factors that the Federal Circuit [has] stated that a district court must consider in granting a preliminary injunction." The Commission has made that change in paragraph (a) of final rule 210.52.

The ITCTLA also commented that the Commission should rewrite the discussion in the preamble of the proposed rules which deals with articulation of the district court standards, because ambiguity is introduced concerning the burden of proof.

The Commission sees no reason to rewrite the commentary in question. Instead, the Commission recommends that, for purposes of drafting or ascertaining the validity of arguments for motions for temporary relief or responses thereto, parties and other interested persons should examine the most recent Commission and Federal Circuit decisions rather than the commentary to the proposed rules.

Paragraph (e). Paragraph (e) of proposed rule 210.52 described how the Commission would be likely to compute the amount of the complainant's bond (if one is required as a prerequisite to the issuance of a temporary exclusion order or a temporary cease and desist order. It provided a tiered bond schedule based on sales of the product at issue and licensing royalties from the intellectual property right at issue.

The ITCTLA commented that it was unclear whether the $10,000 bond amount prescribed in the first tier of the schedule—i.e., for sales and licensing royalties of less than $1 million—would apply if the complainant has had *no sales.* The ITCTLA noted that this question could arise if the domestic industry is in the process of being established or if the complainant has been unable to build up sales because of the respondents' presence in the market. The ITCTLA thus suggested that "the scale should be modified to reflect the recognition that such circumstances may exist."

The Commission does not see the need to make the change the ITCTLA has suggested. Proposed rule 210.52(e) explicitly stated that the table was likely to be applied "*[i]n cases where a domestic industry exists and domestic sales of the product in question have commenced and have not been de minimis.*" This proviso precluded application of the schedule in situations of the sort that the ITCTLA has described.

The Commission also sees no need to revise any other provision of paragraph (e) of proposed rule 210.52 "to reflect recognition that [the circumstances the

[67] As the preamble to proposed rule 210.50(a) explained, the Commission thought it inappropriate to require another Federal agency to serve copies of its submission on the parties unless the agency also is a party to the proceeding (as, e.g., through intervention). The Commission also thought that the burden of serving parties should not be imposed on members of the public. *See* 57 FR at 52885.

[68] *See* 57 FR at 52885.

[69] The Commission has received, for example, submissions from the U.S. Customs Service, which Customs has explicitly requested not to be made available to anyone other than the Commission and the Commission staff (and personnel at other agencies who are involved in Presidential review of Commission remedial orders).

[70] Some section 337 investigations have large numbers of respondents. There were 112 respondents, for example, in Inv. No. 337–TA–112, *Certain Cube Puzzles* (1983).

ITCTLA cited] may exist." That paragraph expressly provided that "[i]n cases in which the aforesaid schedule would not be appropriate, the amount of the bond will be determined on a case-by-case basis." Paragraph (e) also indicated that in such cases, the motion for temporary relief should explain (1) why the prescribed schedule is not appropriate, and (2) the theory the complainant believes is appropriate for computing the amount of the bond.

The Commission thus has adopted paragraph (e) of proposed rule 210.52 as a final rule without making the changes the ITCTLA requested.

Section 210.55

Proposed rule 210.55 discussed redaction of confidential business information from the copies of the complaint and motion for temporary relief which the complainant is required to serve on each proposed respondent and the appropriate embassies.

Paragraph (b). Paragraph (b) of proposed rule 210.55 described the action that the Commission would take upon determining that the confidential designation had been abused in the preparation of sanitized service copies of the complaint and motion for temporary relief.

The ITCTLA commented that it was not clear whether paragraph (b) of proposed rule 210.55 provides the complainant with the right of appeal afforded under Commission rules 201.6(e) and (f).[71] The ITCTLA also expressed the opinion that the final rule should provide the standard that the Commission intends to apply to determine whether there have been over-designations.

The Commission did not intend for paragraph (b) of proposed rule 210.55 (or the corresponding paragraph of the final rule) to provide the complainant with the right of appeal afforded under Commission rules 201.6(e) and (f). The Commission does not think it necessary for the final rule to provide a standard for determining whether the confidential designation has been abused. Such determinations are more appropriately made on a case-by-case basis.

Potential complainants should be aware that abuse of the confidential designation and the consequent over-redaction of confidential information from the service copies of a complaint and motion for temporary relief may be sanctionable under final rule 210.4 depending on the facts.

Section 210.58

Proposed rule 210.58 indicates that the Commission will determine whether to provisionally accept a motion for temporary relief and institute an investigation in response to the complaint by a prescribed deadline, unless exceptional circumstances preclude adherence to that deadline.

The ITCTLA commented that it was not clear, under proposed rule 210.58 or proposed rule 210.10, what "exceptional circumstances" are. The ITCTLA questioned whether a definition of that term is desirable.

The Commission sees no need to add a definition of that term to the final rules. The fact that circumstances are "exceptional" strongly suggests that they are not susceptible to definition. Final rule 210.58 thus does not differ substantively from the proposed rule.

Section 210.70

Proposed rule 210.70 addressed the possible forfeiture of a complainant's temporary relief bond when the Commission determines, after issuing a temporary remedial order conditioned on a bond, that one or more respondents have not violated section 337.[72]

Paragraph (c). Paragraph (c) of proposed rule 210.70 enumerated the criteria that the presiding ALJ and the Commission will consider in determining whether to grant a motion for forfeiture of a complainant's temporary relief bond in whole or part. Paragraph (c)(2) indicated that in determining whether to grant the motion, the ALJ and the Commission will consider whether the complainant's filing of the motion for temporary relief was justified under the standard set forth in proposed rule 210.4(b).

In final rule 210.70, paragraph (c)(2) incorporates—

1. the standards of conduct articulated in paragraph (c) of final rule 210.4, and

2. the guidelines in paragraph (d) of final rule 210.4 for determining whether those standards were violated.

Hence, the approach that the ALJ and the Commission will take in bond forfeiture proceedings will be the following:

1. The ALJ and the Commission will determine whether the complainant or its attorneys, by presenting the motion for temporary relief (or a disputed portion thereof) to the presiding ALJ and the Commission (by signing, filing, submitting, or later advocating it), wrongfully certified that to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances—

(a) the motion for temporary relief was not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the investigation;

(b) the claims, defenses, and other legal contentions in the motion were warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(c) the allegations and other factual contentions had evidentiary support or, if specifically so identified, were likely to have evidentiary support after reasonable opportunity for further investigation or discovery; and

(d) the denials of factual contentions were warranted on the evidence or, if specifically so identified, were reasonably based on a lack of information or belief.

2. The ALJ and the Commission will keep in mind that the presentation of the motion for temporary relief (or the relevant portion thereof) by the complainant and its attorneys need not have been frivolous in its entirety in order for the ALJ or the Commission to determine that the standard of conduct articulated above was violated. If the ALJ or the Commission determines that any aspect of the presentation was false, frivolous, misleading, or otherwise in violation of the standards of conduct articulated above, the complainant may be ordered to forfeit its temporary relief bond, in whole or part.

3. In determining whether any of the prescribed standards of conduct has been violated, the ALJ and the Commission will consider whether the presentation of the motion for temporary relief (or the disputed portion thereof) was objectively reasonable under the circumstances.[73]

The Commission decided against drafting paragraph (c) of final rule 210.70 to incorporate the final rule 210.4(d) prohibition against imposing monetary sanctions on a party by reason of misconduct by the party's attorney in the presentation of legal arguments. In reaching a decision not to incorporate that prohibition, the Commission notes that adherence to the entire FRCP 11/ final rule 210.4 standard is not required.[74]

[71] Commission rule 201.6(e) provides the procedure for discretionary appeals to the Commission from the Secretary's *denial* of confidential treatment for a submission or portion thereof, while Commission rule 201.6(f) governs appeals from the Secretary's *granting* of such treatment for a submission or portion thereof. *See* 19 CFR 201.6(e) and (f) (1993).

[72] The forfeiture authority appears in the legislative history of the statute, but does not appear in the statute itself. *See* H.R. Rep. No. 576 at 635; 134 Cong. Rec. H2044 (Apr. 20, 1988); 133 Cong. Rec. S10365 (July 21, 1987).

[73] Consideration 1 above incorporates the standards of conduct set forth in paragraph (c) of final rule 210.4. Considerations 2 and 3 are based on the guidelines that appear in paragraph (d) of rule 210.4 for determining whether the 210.4(c) standards have been violated.

[74] As interested persons may recall, the legislative history providing authorization for the forfeiture of complainants' temporary relief bonds did not direct the Commission to use a particular FRCP as a model. The legislative history simply stated that the forfeiture authority should operate in the same way that respondents' temporary relief bonds "revert" to

The Commission notes further that forfeiture of a temporary relief bond, in whole or in part, is a monetary sanction imposed on the complainant—not its attorneys. If the amended FRCP 11/final rule 210.4 provisions had been made applicable in their entirety to temporary relief bond forfeiture proceedings, the ALJ and the Commission would have to take into account the conduct of the complainant's lawyers, as well as that of the complainant, in determining whether the presentation of the motion for temporary relief (or the relevant portion thereof) violated any of the prescribed standards,[75] and the complainant would be exempt from forfeitures based on misconduct by its attorneys in connection with the presentation of legal arguments.[76]

The Commission believes that a decision as to whether a complainant must forfeit its temporary relief bond in whole or part should be made on a case-by-case basis.[77] In a case in which the ALJ or the Commission finds misconduct by complainant's retained counsel, but decides that the misconduct should not be held against the complainant for purposes of bond forfeiture, separate proceedings can be initiated against such counsel.[78]

Paragraph (d). Paragraph (d) of proposed rule 210.70 stated that motions to stay temporary relief bond forfeiture proceedings would not be granted.

The ITCTLA commented that the final rule should provide for automatic stay of all bond forfeitures. The ITCTLA explained that—

> There are adequate safeguards throughout the rules to deter meritless section 337 temporary relief requests, making an absolute bar on staying forfeiture proceedings while an appeal is pending irrelevant to this concern. There is little inconvenience to respondents since they do not receive the bond amount, and the bond amount is of little significance to the U.S. Treasury. Complainants would prefer to keep the bond outstanding rather than paying the bond amount, especially since the bond may ultimately be returned. The current rule forces the complainant to incur additional legal expenses to recover the forfeited bond after winning on appeal. This is unnecessary and not an efficient allocation of the complainant's and the government's resources. Providing for an automatic stay of bond forfeiture would appear to better serve all parties.

The ITCTLA went on to say that if the Commission does not favor automatic stays of bond forfeitures, final rule 210.70(d) should provide for stays of forfeiture proceedings or the effective date of a forfeiture order on a case-by-case basis. The ITCTLA believes that in a case, for example, in which the complainant has based its appeal on a legal issue over which the Federal Circuit has not ruled, it would be appropriate for the Commission to stay forfeiture of the bond until the Federal Circuit has ruled.

The Commission notes that the legislative history of the bond forfeiture authority indicates that (1) the Commission's temporary relief bond forfeitures are to be effected in the same manner that the U.S. Customs Service collects liquidated damages on respondents' section 337 bonds, and (2) the implementing Customs regulations (19 CFR Part 172) do not provide for stays on the assessment of liquidated damages pending the outcome of judicial review of the relevant Commission determination. The Customs procedures have not changed in that regard. The Commission accordingly has not drafted paragraph (d) of final rule 210.70 to provide for stays of bond forfeitures.

Paragraph (d) of proposed rule 210.70 also provided that if the complainant wins on appeal, the complainant can file a petition requesting a refund of the amount of the bond forfeited or that the Commission may determine to provide a refund sua sponte. The ITCTLA commented there is no reason for the Government to retain the forfeited bond amount and that a refund should be forthcoming as a matter of procedure, and should not be dependent upon the complainant filing for a refund or the Commission considering the issue sua sponte. The Commission agrees and has drafted paragraph (d) of the final rule to provide that if the complainant prevails on appeal, a refund will be forthcoming as a matter of procedure (so that the complainant will not have to file for a refund and the Commission will not have to consider the issue sua sponte).

Subpart I—Enforcement Procedures and Advisory Opinions

Section 210.71

Proposed rule 210.71 discussed the gathering of information relevant to the enforcement of Commission orders.

Paragraph (a). Paragraph (a) of proposed rule 210.71 authorized the Commission to require persons to report facts that will aid the Commission in determining whether a remedial or consent order is being complied with and whether conditions that led to the order have changed.

The ITCTLA objected to this rule in part, apparently because it provided that the Commission can require information to aid *the Commission* in policing compliance with exclusion orders, even though it is the Customs Service and not the Commission that enforces such orders. The Commission has drafted paragraph (a) of the final rule in a manner which should not create the impression that exclusion orders are enforced by the Commission and not by the Customs Service.

The ITCTLA also objected to paragraph (a) of the proposed rule on the grounds that it provides, in effect, that the Commission may require signatories to consent order agreements to make reports that were not part of their agreement. The ITCTLA explained that under proposed rule 210.21(c)(3), signatories to consent order agreements must agree not to impede or challenge

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the U.S. Treasury when the Commission determines that imported articles that were permitted to enter the United States under a bond violate section 337. *See* H.R. Rep. No. 576 at 635; 134 Cong. Rec. H2044 (Apr. 20, 1988); 133 Cong. Rec. S10365 (July 21, 1987).

The Commission decided, on its own initiative, to use the FRCP 11 standard of conduct required by proposed rule 210.4(b) in determining whether a complainant should be ordered to forfeit its temporary relief bond in whole or part. The Commission agreed with commenters on the interim rules who suggested that the adoption of a single standard of conduct would eliminate the need to rationalize the differences between the rule governing forfeiture of a complainant's temporary relief bond as a sanction for abusing the temporary relief process and the general rule concerning sanctions for abuse of process. *See* 57 FR at 52860–52861 (the preamble to proposed rule 210.70).

[75] *See* amended FRCP 11(b) and final rule 210.4(c).

[76] *See* amended FRCP 11(c)(2)(B) and final rule 210.4(d). Both provide that monetary sanctions may not be imposed against a represented party for a violation of the requirement that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, * * * the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

[77] There may be cases in which the complainant's in-house counsel was equally—or primarily—responsible for the retained counsel's misconduct in the presentation of legal arguments concerning the motion for temporary relief. In such a case, it may be appropriate for the complainant to be penalized for its in-house counsel's actions, by having to forfeit all or a percentage of the temporary relief bond (depending on the degree of the in-house counsel's culpability and other relevant facts). On the other hand, if a forfeiture inquiry uncovers misconduct by complainant's retained counsel that did not involve the in-house counsel or any other officer or employee of the complainant, the complainant's lack of involvement may be a relevant equitable consideration under paragraph (c)(5) of final rule 210.70, and thus may be grounds for the Commission to either (a) decline to order forfeiture of the bond, or (b) order forfeiture of a smaller percentage than the Commission would have ordered if the complainant's in-house counsel (or other officers or employees) had been involved.

[78] Specifically, the ALJ or the Commission can issue an order directing the retained counsel to show cause why his conduct was not an abuse of process warranting the payment of a penalty and/or a nonmonetary sanction under final rule 210.4. *See* paragraphs (d)(1)(B) and (d)(2) of final rule 210.4.

in court any Commission effort to gather information pursuant to subpart I of part 210 (the proposed rules governing enforcement procedures and advisory opinions). Thus, a respondent who consents and stipulates to the entry of a consent order is also stipulating to permitting the Commission to request any information it deems pertinent to assisting it in determining whether and to what extent the respondent is complying with the consent order. The ITCTLA pointed out that a respondent could consent to a certain form of consent order, but the Commission could subsequently add reporting requirements to that form and issue the order in a form that the respondent does not consent to, and the respondent will essentially be without recourse, because it has waived the right to challenge the order in court.

The ITCTLA did not specifically ask the Commission to revise the relevant aspects of proposed rule 210.71, and the Commission does not think that any change is warranted. The Commission expects parties who execute consent order settlements to have read and thought through the consequences and implications of final rules 210.21(c)(3) and 210.71(a) before signing the agreement and asking the Commission to terminate the investigation in whole or part on the basis of the agreed upon consent order. A settling respondent who consents and stipulates to the entry of a consent order thus should be aware that it is also stipulating to permitting the Commission to require any additional compliance reports the Commission deems necessary or appropriate to ascertain whether the respondent is complying with the consent order.

The Commission notes also that because consent orders must be enforced, if necessary, by the Commission, it is not unreasonable for the Commission to impose its own reporting requirements so that it can know if the consent order is being complied with by the party to whom it is directed.

Section 210.74

Proposed rule 210.74 concerned the modification of reporting requirements.

Paragraph (a). Paragraph (a) of proposed rule 210.74 governed modification of reporting requirements for section 337 remedial orders.

The ITCTLA commented that paragraph (a) contained the same kind of ambiguity that is present in proposed rule 210.71(a)—namely, it indicates that the Commission can modify reporting requirements of exclusion orders to aid the Commission in policing compliance with such orders, even though it is the U.S. Customs Service and not the Commission that enforces exclusion orders.

The Commission has drafted paragraph (a) of the final rule in a manner which should not create the impression that exclusion orders are enforced by the Commission and not by the Customs Service.

Section 210.75

Proposed rule 210.75 set out the procedure to be used in proceedings to enforce exclusion orders, cease and desist orders, and consent orders.

Paragraph (c). Paragraph (c) of proposed rule 210.75 stated that the Commission need not give prior notice to any person before initiating civil action to enforce a remedial or consent order.

The ITCTLA commented that the court in which the civil action is initiated determines the type, timing, and sufficiency of the notice. For that reason, the ITCTLA suggested that final rule be drafted to state that the Commission need not give notice of its seeking judicial enforcement of an order, except as required by the court in which the civil action is initiated. The Commission has drafted paragraph (c) of final rule 210.75 in that manner.

Distribution Table

As stated above, the organization of the final rules differs significantly from that of the interim rules. To determine which final rule is replacing a particular interim rule, consult the following table.

Interim rule	Final rule
210.1	210.1
210.2	210.2
210.4	210.3
210.5(a)	210.4(a)
210.5(b)	210.4(b)–(e) (see also 210.25)
210.5(c)	210.4(f)
210.5(d)	210.4(g)
210.6	210.5(a) and (b) 210.5(c) 210.5(d)
210.7	210.6
210.8	210.7
210.10	210.8
210.11	210.9
210.12	210.10
210.13	210.11
210.20	210.12(a)–(g) 210.12(h)
210.21	210.13
210.22	210.14(a)–(c)
210.23	210.14(d)
210.24(a)–(d)	210.15
210.24(e)(1)	210.52
210.24(e)(2)	210.53(a)
210.24(e)(3)	210.53(b)
210.24(e)(4)	210.54
210.24(e)(5)	210.55
210.24(e)(6)	210.56
210.24(e)(7)	210.57
210.24(e)(8)	210.58
210.24(e)(9)	210.59
210.24(e)(10)	(see 210.58)
210.24(e)(11)	210.60
210.24(e)(12)	210.61
210.24(e)(13)	210.62
210.24(e)(14)	210.63
210.24(e)(15)	210.64
210.24(e)(16)	210.65
210.24(e)(17)	210.66
210.24(e)(18)	210.67
210.25	210.16 and 210.17
210.26	210.19
210.30 (a), (b), and (d)	210.27 (a), (b), and (c)
210.30(c)	(see 210.61) 210.27(d) (see also 210.25)
210.31	210.28(a)–(h) 210.28(i)
210.32	210.29
210.33	210.30
210.34	210.31
210.35	210.32(a)–(e) 210.32(f) 210.32(g)
210.36	210.33 (a) and (b) 210.33(c) (see also 210.25)
210.37	210.34(a)–(c) (see also 210.25) 210.34(d)
210.40	210.35
210.41	210.36
210.42	210.37
210.43	210.38
210.44(a)–(d)	210.39
210.44(e)	210.20 (see also 210.42(a)(2))
210.50	210.18
210.51 (a) and (b)	210.21 (a) and (b)
210.51(c)[79]	210.21(c)
210.51(d)	210.21(d) and 210.41
210.52	210.40
210.53(a)	210.42(a)(i)
210.53(b)	210.42(b)
210.53(c)–(i)	210.42(c)–(i)
210.53(j)	210.42 (b) and (c) and 210.70(c)
2210.54	210.43 and 210.46(a)
210.55	210.44
210.56	210.45
210.57	210.49
210.58(a)	210.50(a)
210.58(b) (1) and (2)	210.50(b) (1) and (2)
210.58(b)(3)	210.68(a)
210.58(b)(4)	210.68(b)
210.58(b)(5)	210.68(c)
210.58(b)(6)	210.68(d)
210.58(b)(7)	210.69(a)–(c)
210.58(b)(8)	210.69(d)
210.58(c)(1)	210.70 (a) and (c)
210.58(c)(2)	210.70(b)
210.58(c)(3)	210.70(e)
210.58(c)(4)	210.70(c)
210.58(c)(5)	210.70(d)

Interim rule	Final rule
210.59(a)	210.22 (a) and (b), 210.23, and 210.51 (a) and (c)
210.59(b)	210.22(c), 210.23, and 210.51(b) and (c)
210.60	210.47
210.61	210.48
210.70	210.24
210.71	
211.01	([80])
211.10	
211.20	210.21(c)(1)
211.21	210.21(c)(2)
211.22	210.21(c)(3)
211.50 (a) and (b)	([81])
211.50(c)	
211.51	210.71
211.52	210.72
211.53	210.73
211.54	210.79
211.55	211.74
211.56	210.75
211.57	210.76
211.58	210.77
211.59	210.78

[79] See also the entries for interim rules 211.20 through 211.22.

[80] But see final rule 210.1 and the definition in final rule 210.3 of the term "related proceeding."

[81] *Id.*

Derivation Table

To determine which interim rule is the basis, in whole or part, for a particular final rule, consult the following table:

Final rule	Interim rule
210.1	210.1
210.2	210.2
210.3	210.4
210.4(a)	210.5(a)
210.4(b)–(e)	210.5(b)
210.4(f)	210.5(c)
210.4(g)	210.5(d)
210.5 (a) and (b)	210.6
210.5(c)	
210.5(d)	
210.6	210.7
210.7	210.8
210.8	210.10
210.9	210.11
210.10	210.12
210.11	210.13
210.12(a)–(g)	210.20
210.12(h)	
210.13	210.21
210.14(a)–(c)	210.22
210.14(d)	210.23
210.15	210.24 (a)–(d)
210.16	210.25
210.17	210.25
210.18	210.50
210.19	210.26
210.20	210.44(e)
210.21 (a) and (b)	210.51 (a) and (b)
210.21(c)	210.51(c)
210.21(c)(1)	211.20
210.21(c)(2)	211.21
210.21(c)(3)	211.22

Final rule	Interim rule
210.21(d)	210.51(d)
210.22 (a) and (b)	210.59(a)
210.22(c)	210.59(b)
210.23	210.59 (a) and (b)
210.24	210.70
210.25	
210.26	
210.27 (a), (b), and (c)	210.30 (a), (b), and (d)
210.27(d)	
210.28(a)–(h)	210.31
210.28(i)	
210.29	210.32
210.30	210.33
210.31	210.34
210.32(a)–(e)	210.35
210.32(f)	
210.32(g)	
210.33 (a) and (b)	210.36
210.33(c)	
210.34 (a)–(c)	210.37
210.34(d)	
210.35	210.40
210.36	210.41
210.37	210.42
210.38	210.43
210.39	210.44 (a)–(d)
210.40	210.52
210.41	210.51(d)
210.42(a)(i)	210.53(a)
210.42(a)(ii)	
210.42(a)(2)	(but see 210.44(e))
210.42(b)	210.53 (b) and (j)
210.42(c)	210.53 (c) and (j)
210.42 (d)–(i)	210.53 (d)–(i)
210.43	210.54
210.44	210.55
210.45	210.56
210.46	210.54
210.47	210.60
210.48	210.61
210.49	210.57
210.50(a)	210.58(a)
210.50(b)	210.58(b) (1) and (2)
210.51(a)	210.210.59(a)
210.51(b)	210.210.59(b)
210.51(c)	210.59 (a) and (b)
210.52	210.24(e)(1)
210.53(a)	210.24(e)(2)
210.53(b)	210.24(e)(3)
210.54	210.24(e)(4)
210.55	210.24(e)(5)
210.56	210.24(e)(6)
210.57	210.24(e)(7)
210.58	210.24(e)(8)
210.59	210.24(e)(9)
210.60	210.24(e)(11)
210.61	210.24(e)(12)
210.62	210.24(e)(13)
210.63	210.24(e)(14)
210.64	210.24(e)(15)
210.65	210.24(e)(16)
210.66	210.24(e)(17)
210.67	210.24(e)(18)
210.68(a)	210.58(b)(3)
210.68(b)	210.58(b)(4)
210.68(c)	210.58(b)(5)
210.68(d)	210.58(b)(6)
210.69 (a)–(c)	210.210.58(b)(7)
210.69(d)	210.58(b)(8)
210.70(a)	210.58(c)(1)
210.70(b)	210.58(c)(2)
210.70(c)	210.58(c) (1) and (4)

Final rule	Interim rule
210.70(d)	210.58(c)(5)
210.70(e)	210.58(c)(3)
210.71	211.51
210.72	211.52
210.73	211.53
210.74	211.55
210.75	211.56
210.76	211.57
210.77	211.58
210.78	211.59
210.79	211.54

List of Subjects

19 CFR Part 210

Administrative practice and procedure, Advisory opinions, Business and industry, Customs duties and inspection, imports, and investigations, Enforcement, modification, or revocation of exclusion orders, cease and desist orders, or consent orders, Investigations of unfair acts and unfair methods of competition in U.S. import trade.

19 CFR Part 211

Administrative practice and procedure, Enforcement.

For the reasons set forth in the preamble, the U.S. International Trade Commission hereby removes Part 211 and revises Part 210 of Title 19 of the Code of Federal Regulations to read as follows:

SUBCHAPTER C—INVESTIGATIONS OF UNFAIR PRACTICES IN IMPORT TRADE

PART 210—ADJUDICATION AND ENFORCEMENT

Subpart A—Rules of General Applicability

Sec.
210.1 Applicability of part.
210.2 General policy.
210.3 Definitions.
210.4 Written submissions; representations; sanctions.
210.5 Confidential business information.
210.6 Computation of time, additional hearings, postponements, continuances, and extensions of time.
210.7 Service of process and other documents.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

210.8 Commencement of preinstitution proceedings.
210.9 Action of Commission upon receipt of complaint.
210.10 Institution of investigation.
210.11 Service of complaint and notice of investigation.

Subpart C—Pleadings

210.12 The complaint.
210.13 The response.
210.14 Amendments to pleadings and notice; supplemental submissions.

Subpart D—Motions

210.15 Motions.
210.16 Default.
210.17 Failures to act other than the statutory forms of default.
210.18 Summary determinations.
210.19 Intervention.
210.20 Declassification of confidential information.
210.21 Termination of investigations.
210.22 Designating an investigation "more complicated."
210.23 Suspension of investigation.
210.24 Interlocutory appeals.
210.25 Sanctions.
210.26 Other motions.

Subpart E—Discovery and Compulsory Process

210.27 General provisions governing discovery.
210.28 Depositions.
210.29 Interrogatories.
210.30 Requests for production of documents and things and entry upon land.
210.31 Requests for admission.
210.32 Subpoenas.
210.33 Failure to make or cooperate in discovery; sanctions.
210.34 Protective orders.

Subpart F—Prehearing Conferences and Hearings

210.35 Prehearing conferences.
210.36 General provisions for hearings.
210.37 Evidence.
210.38 Record.
210.39 In camera treatment of confidential information.
210.40 Proposed findings and conclusions and briefs.

Subpart G—Determinations and Actions Taken

210.41 Termination of investigation.
210.42 Initial determinations.
210.43 Petitions for review of initial determinations on matters other than temporary relief.
210.44 Commission review on its own motion of initial determinations on matters other than temporary relief.
210.45 Review of initial determinations on matters other than temporary relief.
210.46 Petitions for and sua sponte review of initial determinations on violation of section 337 or temporary relief.
210.47 Petitions for reconsideration.
210.48 Disposition of petitions for reconsideration.
210.49 Implementation of Commission action.
210.50 Commission action, the public interest, and bonding by respondents.
210.51 Period for concluding investigation.

Subpart H—Temporary Relief

210.52 Motions for temporary relief.
210.53 Motion filed after complaint.
210.54 Service of motion by the complainant.
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Authority: 19 U.S.C. 1333, 1335, and 1337, and sections 2 and 1342(d)(1)(B) of Pub. L. No. 100–418, 102 Stat. 1107.

Subpart A—Rules of General Applicability

§ 210.1 Applicability of part.

The rules in this part apply to investigations under section 337 of the Tariff Act of 1930 and related proceedings. These rules are authorized by sections 333, 335, or 337 of the Tariff Act of 1930 (19 U.S.C. §§ 1333, 1335, and 1337) and sections 2 and 1342(d)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107 (1988).

§ 210.2 General policy.

It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, all investigations and related proceedings under this part shall be conducted expeditiously. The parties, their attorneys or other representatives, and the presiding administrative law judge shall make every effort at each stage of the investigation or related proceeding to avoid delay.

§ 210.3 Definitions.

As used in this part—

Administrative law judge means the person appointed under section 3105 of title 5 of the United States Code who presides over the taking of evidence in an investigation under this part. If the Commission so orders or a section of this part so provides, an administrative law judge also may preside over stages of a related proceeding under this part.

Commission investigative attorney means a Commission attorney designated to engage in investigatory activities in an investigation or a related proceeding under this part.

Complainant means a person who has filed a complaint with the Commission under this part, alleging a violation of section 337 of the Tariff Act of 1930.

Intervenor means a person who has been granted leave by the Commission to intervene as a party to an investigation or a related proceeding under this part.

Investigation means a formal Commission inquiry instituted to determine whether there is a violation of section 337 of the Tariff Act of 1930. An investigation is instituted upon publication of a notice in the **Federal Register**. The investigation entails postinstitution adjudication of the complaint. An investigation can also involve the processing of one or more of the following: A motion to amend the complaint and notice of investigation; a motion for temporary relief; a motion to designate "more complicated" the temporary or the permanent relief stage of the investigation; an interlocutory appeal of an administrative law judge's decision on a particular matter; a motion for sanctions for abuse of process, abuse of discovery, or failure to make or cooperate in discovery, which if granted, would have an impact on the adjudication of the merits of the complaint; a petition for reconsideration of a final Commission determination; a motion for termination of the investigation in whole or part; and procedures undertaken in response to a judgment or judicial order issued in an appeal of a Commission determination or remedial order issued under section 337. Final termination of an investigation occurs when the Commission issues a nonappealable determination, order, or notice that ends the investigation, when any administrative or judicial review relating to the final Commission action has ended, or when the time for seeking such review has expired.

Party means each complainant, respondent, intervenor, or Commission investigative attorney.

Proposed intervenor means any person who has filed a motion to intervene in an investigation or a related proceeding under this part.

Proposed respondent means any person named in a complaint filed under this part as allegedly violating section 337 of the Tariff Act of 1930.

Related proceeding means preinstitution proceedings, sanction proceedings (for the possible issuance of sanctions that would not have a bearing on the adjudication of the merits of a complaint or a motion under this part), bond forfeiture proceedings, proceedings to enforce, modify, or revoke a remedial or consent order, or advisory opinion proceedings.

Respondent means any person named in a notice of investigation issued under this part as allegedly violating section 337 of the Tariff Act of 1930.

§ 210.4 Written submissions; representations; sanctions.

(a) *Caption; names of parties.* The front page of every written submission filed by a party or a proposed party to an investigation or a related proceeding under this part shall contain a caption setting forth the name of the Commission, the title of the investigation or related proceeding, the docket number or investigation number, if any, assigned to the investigation or related proceeding, and in the case of a complaint, the names of the complainant and all proposed respondents.

(b) *Signature.* Every pleading, written motion, and other paper of a party or proposed party who is represented by an attorney in an investigation or a related proceeding under this part shall be signed by at least one attorney of record in the attorney's individual name. A party or proposed party who is not represented by an attorney shall sign, or his duly authorized officer or agent shall sign, the pleading, written motion, or other paper. Each paper shall state the signer's address and telephone number, if any. Pleadings, written motions, and other papers need not be under oath or accompanied by an affidavit, except as provided in §§ 210.12(a)(1), 210.13(b), 210.18, 210.52(d), 210.59(b), or another section of this part or by order of the administrative law judge or the Commission. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after omission of the signature is called to the attention of the submitter.

(c) *Representations.* By presenting to the presiding administrative law judge or the Commission (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party or proposed party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the investigation or related proceeding;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(d) *Sanctions.* If, after notice and a reasonable opportunity to respond (see paragraphs (d)(1) (i) and (ii) of this section and § 210.25), the presiding administrative law judge or the Commission determines that paragraph (c) of this section has been violated, the administrative law judge or the Commission may, subject to the conditions stated below and in § 210.25, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated paragraph (c) or are responsible for the violation. A representation need not be frivolous in its entirety in order for the administrative law judge or the Commission to determine that paragraph (c) has been violated. If any portion of a representation is found to be false, frivolous, misleading, or otherwise in violation of paragraph (c), a sanction may be imposed. In determining whether paragraph (c) has been violated, the administrative law judge or the Commission will consider whether the representation or disputed portion thereof was objectively reasonable under the circumstances.

(1) *How initiated*—(i) *By motion.* A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate paragraph (c). It shall be served as provided in paragraph (g) of this section, but shall not be filed with or presented to the presiding administrative law judge or the Commission unless, within seven days after service of the motion (or such other period as the administrative law judge or the Commission may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. See also § 210.25 (a) through (c). If warranted, the administrative law judge or the Commission may award to the party or proposed party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(ii) *On the administrative law judge's or the Commission's initiative.* The administrative law judge or the Commission may enter an order sua sponte describing the specific conduct that appears to violate paragraph (c) of this section and directing an attorney, law firm, party, or proposed party to show cause why it has not violated paragraph (c) with respect thereto.

(2) *Nature of sanctions; limitations.* A sanction imposed for violation of paragraph (c) of this section shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (d)(2) (i) through (iv) of this section, the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(i) Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(ii) Monetary sanctions may not be awarded against a represented party or proposed party for a violation of paragraph (c)(2) of this section.

(iii) Monetary sanctions may not be imposed on the administrative law judge's or the Commission's initiative unless—

(A) The Commission or the administrative law judge issues an order to show cause before the investigation or related proceeding is terminated, in whole or in relevant part, as to the party or proposed party which is, or whose attorneys are, to be sanctioned; and

(B) Such termination is the result of—

(*1*) A motion to withdraw the complaint, motion, or petition that was the basis for the investigation or related proceeding,

(*2*) A settlement agreement, or

(*3*) A consent order agreement.

(iv) Monetary sanctions imposed to compensate the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations will include reimbursement for some or all costs reasonably incurred as a direct result of the violation, but will not include attorney's fees.

(3) *Order.* When imposing sanctions, the administrative law judge or the Commission shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed. See also § 210.25 (d) and (f).

(e) *Inapplicability to discovery.* Paragraphs (c) and (d) of this section do not apply to discovery requests, responses, objections, and motions that are subject to provisions of §§ 210.27 through 210.34.

(f) *Specifications; filing of documents.* (1) (i) Written submissions that are addressed to the Commission during an investigation or a related proceeding shall comply with § 201.8 of this chapter, except for the provisions regarding the number of copies to be submitted. The required number of copies shall be governed by paragraph (f)(2) of this section. Written submissions may be produced by standard typographic printing or by a duplicating or copying process which produces a clear black image on white paper. If the submission is produced by other than the standard typographical process used by commercial printers, typed matter shall not exceed 6½ by 9½ inches using 10-pitch (pica) or larger pitch type or 5½ by 8½ inches using 11-point or larger proportional spacing type, and shall be double-spaced between each line of text using the standard of 6 lines of type per inch. Text and footnotes shall be in the same size type. Quotations more than two lines long in the text or footnotes may be indented and single-spaced. Headings and footnotes may be single-spaced.

(ii) The administrative law judge may impose any specifications he deems appropriate for submissions that are addressed to the administrative law judge.

(2) Unless the Commission or another section of this part specifically states otherwise, the original and 6 true copies of each submission shall be filed if the investigation or related proceeding is before an administrative law judge, and the original and 14 true copies of each submission shall be filed if the investigation or related proceeding is before the Commission.

(3) Persons who file the following submissions that contain confidential business information covered by an administrative protective order, or that are the subject of a request for confidential treatment, must file nonconfidential copies and serve them on the other parties to the investigation or related proceeding within 10 calendar days after filing the confidential version with the Commission:

(i) A complaint and all supplements and exhibits thereto;

(ii) A response to a complaint and all supplements and exhibits thereto;

(iii) All submissions relating to a motion to amend the complaint or notice of investigation; and

(iv) All submissions addressed to the Commission. Other sections of this part may require, or the Commission or the administrative law judge may order, the filing and service of nonconfidential copies of other kinds of confidential submissions. If the submitter's ability to prepare a nonconfidential copy is dependent upon receipt of the nonconfidential version of an initial determination, or a Commission order or opinion, or a ruling by the administrative law judge or the Commission as to whether some or all of the information at issue is entitled to confidential treatment, the nonconfidential copies of the submission must be filed within 10 calendar days after service of the Commission or administrative law judge document in question. The time periods for filing specified in this paragraph apply unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

(g) *Service.* Unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise, every written submission filed by a party or proposed party shall be served on all other parties in the manner specified in § 201.16(b) of this chapter.

§ 210.5 Confidential business information.

(a) *Definition and submission.* Confidential business information shall be defined and identified in accordance with § 201.6(a) and (c) of this chapter. Unless otherwise ordered by the Commission or the administrative law judge, confidential business information shall be submitted in accordance with § 201.6(c).

(b) *Restrictions on disclosure.* Information submitted to the Commission or exchanged among the parties in connection with an investigation or a related proceeding under this part, which is properly designated confidential under paragraph (a) of this section and § 201.6(a) of this chapter, may not be disclosed to anyone other than the following persons without the consent of the submitter:

(1) Persons who are granted access to confidential information under § 210.39(a) or a protective order issued pursuant to § 210.34(a);

(2) An officer or employee of the Commission who is directly concerned with carrying out or maintaining the records of the investigation or related proceeding for which the information was submitted;

(3) An officer or employee of the United States Government who is directly involved in a review conducted pursuant to section 337(j) of the Tariff Act of 1930; or

(4) An officer or employee of the United States Customs Service who is directly involved in administering an exclusion from entry under section 337(d) or (g) of the Tariff Act or an entry under bond under section 337(e) of the Tariff Act resulting from the investigation in connection with which the information was submitted.

(c) *Confidentiality determinations in preinstitution proceedings.* After a complaint is filed under section 337 of the Tariff Act of 1930 and before an investigation is instituted by the Commission, confidential business information designated confidential by the supplier shall be submitted in accordance with § 201.6(b) of this chapter. The Secretary shall decide, in accordance with § 201.6(d) of this chapter, whether the information is entitled to confidential treatment. Appeals from the ruling of the Secretary shall be made to the Commission as set forth in § 201.6(e) and (f) of this chapter.

(d) *Confidentiality determinations in investigations and other related proceedings.* (1) If an investigation is instituted or if a related proceeding is assigned to an administrative law judge, the administrative law judge shall set the ground rules for the designation, submission, and handling of information designated confidential by the submitter. When requested to do so, the administrative law judge shall decide whether information in a document addressed to the administrative law judge, or to be exchanged among the parties while the administrative law judge is presiding, is entitled to confidential treatment. The administrative law judge shall also decide, with respect to all orders, initial determinations, or other documents issued by the administrative law judge, whether information designated confidential by the supplier is entitled to confidential treatment. The supplier of the information or the person seeking

the information may, with leave of the administrative law judge, request an appeal to the Commission of the administrative law judge's unfavorable ruling on this issue, under § 210.24(b)(2).

(2) The Commission may continue protective orders issued by the administrative law judge, amend or revoke those orders, or issue new ones. All submissions addressed to the Commission that contain information covered by an existing protective order will be given confidential treatment. (See also § 210.72.) New information that is submitted to the Commission, designated confidential by the supplier, and not covered by an existing protective order must be submitted to the Secretary with a request for confidential treatment in accordance with § 201.6(b) and (c) of this chapter. The Secretary shall decide, in accordance with § 201.6(d) of this chapter, whether the information is entitled to confidential treatment. Appeals from the ruling of the Secretary shall be made to the Commission as provided in § 201.6(e) and (f) of this chapter. The Commission shall decide, with respect to all orders, notices, opinions, and other documents issued by or on behalf of the Commission, whether information designated confidential by the supplier is entitled to confidential treatment.

§ 210.6 Computation of time, additional hearings, postponements, continuances, and extensions of time.

Unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise, the computation of time and the granting of additional hearings, postponements, continuances, and extensions of time shall be in accordance with §§ 201.14 and 201.16(d) of this chapter. Whenever a party has the right or is required to perform some act or to take some action within a prescribed period after service of a document upon it, and the document was served by mail, the deadline shall be computed by adding to the end of the prescribed period the additional time allotted under § 201.16(d), unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

§ 210.7 Service of process and other documents.

The service of process and all documents issued by or on behalf of the Commission or the administrative law judge—and the service of all documents issued by parties under §§ 210.27 through 210.34 of this part—shall be in accordance with § 201.16 of this chapter, unless the Commission, the administrative law judge, or another section of this part specifically provides otherwise.

Subpart B—Commencement of Preinstitution Proceedings and Investigations

§ 210.8 Commencement of preinstitution proceedings.

(a) *Upon receipt of complaint.* A preinstitution proceeding is commenced by filing with the Secretary the original and 14 true copies of a complaint, plus one copy for each person named in the complaint as violating section 337 of the Tariff Act of 1930 and one copy for the government of each foreign country of any person or persons so named. If the complainant is seeking temporary relief, one additional copy of the motion for such relief also must be filed for each proposed respondent and for the government of the foreign country of the proposed respondent. The additional copies of the complaint and motion for temporary relief for each proposed respondent and the appropriate foreign government are to be provided notwithstanding the procedures applicable to a motion for temporary relief, which require service of the complaint and motion for temporary relief by the complainant.

(b) *Upon the initiative of the Commission.* The Commission may upon its initiative commence a preinstitution proceeding based upon any alleged violation of section 337 of the Tariff Act of 1930.

§ 210.9 Action of Commission upon receipt of complaint.

Upon receipt of a complaint alleging violation of section 337 of the Tariff Act of 1930, the Commission shall take the following actions:

(a) *Examination of complaint.* The Commission shall examine the complaint for sufficiency and compliance with the applicable sections of this chapter.

(b) *Informal investigatory activity.* The Commission shall identify sources of relevant information, assure itself of the availability thereof, and, if deemed necessary, prepare subpoenas therefore, and give attention to other preliminary matters.

§ 210.10 Institution of investigation.

(a)(1) The Commission shall determine whether the complaint is properly filed and whether an investigation should be instituted on the basis of the complaint. That determination shall be made within 30 days after the complaint is filed, unless—

(i) Exceptional circumstances preclude adherence to a 30-day deadline;

(ii) Additional time is allotted under other sections of this part in connection with the preinstitution processing of a motion by the complainant for temporary relief;

(iii) The complainant requests that the Commission postpone the determination on whether to institute an investigation; or

(iv) The complainant withdraws the complaint.

(2) If exceptional circumstances preclude Commission adherence to the 30-day deadline for determining whether to institute an investigation on the basis of the complaint, the determination will be made as soon after that deadline as possible.

(3) If additional time is allotted in connection with the preinstitution processing of a motion by the complainant for temporary relief, the Commission will determine whether to institute an investigation and provisionally accept the motion within 35 days after the filing of the complaint or by a subsequent deadline computed in accordance with § 210.53(a), § 210.54, § 210.55(b), § 210.57, or § 210.58 as applicable.

(4) If the complainant desires to have the Commission postpone making a determination on whether to institute an investigation in response to the complaint, the complainant must file a written request with the Secretary. If the request is granted, the determination will be rescheduled for whatever date is appropriate in light of the facts.

(5)(i) The complainant may withdraw the complaint as a matter of right at any time before the Commission votes on whether to institute an investigation. To effect such withdrawal, the complainant must file a written notice with the Commission. If the complaint is being withdrawn pursuant to a settlement agreement, a copy of the agreement must be filed with the Commission along with the notice of withdrawal. If the agreement contains confidential business information within the meaning of § 201.6(a) of this chapter, at least one copy of the agreement with such information deleted shall accompany the motion, in addition to a copy of the confidential version.

(ii) If a motion for temporary relief was filed in addition to the complaint, the motion must be withdrawn along with the complaint, and the complainant must serve copies of the notice of withdrawal on all proposed respondents and on the embassies that

were served with copies of the complaint and motion pursuant to § 210.54.

(b) An investigation shall be instituted by the publication of a notice in the **Federal Register**. The notice will define the scope of the investigation and may be amended as provided in § 210.14 (b) and (c).

(c) If the Commission determines not to institute an investigation on the basis of the complaint, the complaint shall be dismissed, and the complainant and all proposed respondents will receive written notice of the Commission's action and the reason(s) therefor.

§ 210.11 Service of complaint and notice of investigation.

(a) Notwithstanding the provisions of § 210.54 requiring service of the complaint by the complainant, the Commission, upon institution of an investigation, shall serve copies of the complaint and the notice of investigation (and any accompanying motion for temporary relief) upon the following:

(1) Each respondent;

(2) The U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other agencies and departments as the Commission considers appropriate; and

(3) The embassy in Washington, DC of the government of each foreign country represented by each respondent.

All respondents named after an investigation has been instituted and the governments of the foreign countries they represent shall be served as soon as possible after the respondents are named.

(b) With leave from the presiding administrative law judge, a party may attempt to effect personal service of the complaint and notice of investigation upon a respondent, if the Secretary's efforts to serve the respondent by certified mail have been unsuccessful. If the party succeeds in serving the respondent by personal service, the party must notify the administrative law judge and file proof of such service with the Secretary.

Subpart C—Pleadings

§ 210.12 The complaint.

(a) *Contents of the complaint.* In addition to conforming with the requirements of § 201.8 of this chapter and §§ 210.4 and 210.5 of this part, the complaint shall—

(1) Be under oath and signed by the complainant or his duly authorized officer, attorney, or agent, with the name, address, and telephone number of the complainant and any such officer, attorney, or agent given on the first page of the complaint;

(2) Include a statement of the facts constituting the alleged unfair methods of competition and unfair acts;

(3) Describe specific instances of alleged unlawful importations or sales, and shall provide the Tariff Schedules of the United States item number(s) for importations occurring prior to January 1, 1989, and the Harmonized Tariff Schedule of the United States item number(s) for importations occurring on or after January 1, 1989;

(4) State the name, address, and nature of the business (when such nature is known) of each person alleged to be violating section 337 of the Tariff Act of 1930;

(5) Include a statement as to whether the alleged unfair methods of competition and unfair acts, or the subject matter thereof, are or have been the subject of any court or agency litigation, and, if so, include a brief summary of such litigation;

(6)(i) If the complaint alleges a violation of section 337 based on infringement of a U.S. patent, or a federally registered copyright, trademark, or mask work, under section 337(a)(1) (B), (C), or (D) of the Tariff Act of 1930, include a description of the relevant domestic industry as defined in section 337(a)(3) that allegedly exists or is in the process of being established, including the relevant operations of any licensees. Relevant information includes but is not limited to:

(A) Significant investment in plant and equipment;

(B) Significant employment of labor or capital; or

(C) Substantial investment in the exploitation of the subject patent, copyright, trademark, or mask work, including engineering, research and development, or licensing; or

(ii) If the complaint alleges a violation of section 337 of the Tariff Act of 1930 based on unfair methods of competition and unfair acts that have the threat or effect of destroying or substantially injuring an industry in the United States or preventing the establishment of such an industry under section 337(a)(1)(A) (i) or (ii), include a description of the domestic industry affected, including the relevant operations of any licensees; or

(iii) If the complaint alleges a violation of section 337 of the Tariff Act of 1930 based on unfair methods of competition or unfair acts that have the threat or effect of restraining or monopolizing trade and commerce in the United States under section 337(a)(1)(A)(iii), include a description of the trade and commerce affected.

(7) Include a description of the complainant's business and its interests in the relevant domestic industry or the relevant trade and commerce. For every intellectual property based complaint (regardless of the type of intellectual property right involved), include a showing that at least one complainant is the owner or exclusive licensee of the subject intellectual property; and

(8) If the alleged violation involves an unfair method of competition or an unfair act other than those listed in paragraph (a)(6)(i) of this section, state a specific theory and provide corroborating data to support the allegation(s) in the complaint concerning the existence of a threat or effect to destroy or substantially injure a domestic industry, to prevent the establishment of a domestic industry, or to restrain or monopolize trade and commerce in the United States. The information that should ordinarily be provided includes the volume and trend of production, sales, and inventories of the involved domestic article; a description of the facilities and number and type of workers employed in the production of the involved domestic article; profit-and-loss information covering overall operations and operations concerning the involved domestic article; pricing information with respect to the involved domestic article; when available, volume and sales of imports; and other pertinent data.

(9) Include, when a complaint is based upon the infringement of a valid and enforceable U.S. patent—

(i) The identification of each U.S. letters patent and a certified copy thereof (a legible copy of each such patent will suffice for each required copy of the complainant);

(ii) The identification of the ownership of each involved U.S. letters patent and a certified copy of each assignment of each such patent (a legible copy thereof will suffice for each required copy of the complaint);

(iii) The identification of each licensee under each involved U.S. letters patent;

(iv) When known, a list of each foreign patent, each foreign patent application (not already issued as a patent), and each foreign patent application that has been denied corresponding to each involved U.S. letters patent, with an indication of the prosecution status of each such foreign patent application;

(v) A nontechnical description of the invention of each involved U.S. letters patent;

(vi) A reference to the specific claims in each involved U.S. letters patent that allegedly cover the article imported or sold by each person named as violating section 337 of the Tariff Act of 1930, or the process under which such article was produced;

(vii) A showing that each person named as violating section 337 of the Tariff Act of 1930 is importing or selling the article covered by, or produced under the involved process covered by, the above specific claims of each involved U.S. letters patent. The complainant shall make such showing by appropriate allegations, and when practicable, by a chart that applies an exemplary claim of each involved U.S. letters patent to a representative involved domestic article or process and to a representative involved article of each person named as violating section 337 of the Tariff Act or to the process under which such article was produced; and

(viii) Drawings, photographs, or other visual representations of both the involved domestic article or process and the involved article of each person named as violating section 337 of the Tariff Act of 1930, or of the process utilized in producing the imported article, and, when a chart is furnished under paragraph (a)(9)(vii) of this section, the parts of such drawings, photographs, or other visual representations should be labeled so that they can be read in conjunction with such chart; and

(10) Contain a request for relief, and if temporary relief is requested under section 337 (e) and/or (f) of the Tariff Act of 1930, a motion for such relief shall accompany the complaint as provided in § 210.52(a) or may follow the complaint as provided in § 210.53(a).

(b) *Submissions of articles as exhibits.* At the time the complaint is filed, if practicable, the complainant shall submit both the domestic article and all imported articles that are the subject of the complaint.

(c) *Additional material to accompany each patent-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by, or produced under a process covered by, the claims of a valid U.S. letters patent the following:

(1) Three copies of each license agreement arising out of each involved U.S. letters patent, except that, to the extent that a standard license agreement is used, three copies of the standard license agreement and a list of the licensees operating under such agreement will suffice;

(2) One certified copy of the U.S. Patent and Trademark Office prosecution history for each involved U.S. letters patent, plus three additional copies thereof; and

(3) Four copies of each patent and applicable pages of each technical reference mentioned in the prosecution history of each involved U.S. letters patent.

(d) *Additional material to accompany each registered trademark-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a Federally registered trademark, one certified copy of the Federal registration and three additional copies, three copies of each license agreement (if any) concerning use of the trademark, except that if a standard license agreement is used, three copies of that agreement and a list of the licensees operating under it will suffice;

(e) *Additional material to accompany each complaint based on a non-Federally registered trademark.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a non-Federally registered trademark the following:

(1) A detailed and specific description of the alleged trademark;

(2) Information concerning prior attempts to register the alleged trademark; and

(3) Information on the status of current attempts to register the alleged trademark.

(f) *Additional material to accompany each copyright-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of an article covered by a copyright one certified copy of the Federal registration and three additional copies, three copies of each license agreement (if any) concerning use of the copyright, except that if a standard license agreement is used, three copies of that agreement and a list of the licensees operating under it will suffice;

(g) *Additional material to accompany each registered mask work-based complaint.* There shall accompany the submission of the original of each complaint based upon the alleged unauthorized importation or sale of a semiconductor chip in a manner that constitutes infringement of a Federally registered mask work, one certified copy of the Federal registration and three additional copies, three copies of each license agreement (if any) concerning use of the mask work, except that if a standard license agreement is used, three copies of that agreement and a list of the licensees operating under it will suffice;

(h) *Duty to supplement complaint.* Complainant shall supplement the complaint prior to institution of an investigation if complainant obtains information upon the basis of which he knows or reasonably should know that a material legal or factual assertion in the complaint is false or misleading.

§ 210.13 The response.

(a) *Time for response.* Except as provided in § 210.59(a) and unless otherwise ordered in the notice of investigation or by the administrative law judge, respondents shall have 20 days from the date of service of the complaint and notice of investigation, by the Commission under § 210.11(a) or by a party under § 210.11(b), within which to file a written response to the complaint and the notice of investigation. When the investigation involves a motion for temporary relief and has not been declared "more complicated," the response to the complaint and notice of investigation must be filed along with the response to the motion for temporary relief—i.e., within 10 days after service of the complaint, notice of investigation, and the motion for temporary relief by the Commission under § 210.11(a) or by a party under § 210.11(b). (See § 210.59.)

(b) *Content of the response.* In addition to conforming to the requirements of § 201.8 of this chapter and §§ 210.4 and 210.5 of this part, each response shall be under oath and signed by respondent or his duly authorized officer, attorney, or agent with the name, address, and telephone number of the respondent and any such officer, attorney, or agent given on the first page of the response. Each respondent shall respond to each allegation in the complaint and in the notice of investigation, and shall set forth a concise statement of the facts constituting each ground of defense. There shall be a specific admission, denial, or explanation of each fact alleged in the complaint and notice, or if the respondent is without knowledge of any such fact, a statement to that effect. Allegations of a complaint and notice not thus answered may be deemed to have been admitted. Each response shall include, when available, statistical data on the quantity and value of imports of the involved article. Respondents who are importers must also provide the Harmonized Tariff Schedule item number(s) for

importations of the accused imports occurring on or after January 1, 1989, and the Tariff Schedules of the United States item number(s) for importations occurring before January 1, 1989. Each response shall also include a statement concerning the respondent's capacity to produce the subject article and the relative significance of the United States market to its operations. Respondents who are not manufacturing their accused imports shall state the name and address of the supplier(s) of those imports. Affirmative defenses shall be pleaded with as much specificity as possible in the response. When the alleged unfair methods of competition and unfair acts are based upon the claims of a valid U.S. letters patent, the respondent is encouraged to make the following showing when appropriate:

(1) If it is asserted in defense that the article imported or sold by respondents is not covered by, or produced under a process covered by, the claims of each involved U.S. letters patent, a showing of such noncoverage for each involved claim in each U.S. letters patent in question shall be made, which showing may be made by appropriate allegations and, when practicable, by a chart that applies the involved claims of each U.S. letters patent in question to a representative involved imported article of the respondent or to the process under which such article was produced;

(2) Drawings, photographs, or other visual representations of the involved imported article of respondent or the process utilized in producing such article, and, when a chart is furnished under paragraph (b)(1) of this section, the parts of such drawings, photographs, or other visual representations, should be labeled so that they can be read in conjunction with such chart; and

(3) If the claims of any involved U.S. letters patent are asserted to be invalid or unenforceable, the basis for such assertion, including, when prior art is relied on, a showing of how the prior art renders each claim invalid or unenforceable and a copy of such prior art. For good cause, the presiding administrative law judge may waive any of the substantive requirements imposed under this paragraph or may impose additional requirements.

(c) *Submission of article as exhibit.* At the time the response is filed, if practicable, the respondent shall submit the accused article imported or sold by that respondent, unless the article has already been submitted by the complainant.

§ 210.14 Amendments to pleadings and notice; supplemental submissions.

(a) *Preinstitution amendments.* The complaint may be amended at any time prior to the institution of the investigation.

(b) *Postinstitution amendments generally.* (1) After an investigation has been instituted, the complaint or notice of investigation may be amended only by leave of the Commission for good cause shown and upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation. A motion for amendment must be made to the presiding administrative law judge. If the proposed amendment of the complaint would require amending the notice of investigation, the presiding administrative law judge may grant the motion only by filing with the Commission an initial determination. All other dispositions of such motions shall be by order.

(2) If disposition of the issues in an investigation on the merits will be facilitated, or for other good cause shown, the presiding administrative law judge may allow appropriate amendments to pleadings other than complaints upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation.

(c) *Postinstitution amendments to conform to evidence.* When issues not raised by the pleadings or notice of investigation, but reasonably within the scope of the pleadings and notice, are considered during the taking of evidence by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings and notice. Such amendments of the pleadings and notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time, and shall be effective with respect to all parties who have expressly or impliedly consented.

(d) *Supplemental submissions.* The administrative law judge may, upon reasonable notice and on such terms as are just, permit service of a supplemental submission setting forth transactions, occurrences, or events that have taken place since the date of the submission sought to be supplemented and that are relevant to any of the issues involved.

Subpart D—Motions

§ 210.15 Motions.

(a) *Presentation and disposition.* (1) During the period between the institution of an investigation and the assignment of the investigation to a presiding administrative law judge, all motions shall be addressed to the chief administrative law judge. During the time that an investigation or related proceeding is before an administrative law judge, all motions therein shall be addressed to the administrative law judge.

(2) When an investigation or related proceeding is before the Commission, all motions shall be addressed to the Chairman of the Commission. A motion to amend the complaint and notice of investigation to name an additional respondent after institution shall be served on the proposed respondent. All motions shall be filed with the Secretary and shall be served upon each party.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) *Responses to motions.* Within 10 days after service of any written motions, or within such longer or shorter time as may be designated by the administrative law judge or the Commission, a nonmoving party, or in the instance of a motion to amend the complaint or notice of investigation to name an additional respondent after institution, the proposed respondent, shall respond or he may be deemed to have consented to the granting of the relief asked for in the motion. The moving party shall have no right to reply, except as permitted by the administrative law judge or the Commission.

(d) *Motions for extensions.* As a matter of discretion, the administrative law judge or the Commission may waive the requirements of this section as to motions for extension of time, and may rule upon such motions ex parte.

§ 210.16 Default.

(a) *Definition of default.* (1) A party shall be found in default if it fails to respond to the complaint and notice of investigation in the manner prescribed in § 210.13 or § 210.59(c), or otherwise fails to answer the complaint and notice, and fails to show cause why it should not be found in default.

(2) A party may be found in default as a sanction for abuse of process, under § 210.4(c), or failure to make or cooperate in discovery, under § 210.33(b).

(b) *Procedure for determining default.* (1) If a respondent has failed to respond or appear in the manner described in paragraph (a)(1) of this section, a party may file a motion for, or the administrative law judge may issue upon his own initiative, an order directing that respondent to show cause why it should not be found in default. If the respondent fails to make the

necessary showing, the administrative law judge shall issue an initial determination finding the respondent in default. An administrative law judge's decision denying a motion for a finding of default under paragraph (a)(1) of this section shall be in the form of an order.

(2) Any party may file a motion for issuance of, or the administrative law judge may issue on his own initiative, an initial determination finding a party in default for abuse of process under § 210.4(c) or failure to make or cooperate in discovery. A motion for a finding of default as a sanction for abuse of process or failure to make or cooperate in discovery shall be granted by initial determination or denied by order.

(3) A party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation.

(c) *Relief against a respondent in default.* (1) After a respondent has been found in default by the Commission, the complainant may file with the Commission a declaration that it is seeking immediate entry of relief against the respondent in default. The facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent. The Commission may issue an exclusion order, a cease and desist order, or both, affecting the defaulting respondent only after considering the effect of such order(s) upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, and concluding that the order(s) should still be issued in light of the aforementioned public interest factors.

(2) In any motion requesting the entry of default or the termination of the investigation with respect to the last remaining respondent in the investigation, the complainant shall declare whether it is seeking a general exclusion order. The Commission may issue a general exclusion order pursuant to section 337(g)(2) of the Tariff Act of 1930, regardless of the source or importer of the articles concerned, provided that a violation of section 337 of the Tariff Act is established by substantial, reliable, and probative evidence, and only after considering the aforementioned public interest factors.

§ 210.17 Failures to act other than the statutory forms of default.

Failures to act other than the defaults listed in § 210.16 may provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930), and orders that are adverse to the party who fails to act. Such failures include, but are not limited to:

(a) Failure to respond to a motion that materially alters the scope of the investigation or a related proceeding;

(b) Failure to respond to a motion for temporary relief pursuant to § 210.59;

(c) Failure to respond to a motion for summary determination under § 210.18;

(d) Failure to appear at a hearing before the administrative law judge after filing a written response to the complaint or motion for temporary relief, or failure to appear at a hearing before the Commission;

(e) Failure to file a brief or other written submission requested by the administrative law judge or the Commission during an investigation or a related proceeding;

(f) Failure to respond to a petition for review of an initial determination, a petition for reconsideration of an initial determination, or an application for interlocutory review of an administrative law judge's order;

(g) Failure to file a brief or other written submission requested by the administrative law judge or the Commission; and

(h) Failure to participate in temporary relief bond forfeiture proceedings under § 210.70.

The presiding administrative law judge or the Commission may take action under this rule sua sponte or in response to the motion of a party.

§ 210.18 Summary determinations.

(a) *Motions for summary determinations.* Any party may move with any necessary supporting affidavits for a summary determination in his favor upon all or any part of the issues to be determined in the investigation. Counsel or other representatives in support of the complaint may so move at any time after 20 days following the date of service of the complaint and notice instituting the investigation. Any other party or a respondent may so move at any time after the date of publication of the notice of investigation in the **Federal Register**. Any such motion by any party in connection with the issue of permanent relief, however, must be filed at least 30 days before the date fixed for any hearing provided for in § 210.36(a)(1). Any motion for summary determination filed in connection with the temporary relief phase of an investigation must be filed on or before the deadline set by the presiding administrative law judge.

(b) *Opposing affidavits; oral argument; time and basis for determination.* Any nonmoving party may file opposing affidavits within 10 days after service of the motion for summary determination. The administrative law judge may, in his discretion or at the request of any party, set the matter for oral argument and call for the submission of briefs or memoranda. The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

(c) *Affidavits.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The administrative law judge may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary determination is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of the opposing party's pleading, but the opposing party's response, by affidavits, answers to interrogatories, or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue of fact for the evidentiary hearing under § 210.36(a)(1) or (2). If the opposing party does not so respond, a summary determination, if appropriate, shall be rendered against the opposing party.

(d) *Refusal of application for summary determination; continuances and other orders.* Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the administrative law judge may refuse the application for summary determination, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is appropriate, and a ruling to that effect shall be made a matter of record.

(e) *Order establishing facts.* If on motion under this section a summary determination is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the administrative law judge, by examining the pleadings and the evidence and by interrogating counsel if necessary, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The administrative law judge shall thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the investigation as are warranted. The facts so specified shall be deemed established.

(f) *Order of summary determination.* An order of summary determination shall constitute an initial determination of the administrative law judge.

§ 210.19 Intervention.

Any person desiring to intervene in an investigation or a related proceeding under this part shall make a written motion. The motion shall have attached to it a certificate showing that the motion has been served upon each party to the investigation or related proceeding in the manner described in § 201.16(b) of this chapter. Any party may file a response to the motion in accordance with § 210.15(c) of this part, provided that the response is accompanied by a certificate confirming that the response was served on the proposed intervenor and all other parties. The Commission, or the administrative law judge by initial determination, may grant the motion to the extent and upon such terms as may be proper under the circumstances.

§ 210.20 Declassification of confidential information.

(a) Any party may move to declassify documents (or portions thereof) that have been designated confidential by the submitter but that do not satisfy the confidentiality criteria set forth in § 201.6(a) of this chapter. All such motions, whether brought at any time during the investigation or after conclusion of the investigation shall be addressed to and ruled upon by the presiding administrative law judge, or if the investigation is not before a presiding administrative law judge, by the chief administrative law judge or such administrative law judge as he may designate.

(b) Following issuance of a public version of the initial determination on whether there is a violation of section 337 of the Tariff Act of 1930 or an initial determination that would otherwise terminate the investigation (if adopted by the Commission), the granting of a motion, in whole or part, to declassify information designated confidential shall constitute an initial determination, except as to that information for which no submissions in opposition to declassification have been filed.

§ 210.21 Termination of investigations.

(a) *Motions for termination.* (1) Any party may move at any time prior to the issuance of an initial determination on violation of section 337 of the Tariff Act of 1930 for an order to terminate an investigation in whole or in part as to any or all respondents, on the basis of withdrawal of the complaint or certain allegations contained therein, or for good cause other than the grounds listed in paragraph (a)(2) of this section. The presiding administrative law judge may grant the motion in an initial determination upon such terms and conditions as he deems proper.

(2) Any party may move at any time for an order to terminate an investigation in whole or in part as to any or all respondents on the basis of a settlement, a licensing or other agreement, or a consent order, as provided in paragraphs (b) and (c) of this section.

(b) *Termination by Settlement.* (1) An investigation before the Commission may be terminated as to one or more respondents pursuant to section 337(c) of the Tariff Act of 1930 on the basis of a licensing or other settlement agreement. A motion for termination by settlement shall contain copies of the licensing or other settlement agreement, any supplemental agreements, and a statement that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation. If the licensing or other settlement agreement contains confidential business information within the meaning of § 201.6(a) of this chapter, a copy of the agreement with such information deleted shall accompany the motion.

(2) The motion and agreement(s) shall be certified by the administrative law judge to the Commission with an initial determination if the motion for termination is granted. If the licensing or other agreement or the initial determination contains confidential business information, copies of the agreement and initial determination with confidential business information deleted shall be certified to the Commission simultaneously with the confidential versions of such documents. The Commission shall promptly publish a notice in the Federal Register stating that an initial determination has been received, that nonconfidential versions of the initial determination and the agreement are available for inspection in the Office of the Secretary, and that interested persons may submit written comments concerning termination of the respondents in question within 10 days of the date of publication of the notice in the Federal Register. An order of termination by settlement need not constitute a determination as to violation of section 337 of the Tariff Act of 1930.

(c) *Termination by entry of consent order.* An investigation before the Commission may be terminated pursuant to section 337(c) of the Tariff Act of 1930 on the basis of a consent order. An order of termination by consent order need not constitute a determination as to violation of section 337.

(1) *Opportunity to submit proposed consent order. (i) Prior to institution of an investigation.* Where time, the nature of the proceeding, and the public interest permit, any person being investigated pursuant to section 603 of the Trade Act of 1974 (19 U.S.C. § 2482) shall be afforded the opportunity to submit to the Commission a proposal for disposition of the matter under investigation in the form of a consent order stipulation that incorporates a proposed consent order executed by or on behalf of such person and that complies with the requirements of paragraph (c)(3) of this section.

(ii) *Subsequent to institution of an investigation.* In investigations under section 337 of the Tariff Act of 1930, a proposal to terminate by consent order shall be submitted as a motion to the administrative law judge with a stipulation that incorporates a proposed consent order. If the stipulation contains confidential business information within the meaning of § 201.6(a) of this chapter, a copy of the stipulation with such information deleted shall accompany the motion. The stipulation shall comply with the requirements of paragraph (c)(3)(i) of this section. At any time prior to commencement of the hearing, the motion may be filed by one or more respondents, and may be filed jointly with other parties to the investigation. Upon request and for good cause shown, the administrative law judge may consider such a motion during or after a hearing. The filing of the motion shall not stay proceedings before the administrative law judge unless the administrative law judge so orders. The administrative law judge shall promptly file with the Commission an initial determination regarding the

motion for termination if the motion is granted. If the initial determination contains confidential business information, a copy of the initial determination with such information deleted shall be filed with the Commission simultaneously with the filing of the confidential version of the initial determination. Pending disposition by the Commission of a consent order stipulation, a party may not, absent good cause shown, withdraw from the stipulation once it has been submitted pursuant to this section.

(2) *Commission disposition of consent order.* (i) If an initial determination granting the motion for termination based on a consent order stipulation is filed with the Commission, the Commission shall promptly serve copies of the nonconfidential version of the initial determination and the consent order stipulation on the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as the Commission deems appropriate.

(ii) The Commission, after considering the effect of the settlement by consent order upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, shall dispose of the initial determination according to the procedures of §§ 210.42 through 210.45. An order of termination by consent order need not constitute a determination as to violation of section 337. The Commission shall publish in the **Federal Register** and serve on all parties notice of its action. Should the Commission reverse the initial determination, the parties are in no way bound by their proposal in later actions before the Commission.

(3) *Contents of consent order stipulation.* (i) *Contents.*

(A) Every consent order stipulation shall contain, in addition to the proposed consent order, the following:

(*1*) An admission of all jurisdictional facts;

(*2*) An express waiver of all rights to seek judicial review or otherwise challenge or contest the validity of the consent order;

(*3*) A statement that the signatories to the consent order stipulation will cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of this part; and

(*4*) A statement that the enforcement, modification, and revocation of the consent order will be carried out pursuant to subpart I of this part, incorporating by reference the Commission's Rules of Practice and Procedure.

(B) In the case of an intellectual property-based investigation, the consent order stipulation shall also contain—

(*1*) a statement that the consent order shall not apply with respect to any claim of any intellectual property right that has expired or been found or adjudicated invalid or unenforceable by the Commission or a court or agency of competent jurisdiction, provided that such finding or judgment has become final and nonreviewable; and

(*2*) a statement that each signatory to the stipulation who was a respondent in the investigation will not seek to challenge the validity of the intellectual property right(s), in any administrative or judicial proceeding to enforce the consent order.

(C) The consent order stipulation may contain a statement that the signing thereof is for settlement purposes only and does not constitute admission by any respondent that an unfair act has been committed.

(ii) *Effect, interpretation, and reporting.* The consent order shall have the same force and effect and may be enforced, modified, or revoked in the same manner as is provided in section 337 of the Tariff Act of 1930 and this part for other Commission actions. The Commission may require periodic compliance reports pursuant to subpart I of this part to be submitted by the person entering into the consent order stipulation.

(d) *Effect of termination.* An order of termination issued by the administrative law judge shall constitute an initial determination.

§ 210.22 Designating an investigation "more complicated".

(a) *Definition.* A "more complicated" investigation is an investigation that is of an involved nature owing to the subject matter, difficulty in obtaining information, the large number of parties involved, or other significant factors.

(b) *Permanent relief.* Upon motion or sua sponte, the administrative law judge or the Commission may issue an order designating an investigation "more complicated" in order to have up to six months of additional time to adjudicate a complainant's request for permanent relief under section 337 of the Tariff Act of 1930. See § 210.51(a) of this part. The administrative law judge or the Commission shall publish a notice in the **Federal Register** announcing the designation and the reasons for it. If the designation is imposed by the administrative law judge prior to issuance of an initial determination on violation of section 337 of the Tariff Act, any party aggrieved by the designation may file an application for interlocutory review under § 210.24(a)(2). If the designation is imposed by the administrative law judge in an order issued concurrently with the initial determination on violation of section 337, any party may contest the designation in a petition for review, as if the order were an initial determination issued under § 210.42(c). The extended deadline for concluding the permanent relief phase of an investigation that has been designated "more complicated" under this paragraph shall be computed in the manner specified in § 210.51(c).

(c) *Temporary relief.* The Commission or the presiding administrative law judge, pursuant to § 210.60, may declare an investigation "more complicated" in order to have up to 60 days of additional time to adjudicate a motion for temporary relief. See also § 210.51(b). The Commission's or the administrative law judge's reasons for designating the investigation "more complicated" for that purpose shall be published in the **Federal Register**. The extended deadline for concluding an investigation that has been designated "more complicated" under this paragraph shall be computed in the manner specified in § 210.51(c).

§ 210.23 Suspension of investigation.

Any party may move to suspend an investigation under this part, because of the pendency of proceedings in a court or agency of the United States involving questions concerning the subject matter of the investigation that are similar to the questions being adjudicated by the Commission. The administrative law judge or the Commission also may raise the issue sua sponte. An administrative law judge's decision granting a motion for suspension shall be in the form of an initial determination.

§ 210.24 Interlocutory appeals.

Rulings by the administrative law judge on motions may not be appealed to the Commission prior to the administrative law judge's issuance of an initial determination, except in the following circumstances:

(a) *Appeals without leave of the administrative law judge.* The Commission may in its discretion entertain interlocutory appeals, except as provided in § 210.64, when a ruling of the administrative law judge:

(1) Requires the disclosure of Commission records or requires the

appearance of Government officials pursuant to § 210.32(c)(2);

(2) Designates the permanent relief phase of an investigation "more complicated" pursuant to § 210.22(b); or

(3) Denies an application for intervention under § 210.19. Appeals from such rulings may be sought by filing an application for review, not to exceed 15 pages, with the Commission within five days after service of the administrative law judge's ruling. An answer to the application for review may be filed within five days after service of the application. The application for review should specify the person or party taking the appeal, designate the ruling or part thereof from which appeal is being taken, and specify the reasons and present arguments as to why review is being sought. The Commission may, upon its own motion, enter an order staying the return date of an order issued by the administrative law judge pursuant to § 210.32(c)(2) or may enter an order placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues that will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals with leave of the administrative law judge.*

(1) Except as otherwise provided in paragraph (a) of this section, § 210.64, and paragraph (b)(2) of this section, applications for review of a ruling by an administrative law judge may be allowed only upon request made to the administrative law judge and upon determination by the administrative law judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion, and that either an immediate appeal from the ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy.

(2) Applications for review of a ruling by an administrative law judge under § 210.5(d)(1) as to whether information designated confidential by the supplier is entitled to confidential treatment under § 210.5(b) may be allowed only upon request made to the administrative law judge and upon determination by the administrative law judge in writing, with justification in support thereof.

(3) A written application for review under paragraph (b)(1) or (b)(2) of this section shall not exceed 15 pages and may be filed within five days after service of the administrative law judge's determination. An answer to the application for review may be filed within five days after service of the application for review. Thereupon, the Commission may, in its discretion, permit an appeal. Unless otherwise ordered by the Commission, Commission review, if permitted, shall be confined to the application for review and answer thereto, without oral argument or further briefs.

(c) *Investigation not stayed.* Application for review under this section shall not stay the investigation before the administrative law judge unless the administrative law judge or the Commission shall so order.

§ 210.25 Sanctions.

(a) (1) Any party may file a motion for sanctions for abuse of process under § 210.4(d)(1), abuse of discovery under § 210.27(d)(3), failure to make or cooperate in discovery under § 210.33 (b) or (c), or violation of a protective order under § 210.34(c). A motion alleging abuse of process should be filed promptly after the requirements of § 210.4(d)(1)(i) have been satisfied. A motion alleging abuse of discovery, failure to make or cooperate in discovery, or violation of a protective order should be filed promptly after the allegedly sanctionable conduct is discovered.

(2) The administrative law judge (when the investigation or related proceeding is before him) or the Commission (when the investigation or related proceeding is before it) also may raise the sanction issue sua sponte. (See also §§ 210.4(d)(1)(ii), 210.27(d)(3), 210.33(c), and 210.34(c).)

(b) A motion for sanctions shall be addressed to the presiding administrative law judge, if the allegedly sanctionable conduct occurred and is discovered while the administrative law judge is presiding in an investigation or in a related proceeding. During an investigation, the administrative law judge's ruling on the motion shall be in the form of an order, if it is issued before or concurrently with the initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of the investigation. In a related proceeding, the administrative law judge's ruling shall be in the form of an order, regardless of the point in time at which the order is issued.

(c) A motion for sanctions shall be addressed to the Commission, if the allegedly sanctionable conduct occurred while the Commission is presiding or is filed after the subject investigation or related proceeding is terminated. The Commission may assign the motion to an administrative law judge for issuance of a recommended determination. The deadlines and procedures that will be followed in processing the recommended determination will be set forth in the Commission order assigning the motion to an administrative law judge.

(d) If an administrative law judge's order concerning sanctions is issued before the initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of the investigation, it may be appealed under § 210.24(b)(1) with leave from the administrative law judge, if the requirements of that section are satisfied. If the order is issued concurrently with the initial determination, the order may be appealed by filing a petition meeting the requirements of § 210.43(b). The periods for filing such petitions and responding to the petitions will be specified in the Commission notice issued pursuant to § 210.42(i), if the initial determination has granted a motion for termination of the investigation, or in the Commission notice issued pursuant to § 210.46(a), if the initial determination concerns violation of section 337. The Commission will determine whether to adopt the order after disposition of the initial determination concerning violation of section 337 or termination of the investigation.

(e) If the administrative law judge's ruling on the motion for sanctions is in the form of a recommended determination pursuant to paragraph (c) of this section, the deadlines and procedures for parties to contest the recommended determination will be set forth in the Commission order assigning the motion to an administrative law judge.

(f) If a motion for sanctions is filed with the administrative law judge during an investigation, he may defer his adjudication of the motion until after he has issued a final initial determination concerning violation of section 337 of the Tariff Act of 1930 or termination of investigation. If the administrative law judge defers his adjudication in such a manner, his ruling on the motion for sanctions must be in the form of a recommended determination and shall be issued no later than 90 days after issuance of the aforesaid initial determination on violation of section 337 or termination of the investigation. To aid the Commission in determining whether to adopt a recommended determination, any party may file written comments with the Commission 14 days after service of the recommended determination. Replies to such comments may be filed within seven

days after service of the comments. The Commission will determine whether to adopt the recommended determination after reviewing the parties' arguments and taking any other steps the Commission deems appropriate.

§ 210.26 Other motions.

Motions pertaining to discovery shall be filed in accordance with § 210.15 and the pertinent provisions of subpart E of this part (§§ 210.27 through 210.34). Motions pertaining to evidentiary hearings and prehearing conferences shall be filed in accordance with § 210.15 and the pertinent provisions of subpart F of this part (§§ 210.35 through 210.40). Motions for temporary relief shall be filed as provided in subpart H of this part (see §§ 210.52 through 210.57).

Subpart E—Discovery and Compulsory Process

§ 210.27 General provisions governing discovery.

(a) *Discovery methods.* The parties to an investigation may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; and requests for admissions.

(b) *Scope of discovery.* Regarding the scope of discovery for the temporary relief phase of an investigation, see § 210.61. For the permanent relief phase of an investigation, unless otherwise ordered by the administrative law judge, a party may obtain discovery regarding any matter, not privileged, that is relevant to the following:

(1) The claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things;

(2) The identity and location of persons having knowledge of any discoverable matter;

(3) The appropriate remedy for a violation of section 337 of the Tariff Act of 1930 (see § 210.42(a)(1)(ii)(A)); or

(4) The appropriate bond for the respondents, under section 337(j)(3) of the Tariff Act of 1930, during Presidential review of the remedial order (if any) issued by the Commission (see § 210.42(a)(1)(ii)(B)).

It is not grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) *Supplementation of Responses.* (1) A party who has responded to a request for discovery with a response is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the administrative law judge or the Commission or in the following circumstances: A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A duty to supplement responses also may be imposed by agreement of the parties, or at any time prior to a hearing through new requests for supplementation of prior responses.

(d) *Signing of Discovery Requests, Responses, and Objections.* (1) The front page of every request for discovery or response or objection thereto shall contain a caption setting forth the name of the Commission, the title of the investigation or related proceeding, and the docket number or investigation number, if any, assigned to the investigation or related proceeding.

(2) Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and shall state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the request, objection, or response is:

(i) Consistent with § 210.5(a) (if applicable) and other relevant provisions of this chapter, and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(ii) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(iii) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a request, response, or objection is certified in violation of paragraph (d)(2) of this section, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25 of this part, may impose an appropriate sanction upon the person who made the certification, the party on whose behalf the request, response, or objection was made, or both.

(4) An appropriate sanction may include an order to pay to the other parties the amount of reasonable expenses incurred because of the violation, including a reasonable attorney's fee, to the extent authorized by Rule 26(g) of the Federal Rules of Civil Procedure. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(5) Monetary sanctions may be imposed under this section to reimburse the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations. Monetary sanctions will not be imposed under this section to reimburse the Commission for attorney's fees.

§ 210.28 Depositions.

(a) *When depositions may be taken.* Following publication in the **Federal Register** of a Commission notice instituting the investigation, any party may take the testimony of any person, including a party, by deposition upon oral examination or written questions. The presiding administrative law judge will determine the permissible dates or deadlines for taking such depositions.

(b) *Persons before whom depositions may be taken.* Depositions may be taken before a person having power to administer oaths by the laws of the United States or of the place where the examination is held.

(c) *Notice of examination.* A party desiring to take the deposition of a person shall give notice in writing to every other party to the investigation. The administrative law judge shall determine the appropriate period for providing such notice. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. A notice may provide for the taking of testimony by telephone, but the administrative law judge may, on motion of any party, require that the

deposition be taken in the presence of the deponent. The parties may stipulate in writing, or the administrative law judge may upon motion order, that the testimony at a deposition be recorded by other than stenographic means. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(d) *Taking of deposition.* Each deponent shall be duly sworn, and any adverse party shall have the right to cross-examine. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. Evidence objected to shall be taken subject to the objections, except that privileged communications and subject matter need not be disclosed. The questions propounded and the answers thereto, together with all objections made, shall be reduced to writing, after which the deposition shall be subscribed by the deponent (unless the parties by stipulation waive signing or the deponent is ill or cannot be found or refuses to sign) and certified by the person before whom the deposition was taken. If the deposition is not subscribed by the deponent, the person administering the oath shall state on the record such fact and the reason therefor. When a deposition is recorded by stenographic means, the stenographer shall certify on the transcript that the witness was sworn in the stenographer's presence and that the transcript is a true record of the testimony of the witness. When a deposition is recorded by other than stenographic means and is thereafter transcribed, the person transcribing it shall certify that the person heard the witness sworn on the recording and that the transcript is a correct writing of the recording. Thereafter, that person shall forward one copy to each party who was present or represented at the taking of the deposition. See paragraph (i) of this section concerning the effect of errors and irregularities in depositions.

(e) *Depositions of nonparty officers or employees of the Commission or of other Government agencies.* A party desiring to take the deposition of an officer or employee of the Commission other than the Commission investigative attorney, or of an officer or employee of another Government agency, or to obtain documents or other physical exhibits in the custody, control, and possession of such officer or employee, shall proceed by written motion to the administrative law judge for leave to apply for a subpoena under § 210.32(c). Such a motion shall be granted only upon a showing that the information expected to be obtained thereby is within the scope of discovery permitted by § 210.27(b) or § 210.61 and cannot be obtained without undue hardship by alternative means.

(f) *Service of deposition transcripts on the Commission staff.* The party taking the deposition shall promptly serve one copy of the deposition transcript on the Commission investigative attorney.

(g) *Admissibility of depositions.* The fact that a deposition is taken and filed with the Commission investigative attorney as provided in this section does not constitute a determination that it is admissible in evidence or that it may be used in the investigation. Only such part of a deposition as is received in evidence at a hearing shall constitute a part of the record in such investigation upon which a determination may be based. Objections may be made at the hearing to receiving in evidence any deposition or part thereof for any reason that would require exclusion of the evidence if the witness were then present and testifying.

(h) *Use of depositions.* A deposition may be used as evidence against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness;

(2) The deposition of a party may be used by an adverse party for any purpose;

(3) The deposition of a witness, whether or not a party, may be used by any party for any purposes if the administrative law judge finds—

(i) That the witness is dead; or

(ii) That the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon application and notice, that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the oral testimony of witnesses at a hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part that ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(i) *Effect of errors and irregularities in depositions.*

(1) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving notice.

(2) *As to disqualification of person before whom the deposition is to be taken.* Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to taking of depositions.* (i) Objections to the competency of a witness or the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(ii) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(iii) Objections to the form of written questions submitted under this section are waived unless served in writing upon the party propounding them. The presiding administrative law judge shall set the deadline for service of such objections.

(4) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the person before whom it is taken are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

§ 210.29 Interrogatories.

(a) *Scope; use at hearing.* Any party may serve upon any other party written interrogatories to be answered by the party served. Interrogatories may relate to any matters that can be inquired into under § 210.27(b) or § 210.61, and the answers may be used to the extent permitted by the rules of evidence.

(b) *Procedure.* (1) Interrogatories may be served upon any party after the date of publication in the **Federal Register** of the notice of investigation.

(2) Parties answering interrogatories shall repeat the interrogatories being answered immediately preceding the answers. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within the time specified by the administrative law judge. The party submitting the interrogatories may move for an order under § 210.33(a) with respect to any objection to or other failure to answer an interrogatory.

(3) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or a later time.

(c) *Option to produce records.* When the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specifications provided shall include sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the documents from which the answer may be ascertained.

§ 210.30 Requests for production of documents and things and entry upon land.

(a) *Scope.* Any party may serve on any other party a request:

(1) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, and other data compilations from which information can be obtained), or to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 210.27(b).

(b) *Procedure.* (1) The request may be served upon any party after the date of publication in the **Federal Register** of the notice of investigation. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(2) The party upon whom the request is served shall serve a written response within the time specified by the administrative law judge. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of any item or category, the part shall be specified. The party submitting the request may move for an order under § 210.33(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request.

(c) *Persons not parties.* This section does not preclude issuance of an order against a person not a party to permit entry upon land.

§ 210.31 Requests for admission.

(a) *Form, content, and service of request for admission.* Any party may serve on any other party a written request for admission of the truth of any matters relevant to the investigation and set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter as to which an admission is requested shall be separately set forth. The request may be served upon a party whose complaint is the basis for the investigation after the date of publication in the **Federal Register** of the notice of investigation. The administrative law judge will determine the period within which a party may serve a request upon other parties.

(b) *Answers and objections to requests for admissions.* A party answering a request for admission shall repeat the request for admission immediately preceding his answer. The matter may be deemed admitted unless, within the period specified by the administrative law judge, the party to whom the request is directed serves upon the party requesting the admission a sworn written answer or objection addressed to the matter. If objection is made, the reason therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter as to which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known to or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter as to which an admission has been requested presents a genuine issue for a hearing may not object to the request on that ground alone; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) *Sufficiency of answers.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of this section, he may order either that the matter is admitted or that an amended answer be served. The administrative law judge may, in lieu of these orders, determine that final

disposition of the request be made at a prehearing conference or at a designated time prior to a hearing under this part.

(d) *Effect of admissions; withdrawal or amendment of admission.* Any matter admitted under this section may be conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission. The administrative law judge may permit withdrawal or amendment when the presentation of the issues of the investigation will be subserved thereby and the party who obtained the admission fails to satisfy the administrative law judge that withdrawal or amendment will prejudice him in maintaining his position on the issue of the investigation. Any admission made by a party under this section is for the purpose of the pending investigation only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding.

§ 210.32 Subpoenas.

(a) *Application for issuance of a subpoena.* (1) *Subpoena ad testificandum.* An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge.

(2) *Subpoena duces tecum.* An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and the reasonableness of the scope of the subpoena.

(3) The administrative law judge shall rule on all applications filed under paragraph (a)(1) or (a)(2) of this section and may issue subpoenas when warranted.

(b) *Use of subpoena for discovery.* Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits that constitute or contain evidence relevant to the subject matter involved and that are in the possession, custody, or control of such person.

(c) *Application for subpoenas for nonparty Commission records or personnel or for records and personnel of other Government agencies.* (1) *Procedure.* An application for issuance of a subpoena requiring the production of nonparty documents, papers, books, physical exhibits, or other material in the records of the Commission, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent could not be obtained without undue hardship or by alternative means.

(2) *Ruling.* Such applications shall be ruled upon by the administrative law judge, and he may issue such subpoenas when warranted. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) *Application for subpoena grounded upon the Freedom of Information Act.* No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. § 552) shall be entertained by the administrative law judge.

(d) *Motion to limit or quash.* Any motion to limit or quash a subpoena shall be filed within such time as the administrative law judge may allow.

(e) *Ex parte rulings on applications for subpoenas.* Applications for the issuance of the subpoenas pursuant to the provisions of this section may be made ex parte, and, if so made, such applications and rulings thereon shall remain ex parte unless otherwise ordered by the administrative law judge.

(f) *Witness Fees.* (1) *Deponents and witnesses.* Any person compelled to appear in person to depose or testify in response to a subpoena shall be paid the same mileage as are paid witnesses with respect to proceedings in the courts of the United States; provided, that salaried employees of the United States summoned to depose or testify as to matters related to their public employment, irrespective of the party at whose instance they are summoned, shall be paid in accordance with the applicable Federal regulations.

(2) *Responsibility.* The fees and mileage referred to in paragraph (f)(1) of this section shall be paid by the party at whose instance deponents or witnesses appear. Fees due under this paragraph shall be tendered no later than the date for compliance with the subpoena issued under this section. Failure to timely tender fees under this paragraph shall not invalidate any subpoena issued under this section.

(g) *Obtaining judicial enforcement.* In order to obtain judicial enforcement of a subpoena issued under paragraphs (a)(3) or (c)(2) of this section, the administrative law judge shall certify to the Commission, on motion or sua sponte, a request for such enforcement. The request shall be accompanied by copies of relevant papers and a written report from the administrative law judge concerning the purpose, relevance, and reasonableness of the subpoena. The Commission will subsequently issue a notice stating whether it has granted the request and authorized its Office of the General Counsel to seek such enforcement.

§ 210.33 Failure to make or cooperate in discovery; sanctions.

(a) *Motion for order compelling discovery.* A party may apply to the administrative law judge for an order compelling discovery upon reasonable notice to other parties and all persons affected thereby.

(b) *Non-monetary sanctions for failure to comply with an order compelling discovery.* If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise

rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or

(6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure.

Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If, in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

(c) *Monetary sanctions for failure to make or cooperate in discovery.* (1) If a party or an officer, director, or managing agent of the party or person designated to testify on behalf of a party fails to obey an order to provide or permit discovery, the administrative law judge or the Commission may make such orders in regard to the failure as are just. In lieu of or in addition to taking action listed in paragraph (b) of this section and to the extent provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, the administrative law judge or the Commission, upon motion or sua sponte under § 210.25, may require the party failing to obey the order or the attorney advising that party or both to pay reasonable expenses, including attorney's fees, caused by the failure, unless the administrative law judge or the Commission finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

(2) Monetary sanctions may be imposed under this section to reimburse the Commission for expenses incurred by a Commission investigative attorney or the Commission's Office of Unfair Import Investigations. Monetary sanctions will not be imposed under this section to reimburse the Commission for attorney's fees.

§ 210.34 Protective orders.

(a) *Issuance of protective order.* Upon motion by a party or by the person from whom discovery is sought or by the administrative law judge on his own initiative, and for good cause shown, the administrative law judge may make any order that may appear necessary and appropriate for the protection of the public interest or that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the administrative law judge;

(6) That a deposition, after being sealed, be opened only by order of the Commission or the administrative law judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; and

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or the administrative law judge. If the motion for a protective order is denied, in whole or in part, the Commission or the administrative law judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The Commission also may, upon motion or sua sponte, issue protective orders or may continue or amend a protective order issued by the administrative law judge.

(b) *Unauthorized disclosure of information.* If confidential business information submitted in accordance with the terms of a protective order is disclosed to any person other than in a manner authorized by the protective order, the party responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of the submitter of the information and the administrative law judge or the Commission, and, without prejudice to other rights and remedies of the submitter of the information, make every effort to prevent further disclosure of such information by the party or the recipient of such information.

(c) *Violation of protective order.* Any individual who has agreed to be bound by the terms of a protective order issued pursuant to paragraph (a) of this section, and who is determined to have violated the terms of the protective order, may be subject to one or more of the following:

(1) An official reprimand by the Commission;

(2) Disqualification from or limitation of further participation in a pending investigation;

(3) Temporary or permanent disqualification from practicing in any capacity before the Commission pursuant to § 201.15(a) of this chapter;

(4) Referral of the facts underlying the violation to the appropriate licensing authority in the jurisdiction in which the individual is licensed to practice;

(5) Sanctions of the sort enumerated in § 210.33(b), or such other action as may be appropriate.

The issue of whether sanctions should be imposed may be raised on a motion by a party, the administrative law judge's own motion, or the Commission's own initiative in accordance with § 210.25(a)(2). The Commission or the administrative law judge shall allow the parties to make written submissions and, if warranted, to present oral argument bearing on the issues of violation of a protective order and sanctions therefor. When the motion is addressed to the administrative law judge, he shall grant or deny a motion for sanctions by issuing an order.

(d) *Reporting requests for confidential business information.* (1) *Reporting Requirement.* Each person subject to protective order issued pursuant to paragraph (a) of this section shall report in writing to the Commission immediately upon learning that confidential business information disclosed to him or her pursuant to the protective order is the subject of a subpoena, court or administrative order (other than an order of a court reviewing a Commission decision), discovery request, agreement, or other written request seeking disclosure, by him or any other person, of that confidential business information to persons who are not, or may not be, permitted access to that information pursuant to either a Commission protective order or § 210.5(b).

(2) *Sanctions and other actions.* After providing notice and an opportunity to comment, the Commission may impose a sanction upon any person who willfully fails to comply with paragraph (d)(1) of this section, or it may take other action.

Subpart F—Prehearing Conferences and Hearings

§ 210.35 Prehearing conferences.

(a) *When appropriate.* The administrative law judge in any investigation may direct counsel or other representatives for all parties to meet with him for one or more conferences to consider any or all of the following:

(1) Simplification and clarification of the issues;

(2) Scope of the hearing;

(3) Necessity or desirability of amendments to pleadings subject, however, to the provisions of § 210.14 (b) and (c);

(4) Stipulations and admissions of either fact or the content and authenticity of documents;

(5) Expedition in the discovery and presentation of evidence including, but not limited to, restriction of the number of expert, economic, or technical witnesses; and

(6) Such other matters as may aid in the orderly and expeditious disposition of the investigation including disclosure of the names of witnesses and the exchange of documents or other physical exhibits that will be introduced in evidence in the course of the hearing.

(b) *Subpoenas.* Prehearing conferences may be convened for the purpose of accepting returns on subpoenas duces tecum issued pursuant to § 210.32(a)(3).

(c) *Reporting.* In the discretion of the administrative law judge, prehearing conferences may or may not be stenographically reported and may or may not be public.

(d) *Order.* The administrative law judge may enter in the record an order that recites the results of the conference. Such order shall include the administrative law judge's rulings upon matters considered at the conference, together with appropriate direction to the parties. The administrative law judge's order shall control the subsequent course of the hearing, unless the administrative law judge modifies the order.

§ 210.36 General provisions for hearings.

(a) *Purpose of hearings.* (1) An opportunity for a hearing shall be provided in each investigation under this part, in accordance with the Administrative Procedure Act. At the hearing, the presiding administrative law judge will take evidence and hear argument for the purpose of determining whether there is a violation of section 337 of the Tariff Act of 1930, and for the purpose of making findings and recommendations, as described in § 210.42(a)(1)(ii), concerning the appropriate remedy and the amount of the bond to be posted by respondents during Presidential review of the Commission's action, under section 337(j) of the Tariff Act.

(2) An opportunity for a hearing in accordance with the Administrative Procedure Act shall also be provided in connection with every motion for temporary relief filed under this part.

(b) *Public hearings.* All hearings in investigations under this part shall be public unless otherwise ordered by the administrative law judge.

(c) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place, continuing until completed unless otherwise ordered by the administrative law judge.

(d) *Rights of the parties.* Every hearing under this section shall be conducted in accordance with the Administrative Procedure Act (i.e., 5 U.S.C. §§ 554 through 556). Hence, every party shall have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

(e) *Presiding official.* An administrative law judge shall preside over each hearing unless the Commission shall otherwise order.

§ 210.37 Evidence.

(a) *Burden of proof.* The proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, or unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded as far as practicable.

(c) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by the Commission investigative attorney when necessary in connection with investigations and may be offered in evidence by the Commission investigative attorney.

(d) *Official notice.* When any decision of the administrative law judge rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

(e) *Objections.* Objections to evidence shall be made in timely fashion and shall briefly state the grounds relied upon. Rulings on all objections shall appear on the record.

(f) *Exceptions.* Formal exception to an adverse ruling is not required.

(g) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the examining party may make a specific offer of what he expects to prove by the answer of the witness, or the administrative law judge may in his discretion receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained with the record so as to be available for consideration by any reviewing authority.

§ 210.38 Record.

(a) *Definition of the record.* The record shall consist of all pleadings, the notice of investigation, motions and responses, all briefs and written statements, and other documents and things properly filed with the Secretary, in addition to all orders, notices, and initial determinations of the administrative law judge, orders and notices of the Commission, hearing and conference transcripts, evidence admitted into the record, and any other items certified into the record by the administrative law judge or the Commission.

(b) *Reporting and transcription.* Hearings shall be reported and transcribed by the official reporter of the Commission under the supervision of the administrative law judge, and the transcript shall be a part of the record.

(c) *Corrections.* Changes in the official transcript may be made only when they involve errors affecting substance. A motion to correct a transcript shall be addressed to the administrative law judge, who may order that the transcript be changed to reflect such corrections as are warranted, after consideration of any objections that may be made. Such corrections shall be made by the official reporter by furnishing substitute typed pages, under the usual certificate of the reporter, for insertion in the transcript. The original uncorrected pages shall be retained in the files of the Commission.

(d) *Certification of record.* The record shall be certified to the Commission by the administrative law judge upon his filing of an initial determination or at such earlier time as the Commission may order.

§ 210.39 In camera treatment of confidential information.

(a) *Definition.* Except as hereinafter provided and consistent with §§ 210.5 and 210.34, confidential documents and testimony made subject to protective orders or orders granting in camera treatment are not made part of the public record and are kept confidential in an in camera record. Only the persons identified in a protective order, persons identified in § 210.5(b), and court personnel concerned with judicial review shall have access to confidential information in the in camera record. The right of the administrative law judge and the Commission to disclose confidential data under a protective order (pursuant to § 210.34) to the extent necessary for the proper disposition of each proceeding is specifically reserved.

(b) *In camera treatment of documents and testimony.* The administrative law judge shall have authority to order documents or oral testimony offered in evidence, whether admitted or rejected, to be placed in camera.

(c) *Part of confidential record.* In camera documents and testimony shall constitute a part of the confidential record of the Commission.

(d) *References to in camera information.* In submitting proposed findings, briefs, or other papers, counsel for all parties shall make an attempt in good faith to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such proposed findings, briefs, or other papers to such documents or testimony including generalized statements based on their contents. To the extent that counsel consider it necessary to include specific details of in camera data in their presentations, such data shall be incorporated in separate proposed findings, briefs, or other papers marked "Business Confidential," which shall be placed in camera and become a part of the confidential record.

§ 210.40 Proposed findings and conclusions and briefs.

At the time a motion for summary determination under § 210.18(a) or a motion for termination under § 210.21(a) is made, or when it is found that a party is in default under § 210.16, or at the close of the reception of evidence in any hearing held pursuant to this part (except as provided in § 210.63), or within a reasonable time thereafter fixed by the administrative law judge, any party may file proposed findings of fact and conclusions of law, together with reasons therefor. When appropriate, briefs in support of the proposed findings of fact and conclusions of law may be filed with the administrative law judge for his consideration. Such proposals and briefs shall be in writing, shall be served upon all parties in accordance with § 210.4(g), and shall contain adequate references to the record and the authorities on which the submitter is relying.

Subpart G—Determinations and Actions Taken

§ 210.41 Termination of investigation.

Except as provided in § 210.21(b)(2) and (c), an order of termination issued by the Commission shall constitute a determination of the Commission under § 210.45(c).

§ 210.42 Initial determinations.

(a)(1) (i) *On issues concerning violation of section 337.* Unless otherwise ordered by the Commission, the administrative law judge shall certify the record to the Commission and shall file an initial determination on whether there is a violation of section 337 of the Tariff Act of 1930 within nine months after publication of the notice of investigation in an ordinary case or within 14 months after such publication in a "more complicated" case.

(ii) *Recommended determination on issues concerning permanent relief and bonding.* Unless the Commission orders otherwise, within 14 days after issuance of the initial determination on violation of section 337 of the Tariff Act of 1930, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning—

(A) The appropriate remedy in the event that the Commission finds a violation of section 337, and

(B) The amount of the bond to be posted by the respondents during Presidential review of Commission action under section 337(j) of the Tariff Act.

(2) *On certain motions to declassify information.* Following issuance of the public version of an initial determination under paragraph (a)(1)(i) of this section, the decision of an administrative law judge granting a motion to declassify information, in whole or in part, shall be in the form of an initial determination as provided in § 210.20(b).

(b) *On issues concerning temporary relief or forfeiture of temporary relief bonds.* Certification of the record and the disposition of an initial determination concerning a motion for temporary relief are governed by §§ 210.65 and 210.66. The disposition of an initial determination concerning possible forfeiture of a complainant's temporary relief bond, in whole or in part, is governed by § 210.70 of this section.

(c) *On other matters.* The administrative law judge shall grant by the following types of motions by issuing an initial determination or shall deny them by issuing an order: a motion to amend the complaint or notice of investigation pursuant to § 210.14(b); a motion for a finding of default pursuant to § 210.16; a motion for summary determination pursuant to § 210.18; a motion for intervention pursuant to § 210.19; a motion for termination pursuant to § 210.21; a motion to suspend an investigation pursuant to § 210.23; or a motion for forfeiture of a complainant's temporary relief bond pursuant to § 210.70.

(d) *Contents.* The initial determination shall include: an opinion stating findings (with specific page references to principal supporting items of evidence in the record) and conclusions and the reasons or bases therefor necessary for the disposition of all material issues of fact, law, or discretion presented in the record; and a statement that, pursuant to § 210.42(h), the initial determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to § 210.43(a) or the Commission, pursuant to § 210.44, orders on its own motion a review of the initial determination or certain issues therein.

(e) *Notice to and advice from other departments and agencies.* The U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as the Commission deems appropriate shall be served with a copy of the initial determination. The Commission shall consider comments, limited to issues raised by the record, the initial determination, and the petitions for review, received from such agencies when deciding whether to initiate review or the scope of review. The Commission shall allow such agencies 20 days after the service of an initial determination filed pursuant to § 210.42(a)(1)(i) or 10 days after the service of an initial determination filed pursuant to § 210.42(c) or § 210.66(a) to submit their comments.

(f) *Initial determination made by the administrative law judge.* An initial determination under this section shall be made and filed by the administrative law judge who presided over the

investigation, except when that person is unavailable to the Commission and except as provided in § 210.20(a).

(g) *Reopening of proceedings by the administrative law judge.* At any time prior to the filing of the initial determination, the administrative law judge may reopen the proceedings for the reception of additional evidence.

(h) *Effect.* (1) An initial determination filed pursuant to § 210.42(a)(2) shall become the determination of the Commission 45 days after the date of service of the initial determination, unless the Commission has ordered review of the initial determination or certain issues therein, or by order has changed the effective date of the initial determination.

(2) An initial determination under § 210.42(a)(1)(i) shall become the determination of the Commission 45 days after the date of service of the initial determination, unless the Commission, within 45 days after the date of such service shall have ordered review of the initial determination or certain issues therein or by order has changed the effective date of the initial determination. The findings and recommendations made by the administrative law judge in the recommended determination issued pursuant to § 210.42(a)(1)(ii) will be considered by the Commission in reaching determinations on remedy and bonding by the respondents pursuant to § 210.50(a).

(3) An initial determination filed pursuant to § 210.42(c) shall become the determination of the Commission 30 days after the date of service of the initial determination, except as provided in paragraph (h)(5) of this section and § 210.70(c), unless the Commission, within 30 days after the date of such service shall have ordered review of the initial determination or certain issues therein or by order has changed the effective date of the initial determination.

(4) The disposition of an initial determination granting or denying a motion for temporary relief is governed by § 210.66.

(5) The disposition of an initial determination concerning possible forfeiture of a complainant's temporary relief bond is governed by § 210.70(c).

(i) *Notice of determination.* A notice stating the Commission's decision on whether to review an initial determination will be issued by the Secretary, served on the parties, and published in the **Federal Register**.

§ 210.43 Petitions for review of initial determinations on matters other than temporary relief.

(a) *Filing of the petition.* (1) Except as provided in paragraph (a)(2) of this section, any party to an investigation may request Commission review of an initial determination issued under § 210.42 (a)(1) or (c) or § 210.70(c) by filing a petition with the Secretary. A petition for review of an initial determination issued under § 210.42(a)(1) must be filed within 10 days after service of the initial determination. A petition for review of an initial determination issued under § 210.42(c) must be filed within five business days after issuance of the initial determination. A petition for review of an initial determination issued under § 210.70(c) must be filed within 10 days after issuance of the initial determination.

(2) A party may not petition for review of any issue as to which the party has been found to be in default. Similarly, a party or proposed respondent who did not file a response to the motion addressed in the initial determination may be deemed to have consented to the relief requested and may not petition for review of the issues raised in the motion.

(b) *Content of the petition.* (1) A petition for review filed under this section shall identify the party seeking review and shall specify the issues upon which review of the initial determination is sought, and shall, with respect to each such issue, specify one or more of the following grounds upon which review is sought:

(i) That a finding or conclusion of material fact is clearly erroneous;

(ii) That a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or

(iii) That the determination is one affecting Commission policy.

The petition for review must set forth a concise statement of the facts material to the consideration of the stated issues, and must present a concise argument providing the reasons that review by the Commission is necessary or appropriate to resolve an important issue of fact, law, or policy.

(2) Any issue not raised in a petition for review will be deemed to have been abandoned by the petitioning party and may be disregarded by the Commission in reviewing the initial determination (unless the Commission chooses to review the issue on its own initiative under § 210.44).

(3) Any petition designated by the petitioner as a "contingent" petition for review shall be deemed to be a petition under paragraph (a)(1) of this section and shall be processed accordingly.

(4) A party's failure to file a petition for review of an initial determination shall constitute abandonment of all issues decided adversely to that party in the initial determination.

(c) *Responses to the petition.* Any party may file a response to a petition for review within five business days after service of the petition, except that a party who has been found to be in default may not file a response to any issue as to which the party has defaulted.

(d) *Grant or denial of review.* (1) The Commission shall decide whether to grant, in whole or in part, a petition for review of an initial determination filed pursuant to § 210.42(a)(1) or § 210.70(c) within 45 days of the service of the initial determination on the parties, or by such other time as the Commission may order. The Commission shall decide whether to grant, in whole or in part, a petition for review of an initial determination filed pursuant to § 210.42(c) within 30 days of the service of the initial determination on the parties, or by such other time as the Commission may order.

(2) The Commission shall decide whether to grant a petition for review, based upon the petition and response thereto, without oral argument or further written submissions unless the Commission shall order otherwise. A petition will be granted and review will be ordered if it appears that an error or abuse of the type described in paragraph (b)(1) of this section is present or if the petition raises a policy matter connected with the initial determination, which the Commission thinks it necessary or appropriate to address.

(3) The Commission shall grant a petition for review and order review of an initial determination or certain issues therein when at least one of the participating Commissioners votes for ordering review. In its notice, the Commission shall establish the scope of the review and the issues that will be considered and make provisions for filing of briefs and oral argument if deemed appropriate by the Commission. The notice that the Commission has granted the petition for review shall be served by the Secretary on all parties, the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as the Commission deems appropriate.

§ 210.44 Commission review on its own motion of initial determinations on matters other than temporary relief.

Within the time provided in § 210.43(d)(1), the Commission on its own initiative may order review of an initial determination, or certain issues in the initial determination, when at least one of the participating Commissioners votes for ordering review. A self-initiated Commission review of an initial determination will be ordered if it appears that an error or abuse of the kind described in § 210.43(b)(1) is present or the initial determination raises a policy matter which the Commission thinks is necessary or appropriate to address.

§ 210.45 Review of initial determinations on matters other than temporary relief.

(a) *Briefs and oral argument.* In the event the Commission orders review of an initial determination pertaining to issues other than temporary relief, the parties may be requested to file briefs on the issues under review at a time and of a size and nature specified in the notice of review. The parties, within the time provided for filing the review briefs, may submit a written request for a hearing to present oral argument before the Commission, which the Commission in its discretion may grant or deny. The Commission shall grant the request when at least one of the participating Commissioners votes in favor of granting the request.

(b) *Scope of review.* Only the issues set forth in the notice of review, and all subsidiary issues therein, will be considered by the Commission.

(c) *Determination on review.* On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge. The Commission also may make any findings or conclusions that in its judgment are proper based on the record in the proceeding.

§ 210.46 Petitions for and sua sponte review of initial determinations on violation of section 337 or temporary relief.

(a) *Violation of section 337.* An initial determination issued under § 210.42(a)(1)(i) on whether respondents have violated section 337 of the Tariff Act of 1930 will be processed as provided in § 210.42(e), (h)(2), and (i) and §§ 210.43 through 210.45. The Commission will issue a notice setting deadlines for written submissions from the parties, other Federal agencies, and interested members of the public on the issues of remedy, the public interest, and bonding by the respondents. In those submissions, the parties may assert their arguments concerning the recommended determination issued by the administrative law judge pursuant to § 210.42(a)(ii) on the issues of remedy and bonding by respondents.

(b) *Temporary relief.* Commission action on an initial determination concerning temporary relief is governed by § 210.66.

§ 210.47 Petitions for reconsideration.

Within 14 days after service of a Commission determination, any party may file with the Commission a petition for reconsideration of such determination or any action ordered to be taken thereunder, setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the determination or action ordered to be taken thereunder and upon which the petitioner had no opportunity to submit arguments. Any party desiring to oppose such a petition shall file an answer thereto within five days after service of the petition upon such party. The filing of a petition for reconsideration shall not stay the effective date of the determination or action ordered to be taken thereunder or toll the running of any statutory time period affecting such determination or action ordered to be taken thereunder unless specifically so ordered by the Commission.

§ 210.48 Disposition of petitions for reconsideration.

The Commission may affirm, set aside, or modify its determination, including any action ordered by it to be taken thereunder. When appropriate, the Commission may order the administrative law judge to take additional evidence.

§ 210.49 Implementation of Commission action.

(a) *Service of Commission determination upon the parties.* A Commission determination pursuant to § 210.45(c) or a termination on the basis of a licensing or other agreement or a consent order pursuant to § 210.21 (b) or (c), respectively, shall be served upon each party to the investigation.

(b) *Publication and transmittal to the President.* A Commission determination that there is a violation of section 337 of the Tariff Act of 1930 or that there is reason to believe that there is such a violation, together with the action taken relative to such determination, or Commission action taken pursuant to subpart I of this part, shall promptly be published in the **Federal Register** and transmitted to the President, together with the record upon which the determination and the action are based.

(c) *Enforceability of Commission action.* Unless otherwise specified, any Commission action other than an exclusion order or an order directing seizure and forfeiture of articles imported in violation of an outstanding exclusion order shall be enforceable upon receipt by the affected party of notice of such action. Exclusion orders and seizure and forfeiture orders shall be enforceable upon receipt of notice thereof by the Secretary of the Treasury.

(d) *Finality of affirmative Commission action.* If the President does not disapprove the Commission's action within a 60-day period beginning the day after a copy of the Commission's action is delivered to the President, or if the President notifies the Commission before the close of the 60-day period that he approves the Commission's action, such action shall become final the day after the close of the 60-day period or the day the President notifies the Commission of his approval, as the case may be.

(e) *Duration.* Final Commission action shall remain in effect as provided in subpart I of this part.

§ 210.50 Commission action, the public interest, and bonding by respondents.

(a) During the course of each investigation under this part, the Commission shall—

(1) Consider what action (general or limited exclusion of articles from entry or a cease and desist order, or exclusion of articles from entry under bond or a temporary cease and desist order), if any, it should take, and, when appropriate, take such action;

(2) Consult with and seek advice and information from the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as it considers appropriate, concerning the subject matter of the complaint and the effect its actions (general or limited exclusion of articles from entry or a cease and desist order, or exclusion of articles from entry under bond or a temporary cease and desist order) under section 337 of the Tariff Act of 1930 shall have upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers;

(3) Determine the amount of the bond to be posted by a respondent pursuant to section 337(j)(3) of the Tariff Act of 1930 following the issuance of temporary or permanent relief under

section 337 (d), (e), (f), or (g), of the Tariff Act taking into account, among other things, the amount that would offset any competitive advantage to the respondent resulting from its alleged unfair methods of competition and unfair acts in the importation or sale of the articles in question;

(4) Receive submissions from the parties, interested persons, and other Government agencies and departments with respect to the subject matter of paragraphs (a)(1), (a)(2), and (a)(3), of this section.

When the matter under consideration pursuant to paragraph (a)(1) of this section is whether to grant some form of permanent relief, the submissions described in paragraph (a)(4) of this section shall be filed by the deadlines specified in the Commission notice issued pursuant to § 210.46(a). When the matter under consideration is whether to grant some form of temporary relief, such submissions shall be filed by the deadlines specified in § 210.67(b), unless the Commission orders otherwise. Any submission from a party shall be served upon the other parties in accordance with § 210.4(g). The parties' submissions, as well as any filed by interested persons or other agencies shall be available for public inspection in the Office of the Secretary. The Commission will consider motions for oral argument or, when necessary, a hearing with respect to the subject matter of this section, except that no hearing or oral argument will be permitted in connection with a motion for temporary relief.

(b)(1) With respect to an administrative law judge's ability to take evidence or other information and to hear arguments from the parties and other interested persons on the issues of appropriate Commission action, the public interest, and bonding by the respondents for purposes of an initial determination on temporary relief, see §§ 210.61, 210.62, and 210.66(a). For purposes of the recommended determination required by § 210.42(a)(1)(ii), an administrative law judge shall take evidence or other information and hear arguments from the parties and other interested persons on the issues of appropriate Commission action and bonding by the respondents. Unless the Commission orders otherwise, and except as provided in paragraph (b)(2) of this section, an administrative law judge shall not address the issue of the public interest for purposes of an initial determination on violation of section 337 of the Tariff Act under § 210.42(a)(1)(i).

(2) Regarding settlements by agreement or consent order under § 210.21 (b) or (c), the parties may file statements regarding the impact of the proposed settlement on the public interest, and the administrative-law judge may hear argument, although no discovery may be compelled with respect to issues relating solely to the public interest. Thereafter, the administrative law judge shall consider and make appropriate findings in the initial determination regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.

§ 210.51 Period for concluding investigation.

(a) *Permanent relief.* The permanent relief phase of each investigation instituted under this part shall be concluded and a final order issued no later than 12 months after the date of publication in the **Federal Register** of the notice instituting the investigation, unless the investigation has been designated "more complicated" pursuant to § 210.22(b). If that designation has been made, the deadline for concluding the investigation is 18 months after the publication of the notice of investigation.

(b) *Temporary relief.* The temporary relief phase of an investigation shall be concluded and a final order issued no later than 90 days after publication of the notice of investigation in the **Federal Register**, unless the temporary relief phase of the investigation has been designated "more complicated" by the Commission or the presiding administrative law judge pursuant to § 210.22(c) and § 210.60. If that designation has been made, the temporary relief phase of the investigation shall be concluded and a final order issued no later than 150 days after publication of the notice of investigation in the **Federal Register**.

(c) *Computation of time.* In computing the deadlines imposed in paragraphs (a) and (b) of this section, there shall be excluded any period during which the investigation is suspended because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter of such investigation.

Subpart H—Temporary Relief

§ 210.52 Motions for temporary relief.

Requests for temporary relief under section 337 (e) or (f) of the Tariff Act of 1930 shall be made through a motion filed in accordance with the following provisions:

(a) A complaint requesting temporary relief shall be accompanied by a motion setting forth the complainant's request for such relief. In determining whether to grant temporary relief, the Commission will apply the standards the U.S. Court of Appeals for the Federal Circuit uses in determining whether to affirm lower court decisions granting preliminary injunctions. The motion for temporary relief accordingly must contain a detailed statement of specific facts bearing on the factors the Federal Circuit has stated that a U.S. District Court must consider in granting a preliminary injunction.

(b) The motion must also contain a detailed statement of facts bearing on:

(1) Whether the complainant should be required to post a bond as a prerequisite to the issuance of temporary relief; and

(2) The appropriate amount of the bond, if the Commission determines that a bond will be required.

(c) The factors the Commission will consider in determining whether to require a bond as a prerequisite to the issuance of temporary relief include the following:

(1) The strength of the complainant's case;

(2) Whether posting a bond would impose an undue hardship on the complainant;

(3) Whether the respondent has responded to the motion for temporary relief (in the time and manner specified in § 210.59 or by order of the Commission or the administrative law judge);

(4) Whether the respondent will be harmed by issuance of the temporary relief sought by the complainant;

(5) Any other legal, equitable, or public interest consideration that is relevant to whether the complainant should be required to post a bond as a condition precedent to obtaining temporary relief, including whether the complainant is likely to use the temporary relief proceedings or the temporary relief order to harass the respondents or for some other improper purpose.

No single factor will be determinative. The Commission's general policy is to favor the posting of a bond in every case. Therefore, a complainant who believes that a bond should not be required has the burden of persuading the Commission.

(d) The following documents and information also shall be filed along with the motion for temporary relief:

(1) A memorandum of points and authorities in support of the motion;

(2) Affidavits executed by persons with knowledge of the facts asserted in the motion; and

(3) All documents, information, and other evidence in complainant's possession that complainant intends to submit in support of the motion.

(e) The complainant must also provide information and documents that will assist the presiding administrative law judge and the Commission in computing the amount of the bond, if a bond is to be required. (A complainant also may file, if it chooses, a draft of the bond it expects to submit if a bond is to be required.) In cases where a domestic industry exists and domestic sales of the product in question have commenced and have not been de minimis, the amount of the bond is likely to be the amount indicated on the following schedule based on the sales revenues from the domestic product at issue—and, if applicable, licensing royalties from the intellectual property right at issue—as reflected in the complainant's audited annual financial statements for the most recent fiscal year:

Complainant's sales and licensing royalties	Bond amount
Less than $1 million	$10,000
Greater than $1 million but not more than $10 million	100,000
Greater than $10 million but not more than $50 million	250,000
Greater than $50 million but not more than $100 million	500,000
Greater than $100 million	[1] 1

[1] Million.

In cases in which the foregoing schedule applies, the complainant must provide the following documents:

(1) The audited financial statements (or the equivalent thereof, if audited statements do not exist) for the most recently completed fiscal year;

(2) The back-up income statements, work sheets, or other documents showing revenues for the domestic product at issue in the investigation, which are tied to the aggregate revenue listed on the financial statements; and

(3) A certification under oath by the complainant's chief financial officer indicating that the detail provided in the work sheets or other documents tied to the audited financial statements is correct.

The Commission retains the option to require bonds in higher or lower amounts than prescribed under the aforesaid schedule in exceptional cases. In cases in which the aforesaid schedule would not be appropriate, the amount of the bond will be determined on a case-by-case basis. In such cases, the motion for temporary relief should state why the prescribed schedule is not appropriate (with supporting documentation where appropriate). The motion should also state the theory the complainant believes is appropriate for computing the amount of the bond (if the Commission determines to require a bond) and should provide supporting financial and economic data with certification under oath executed by the complainant's chief financial officer attesting to the veracity of the data provided. All complainants who are seeking temporary relief (including complainants who have provided the audited financial statements and back up data listed above) must be prepared to provide upon short notice any additional financial or economic data requested by the presiding administrative law judge in connection with the issue of bonding and the certification under oath by the complainant's chief financial officer that the information submitted is correct.

(f) If the complaint, the motion for temporary relief, and the supporting documentation contain confidential business information as defined in § 201.6(a) of this chapter, the complainant must follow the procedure outlined in §§ 210.5(a), 201.6 (a) and (c), and 210.55.

§ 210.53 Motion filed after complaint.

(a) A motion for temporary relief may be filed after the complaint, but must be filed prior to the Commission determination under § 210.10 on whether to institute an investigation. A motion filed after the complaint shall contain the information, documents, and evidence described in § 210.52 and must also make a showing that extraordinary circumstances exist that warrant temporary relief and that the moving party was not aware, and with due diligence could not have been aware, of those circumstances at the time the complaint was filed. When a motion for temporary relief is filed after the complaint but before the Commission has determined whether to institute an investigation based on the complaint, the 35-day period allotted under § 210.58 for review of the complaint and informal investigatory activity will begin to run anew from the date on which the motion was filed.

(b) A motion for temporary relief may not be filed after an investigation has been instituted.

§ 210.54 Service of motion by the complainant.

Notwithstanding the provisions of § 210.11 regarding service of the complaint and motion for temporary relief by the Commission upon institution of an investigation, on the day the complainant files a complaint and motion for temporary relief with the Commission (see § 201.8(a) of this chapter), the complainant must serve nonconfidential copies of both documents (as well as nonconfidential copies of all materials or documents attached thereto) on all proposed respondents and on the embassy in Washington, DC of each country from which the allegedly unfair imports come. The complaint and motion shall be served by messenger, courier, express mail, or equivalent means. A signed certificate of service must accompany the complaint and motion for temporary relief. If the certificate does not accompany the complaint and the motion, the Secretary shall not accept the complaint or the motion and shall promptly notify the submitter. Actual proof of service on each respondent and embassy (e.g., certified mail return receipts, courier or overnight delivery receipts, or other proof of delivery)—or proof of a serious but unsuccessful effort to make such service—must be filed within 10 days after the filing of the complaint and motion. If the requirements of this section are not satisfied, the Commission may extend its 35-day deadline under § 210.58 for determining whether to provisionally accept the motion for temporary relief and institute an investigation on the basis of the complaint.

§ 210.55 Content of service copies.

(a) Any purported confidential business information that is deleted from the nonconfidential service copies of the complaint and motion for temporary relief must satisfy the requirements of § 201.6(a) of this chapter (which defines confidential information for purposes of Commission proceedings). For attachments to the complaint or motion that are confidential in their entirety, the complainant must provide a nonconfidential summary of what each attachment contains. Despite the redaction of confidential material from the complaint and motion for temporary relief, the nonconfidential service copies must contain enough factual information about each element of the violation alleged in the complaint and the motion to enable each proposed respondent to comprehend the allegations against it.

(b) If the Commission determines that the complaint, motion for temporary relief, or any exhibits or attachments thereto contain excessive designations of confidentiality that are not warranted under § 201.6(a) of this chapter, the

Commission may require the complainant to file and serve new nonconfidential versions of the aforesaid submissions and may determine that the 35-day period under § 210.58 for deciding whether to institute an investigation and to provisionally accept the motion for temporary relief for further processing shall begin to run anew from the date the new nonconfidential versions are filed with the Commission and served on the proposed respondents.

§ 210.56 Notice accompanying service copies.

(a) Each service copy of the complaint and motion for temporary relief shall be accompanied by a notice containing the following text:

Notice is hereby given that the attached complaint and motion for temporary relief will be filed with the U.S. International Trade Commission in Washington, DC on _____, 19__. The filing of the complaint and motion will not institute an investigation on that date, however, nor will it begin the period for filing responses to the complaint and motion pursuant to 19 CFR 210.13 and 210.59.

Upon receipt of the complaint, the Commission will examine the complaint for sufficiency and compliance with 19 CFR 201.8, 210.4, 210.5, 210.8, and 210.12. The Commission's Office of Unfair Import Investigations will conduct informal investigatory activity pursuant to 19 CFR 210.9 to identify sources of relevant information and to assure itself of the availability thereof. The motion for temporary relief will be examined for sufficiency and compliance with 19 CFR 201.8, 210.4, 210.5, 210.52, 210.53(a) (if applicable), 210.54, 210.55, and 210.56, and will be subject to the same type of preliminary investigative activity as the complaint.

The Commission generally will determine whether to institute an investigation on the basis of the complaint and whether to provisionally accept the motion for temporary relief within 35 days after the complaint and motion are filed or, if the motion is filed after the complaint, within 35 days after the motion is filed—unless the 35-day deadline is extended pursuant to 19 CFR 210.53, 210.54, 210.55(b), 210.57, or 210.58. If the Commission determines to institute an investigation and provisionally accept the motion, the motion will be assigned to a Commission administrative law judge for issuance of an initial determination in accordance with 19 CFR 210.66. See 19 CFR 210.10 and 210.58.

If the Commission determines to conduct an investigation of the complaint and the motion for temporary relief, the investigation will be formally instituted on the date the Commission publishes a notice of investigation in the **Federal Register** pursuant to 19 CFR 210.10(b). If an investigation is instituted, copies of the complaint, the notice of investigation, the motion for temporary relief, and the Commission's Rules of Practice and Procedure (19 CFR Part 210) will be served on each respondent by the Commission pursuant to 19 CFR 210.11(a). Responses to the complaint, the notice of investigation, and the motion for temporary relief must be filed within 10 days after Commission service thereof, and must comply with 19 CFR 201.8, 210.4, 210.5, 210.13, and 210.59. See also 19 CFR 201.14 and 210.6 regarding computation of the 10-day response period.

If, after reviewing the complaint and motion for temporary relief, the Commission determines not to institute an investigation, the complaint and motion will be dismissed and the Commission will provide written notice of that decision and the reasons therefor to the complainant and all proposed respondents pursuant to 19 CFR 210.10.

For information concerning the filing and processing of the complaint and its treatment, and to ask general questions concerning section 337 practice and procedure, contact the Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Room 401, Washington, DC 20436, telephone 202–205–2560. Such inquiries will be referred to the Commission investigative attorney assigned to the complaint. (See also the Commissions's Rules of Practice and Procedure set forth in 19 CFR Part 210.)

To learn the date that the Commission will vote on whether to institute an investigation and the publication date of the notice of investigation (if the Commission decides to institute an investigation), contact the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., room 112, Washington, DC 20436, telephone 202–205–2000.

This notice is being provided pursuant to 19 CFR 210.56.

(b) In the event that the complaint and motion for temporary relief are filed after the date specified in the above notice, the complainant must serve a supplementary notice to all proposed respondents and embassies stating the correct filing date. The supplementary notice shall be served by messenger, courier, express mail, or equivalent means. The complainant shall file a certificate of service and a copy of the supplementary notice with the Commission.

§ 210.57 Amendment of the motion.

A motion for temporary relief may be amended at any time prior to the institution of an investigation. All material filed to amend the motion (or the complaint) must be served on all proposed respondents and on the embassies in Washington, DC, of the foreign governments that they represent, in accordance with § 210.54. If the amendment expands the scope of the motion or changes the complainant's assertions on the issue of whether a bond is to be required as a prerequisite to the issuance of temporary relief or the appropriate amount of the bond, the 35-day period under § 210.58 for determining whether to institute an investigation and provisionally accept the motion for temporary relief shall begin to run anew from the date the amendment is filed with the Commission. A motion for temporary relief may not be amended to expand the scope of the temporary relief inquiry after an investigation is instituted.

§ 210.58 Provisional acceptance of the motion.

The Commission shall determine whether to accept a motion for temporary relief at the same time it determines whether to institute an investigation on the basis of the complaint. That determination shall be made within 35 days after the complaint and motion for temporary relief are filed, unless the 35-day period is restarted pursuant to § 210.53(a), 210.54, 210.55, or 210.57, or exceptional circumstances exist which preclude adherence to the prescribed deadline. (See § 210.10(a)(1).) Before the Commission determines whether to provisionally accept a motion for temporary relief, the motion will be examined for sufficiency and compliance with §§ 210.52, 210.53(a) (if applicable), 210.54 through 210.56, as well as §§ 201.8, 210.4, and 210.5. The motion will be subject to the same type of preliminary investigatory activity as the complaint. (See § 210.9(b).) Acceptance of a motion pursuant to this paragraph constitutes provisional acceptance for referral of the motion to the chief administrative law judge, who will assign the motion to a presiding administrative law judge for issuance of an initial determination under § 210.66(a). Commission rejection of an insufficient or improperly filed complaint will preclude acceptance of a motion for temporary relief. Commission rejection of a motion for temporary relief will not preclude institution of an investigation of the complaint.

§ 210.59 Responses to the motion and the complaint.

(a) Any party may file a response to a motion for temporary relief. Unless otherwise ordered by the administrative law judge, a response to a motion for temporary relief in an ordinary investigation must be filed not later than 10 days after service of the motion by the Commission. In a "more complicated" investigation, the response shall be due within 20 days after such service, unless otherwise ordered by the presiding administrative law judge.

(b) The response must comply with the requirements of § 201.8 of this chapter, as well as §§ 210.4 and 210.5 of this part, and shall contain the following information:

(1) A statement that sets forth with particularity any objection to the motion for temporary relief;

(2) A statement of specific facts concerning the factors the U.S. Court of Appeals for the Federal Circuit would consider in determining whether to affirm lower court decisions granting or denying preliminary injunctions;

(3) A memorandum of points and authorities in support of the respondent's response to the motion;

(4) Affidavits, where possible, executed by persons with knowledge of the facts specified in the response. Each response to the motion must address, to the extent possible, the complainant's assertions regarding whether a bond should be required and the appropriate amount of the bond. Responses to the motion for temporary relief also may contain counter-proposals concerning the amount of the bond or the manner in which the bond amount should be calculated.

(c) Each response to the motion for temporary relief must also be accompanied by a response to the complaint and notice of investigation. Responses to the complaint and notice of investigation must comply with § 201.8 of this chapter, §§ 210.4 and 210.5 of this part, and any protective order issued by the administrative law judge under § 210.34 of this part.

§ 210.60 Designating an investigation "more complicated" for the purpose of adjudicating a motion for temporary relief.

At the time the Commission determines to institute an investigation and provisionally accepts a motion for temporary relief pursuant to § 210.58, the Commission may designate the investigation "more complicated" pursuant to § 210.22(c) for the purpose of obtaining up to 60 additional days to adjudicate the motion for temporary relief. In the alternative, after the motion for temporary relief is referred to the administrative law judge for an initial determination under § 210.66(a), the administrative law judge may issue an order, sua sponte or on motion, designating the investigation "more complicated" for the purpose of obtaining additional time to adjudicate the motion for temporary relief. Such order shall constitute a final determination of the Commission, and notice of the order shall be published in the **Federal Register**. As required by section 337(e)(2) of the Tariff Act of 1930, the notice shall state the reasons that the temporary relief phase of the investigation was designated "more complicated." The "more complicated" designation may be conferred by the Commission or the presiding administrative law judge pursuant to this paragraph on the basis of the complexity of the issues raised in the motion for temporary relief or the responses thereto, or for other good cause shown.

§ 210.61 Discovery and compulsory process.

The presiding administrative law judge shall set all discovery deadlines. The administrative law judge's authority to compel discovery includes discovery relating to the following issues:

(a) Any matter relevant to the motion for temporary relief and the responses thereto, including the issues of bonding by the complainant; and

(b) The issues the Commission considers pursuant to sections 337 (e)(1), (f)(1), and (j)(3) of the Tariff Act of 1930, viz.,

(1) The appropriate form of relief (notwithstanding the form requested in the motion for temporary relief),

(2) Whether the public interest precludes that form of relief, and

(3) The amount of the bond to be posted by the respondents to secure importations or sales of the subject imported merchandise while the temporary relief order is in effect. The administrative law judge may, but is not required to, make findings on the issues specified in sections 337 (e)(1), (f)(1), or (j)(3) of the Tariff Act of 1930. Evidence and information obtained through discovery on those issues will be used by the parties and considered by the Commission in the context of the parties' written submissions on remedy, the public interest, and bonding by respondents, which are filed with the Commission pursuant to § 210.67(b).

§ 210.62 Evidentiary hearing.

An opportunity for a hearing in accordance with the Administrative Procedure Act and § 210.36 of this part will be provided in connection with every motion for temporary relief. If a hearing is conducted, the presiding administrative law judge may, but is not required to, take evidence concerning the issues of remedy, the public interest, and bonding by respondents under section 337 (e)(1), (f)(1), and (j)(3) of the Tariff Act of 1930.

§ 210.63 Proposed findings and conclusions and briefs.

The administrative law judge shall determine whether and, if so, to what extent the parties shall be permitted to file proposed findings of fact, proposed conclusions of law, or briefs under § 210.40 concerning the issues involved in adjudication of the motion for temporary relief.

§ 210.64 Interlocutory appeals.

There will be no interlocutory appeals to the Commission under § 210.24 on any matter connected with a motion for temporary relief that is decided by an administrative law judge prior to the issuance of the initial determination on the motion for temporary relief.

§ 210.65 Certification of the record.

When the administrative law judge issues an initial determination concerning temporary relief pursuant to § 210.66(a), he shall also certify to the Commission the record upon which the initial determination is based.

§ 210.66 Initial determination concerning temporary relief; Commission action thereon.

(a) On or before the 70th day after publication of the notice of investigation in an ordinary investigation, or on or before the 120th day after such publication in a "more complicated" investigation, the administrative law judge will issue an initial determination concerning the issues listed in §§ 210.52 and 210.59. If the 70th day or the 120th day is a Saturday, Sunday, or Federal holiday, the initial determination must be received in the Office of the Secretary no later than 12:00 noon on the first business day after the 70-day or 120-day deadline. The initial determination may, but is not required to, address the issues of remedy, the public interest, and bonding by the respondents pursuant under sections 337 (e)(1), (f)(1), and (j)(3) of the Tariff Act of 1930.

(b) If the initial determination on temporary relief is issued on the 70-day or 120-day deadline imposed in paragraph (a) of this section, the initial determination will become the Commission's determination 20 calendar days after issuance thereof in an ordinary case, and 30 calendar days after issuance in a "more complicated" investigation, unless the Commission modifies, reverses, or sets aside the initial determination in whole or part within that period. If the initial determination on temporary relief is issued before the 70-day or 120-day deadline imposed in paragraph (a) of this section, the Commission will add the extra time to the 20-day or 30-day deadline to which it would otherwise have been held. In computing the deadlines imposed by this paragraph, intermediary Saturdays, Sundays, and Federal holidays shall be included. If

the last day of the period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the effective date of the initial determination shall be extended to the next business day.

(c) The Commission will not modify, reverse, or set aside an initial determination concerning temporary relief unless the Commission finds that a finding of material fact is clearly erroneous, that the initial determination contains an error of law, or that there is a policy matter warranting discussion by the Commission. All parties may file written comments concerning any clear error of material fact, error of law, or policy matter warranting such action by the Commission. Such comments must be limited to 35 pages in an ordinary investigation and 45 pages in a "more complicated" investigation. The comments must be filed no later than seven calendar days after issuance of the initial determination in an ordinary case and 10 calendar days after issuance of the initial determination in a "more complicated" investigation. In computing the aforesaid 7-day and 10-day deadlines, intermediary Saturdays, Sundays, and Federal holidays shall be included. If the initial determination is issued on a Friday, however, the filing deadline for comments shall be measured from the first business day after issuance. If the last day of the filing period is a Saturday, Sunday, or Federal holiday as defined in § 201.14(a) of this chapter, the filing deadline shall be extended to the next business day. The parties shall serve their comments on other parties by messenger, courier, express mail, or equivalent means.

(d) Nonconfidential copies of the initial determination also will be served on other agencies listed in § 210.50(a)(2). Those agencies will be given 10 calendar days to file comments on the initial determination.

(e) (1) Each party may file a response to each set of comments filed by another party. All such reply comments must be filed within 10 calendar days after issuance of the initial determination in an ordinary case and within 14 calendar days after issuance of an initial determination in a "more complicated" investigation. The deadlines for filing reply comments shall be computed in the manner described in paragraph (c) of this section, except that in no case shall a party have fewer than two calendar days to file reply comments.

(2) Each set of reply comments will be limited to 20 pages in an ordinary investigation and 30 pages in a "more complicated" case.

(f) If the Commission determines to modify, reverse, or set aside the initial determination, the Commission will issue a notice and, if appropriate, a Commission opinion. If the Commission does not modify, reverse, or set aside the administrative law judge's initial determination within the time provided under paragraph (b) of this section, the initial determination will automatically become the determination of the Commission. Notice of the Commission's determination concerning the initial determination will be issued on the statutory deadline for determining whether to grant temporary relief or as soon as possible thereafter, will be published in the **Federal Register**, and will be served on the parties. If the Commission determines (either by reversing or modifying the administrative law judge's initial determination, or by adopting the initial determination) that the complainant must post a bond as a prerequisite to the issuance of temporary relief, the Commission may issue a supplemental notice a setting forth conditions for the bond if any (in addition to those outlined in the initial determination) and the deadline for filing the bond with the Commission.

§ 210.67 Remedy, the public interest, and bonding by respondents.

The procedure for arriving at the Commission's determination of the issues of the appropriate form of temporary relief, whether the public interest factors enumerated in the statute preclude such relief, and the amount of the bond under which respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission, is as follows:

(a) While the motion for temporary relief is before the administrative law judge, he may compel discovery on matters relating to remedy, the public interest, and bonding by respondents (as provided in § 210.61). The administrative law judge also is authorized to make findings pertaining to the public interest, as provided in § 210.66(a). Such findings may be superseded, however, by Commission findings on that issue as provided in paragraph (c) of this section.

(b) On the 65th day after institution in an ordinary case or on the 110th day after institution in a "more complicated" investigation, all parties shall file written submissions with the Commission addressing those issues. The submissions shall refer to information and evidence already on the record, but additional information and evidence germane to the issues of appropriate relief, the statutory public interest factors, and bonding by respondents may be provided along with the parties' submissions. Pursuant to § 210.50(a)(4), interested persons may also file written comments, on the aforesaid dates, concerning the issues of remedy, the public interest, and bonding by the respondents.

(c) On or before the 90-day or 150-day statutory deadline for determining whether to order temporary relief under section 337 (e)(1) and/or (f)(1) of the Tariff Act of 1930, the Commission will determine what relief is appropriate in light of any violation that appears to exist, whether the public interest factors enumerated in the statute preclude the issuance of such relief, and the amount of the bond under which the respondents' merchandise will be permitted to enter the United States during the pendency of any temporary relief order issued by the Commission. In the event that Commission's findings on the public interest pursuant to this paragraph are inconsistent with findings made by the administrative law judge in the initial determination pursuant to § 210.66(a), the Commission's findings are controlling.

§ 210.68 Complainant's temporary relief bond.

(a) In every investigation under this part involving a motion for temporary relief, the question of whether the complainant shall be required to post a bond as a prerequisite to the issuance of such relief shall be addressed by the parties, the presiding administrative law judge, and the Commission in the manner described in §§ 210.52, 210.59, 210.61, 210.62, and 210.66. If the Commission determines that a bond should be required, the bond may consist of one or more of the following:

(1) The surety bond of a surety or guarantee corporation that is licensed to do business with the United States in accordance with 31 U.S.C. 9304–9306 and 31 CFR Parts 223 and 224;

(2) The surety bond of an individual, a trust, an estate, or a partnership, or a corporation, whose solvency and financial responsibility will be investigated and verified by the Commission; or

(3) A certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other Government obligation within the meaning of 31 U.S.C. 9301 and 31 CFR Part 225, which is owned by the complainant and tendered in lieu of a surety bond, pursuant to 31 U.S.C. 9303(c) and 31 CFR Part 225.

The same restrictions and requirements applicable to individual and corporate sureties on Customs bonds, which are

set forth in 19 CFR Part 113, shall apply with respect to sureties on bonds filed with the Commission by complainants as a prerequisite to a temporary relief under section 337 of the Tariff Act of 1930. If the surety is an individual, the individual must file an affidavit of the type shown in Appendix A to § 210.68. Unless otherwise ordered by the Commission, while the bond of the individual surety is in effect, an updated affidavit must be filed every four months (computed from the date on which the bond was approved by the Secretary or the Commission).

(b) The bond and accompanying documentation must be submitted to the Commission within the time specified in the Commission notice, order, determination, or opinion requiring the posting of a bond, or within such other time as the Commission may order. If the bond is not submitted within the specified period (and an extension of time has not been granted), temporary relief will not be issued.

(c) The corporate or individual surety on a bond or the person posting a certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other Government obligation in lieu of a surety bond must provide the following information on the face of the bond or in the instrument authorizing the Government to collect or sell the bond, certified check, bank draft, post office money order, cash, United States bond, Treasury note, or other Government obligation in response to a Commission order requiring forfeiture of the bond pursuant to § 210.70:

(1) The investigation caption and docket number;

(2) The names, addresses, and seals (if appropriate) of the principal, the surety, the obligee, as well as the "attorney in fact" and the registered process agent (if applicable) (see Customs Service regulations in 19 CFR Part 113 and Treasury Department regulations in 31 CFR Parts 223, 224, and 225);

(3) The terms and conditions of the bond obligation, including the reason the bond is being posted, the amount of the bond, the effective date and duration of the bond (as prescribed by the Commission order, notice, determination, or opinion requiring the complainant to post a bond); and

(4) A section at the bottom of the bond or other instrument for the date and authorized signature of the Secretary to reflect Commission approval of the bond.

(d) Complainants who wish to post a certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other Government obligation in lieu of a surety bond must notify the Commission in writing immediately upon receipt of the Commission document requiring the posting of a bond, and must contact the Secretary to make arrangements for Commission receipt, handling, management, and deposit of the certified check, bank draft, post office money order, cash, United States bond, Treasury note, or other Government obligation tendered in lieu of a surety bond, in accordance with 31 U.S.C. § 9303, 31 CFR Parts 202, 206, and 225 and other governing Treasury regulations and circular(s). If required by the governing Treasury regulations and circular, a certified check, a bank draft, a post office money order, cash, a United States bond, a Treasury note, or other government obligation tendered in lieu of a surety bond may have to be collateralized. See, e.g., 31 CFR 202.6 and the appropriate Treasury Circular.

Appendix A to § 210.68 Affidavit by Individual Surety

United States International Trade Commission Affidavit by Individual Surety 19 CFR 210.68

State of _____

County _____

SS: _____

I, the undersigned, being duly sworn, depose and say that I am a citizen of the United States, and of full age and legally competent; that I am not a partner in any business of the principal on the bond or bonds on which I appear as surety; and that the information herein below furnished is true and complete to the best of my knowledge. This affidavit is made to induce the United States International Trade Commission to accept me as surety on the bond(s) filed or to be filed with the United States International Trade Commission pursuant to 19 CFR 210.68. I agree to notify the Commission of any transfer or change in any of the assets herein enumerated.

1. Name (First, Middle, Last) _____

2. Home Address _____

3. Type & Duration of Occupation _____

4. Name of Employer (If Self-Employed) _____

5. Business Address _____

6. Telephone No.
Home _____
Business _____

7. The following is a true representation of my assets, liabilities, and net worth and does not include any financial interest I have in the assets of the principal on the bond(s) on which I appear as surety.

a. Fair value of solely owned real estate *	.....
b. All mortgages or other encumbrances on the real estate included in Line a	.....
c. Real estate equity (subtract Line b from Line a)	.....
d. Fair value of all solely owned property other than real estate	.....
e. Total of the amounts on Lines c and d	.....
f. All other liabilities owing or incurred not included in Line b	.....
g. Net worth (subtract Line f from Line e)	.....

*Do not include property exempt from execution and sale for any reason. Surety's interest in community property may be included if not so exempt.

8. LOCATION AND DESCRIPTION OF REAL ESTATE OF WHICH I AM SOLE OWNER, THE VALUE OF WHICH IS IN LINE a, ITEM 7 ABOVE [1]

Amount of assessed value of above real state for taxation purposes:

9. DESCRIPTION OF PROPERTY INCLUDED IN LINE d, ITEM 7 ABOVE (List the value of each category of property separately) [2]

10. ALL OTHER BONDS ON WHICH I AM SURETY (State character and amount of each bond; if none, so state) [3]

11. SIGNATURE

12. BOND AND COMMISSION INVESTIGATION TO WHICH THIS AFFIDAVIT RELATES

SUBSCRIBED AND SWORN TO BEFORE ME AS FOLLOWS:
DATE OATH ADMINISTERED
MONTH DAY YEAR
CITY _____
STATE (Or Other Jurisdiction) _____

NAME & TITLE OF OFFICIAL ADMINISTERING OATH _____
SIGNATURE _____
MY COMMISSION EXPIRES _____

INSTRUCTIONS

1. Here describe the property by giving the number of the lot and square or block, and addition or subdivision, if in a city, and, if in the country, after showing state, county, and township, locate the property by metes and bounds, or by part of section, township, and range, so that it may be identified.

2. Here describe the property by name so that it can be identified—for example "Fifteen shares of the stock of the "National Metropolitan Bank, New York City," or "Am. T. & T. s. f.5's 60."

3. Here state what other bonds the affiant has already signed as surety, giving the name and address of the principal, the date, and the amount and character of the bond.

§ 210.69 Approval of complainant's temporary relief bond.

(a) In accordance with 31 U.S.C. § 9304(b), all bonds posted by

complainants must be approved by the Commission before the temporary relief sought by the complainant will be issued. See also 31 U.S.C. § 9303(a) and 31 CFR 225.1 and 225.20. The Commission's bond approval officer for purposes of those provisions shall be the Secretary.

(b) The bond approval process may entail investigation by the Secretary or the Commission's Office of Investigations to determine the veracity of all factual information set forth in the bond and the accompanying documentation (e.g., powers of attorney), as well as any additional verification required by 31 CFR Parts 223, 224, or 225. The Secretary may reject a bond on one or more of the following grounds:

(1) Failure to comply with the instructions in the Commission determination, order, or notice directing the complainant to post a bond;

(2) Failure of the surety or the bond to provide information or supporting documentation required by the Commission, the Secretary, § 210.68 of this part, 31 CFR Parts 223 or 224, or other governing statutes, regulations, or Treasury circulars, or because of a limitation prescribed in a governing statute, regulation, or circular;

(3) Failure of an individual surety to execute and file with the bond, an affidavit of the type shown in Appendix A to § 210.68, which sets forth information about the surety's assets, liabilities, net worth, real estate and other property of which the initial surety is the sole owner, other bonds on which the individual surety is a surety (and which must be updated at 4-month intervals while the bond is in effect, measured from the date on which the bond is approved by the Secretary on behalf of the Commission or by the Commission);

(4) Any question about the solvency or financial responsibility of the surety, or any question of fraud, misrepresentation, or perjury which comes to light as a result of the verification inquiry during the bond approval process; and

(5) Any other reason deemed appropriate by the Secretary.

(c) If the complainant believes that the Secretary's rejection of the bond was erroneous as a matter of law, the complainant may appeal the Secretary's rejection of the bond by filing a petition with the Commission in the form of a letter to the Chairman, within 10 days after service of the rejection letter.

(d) After the bond is approved and temporary relief is issued, if any question concerning the continued solvency of the individual or the legality or enforceability of the bond or undertaking develops, the Commission may take the following action(s), sua sponte or on motion;

(1) Revoke the Commission approval of the bond and require complainant to post a new bond; or

(2) Revoke or vacate the temporary remedial order for public interest reasons or changed conditions of law or fact (criteria that are the basis for modification or rescission of final Commission action pursuant to § 210.76(a)(1) and (b)); or

(3) Notify the Treasury Department if the problem involves a corporate surety licensed to do business with the United States under 31 U.S.C. §§ 9303–9306 and 31 CFR Parts 223 and 224; or

(4) Refer the matter to the U.S. Department of Justice if there is a suggestion of fraud, perjury, or related conduct.

§ 210.70 Forfeiture of complainant's temporary relief bond.

(a) If the Commission determines that one or more of the respondents whose merchandise was covered by the temporary relief order has not violated section 337 of the Tariff Act of 1930 to the extent alleged in the motion for temporary relief and provided for in the temporary relief order, proceedings to determine whether the complainant's bond should be forfeited in whole or part may be initiated upon the filing of a motion by a respondent or the Commission investigative attorney. Alternatively, such proceedings may be initiated by the Commission on its own initiative. A motion by a respondent or the Commission investigative attorney should be filed within 30 days after the service of the aforesaid Commission determination on violation.

(b) The complainant and any nonmoving party may file a response to the motion within 15 days after service of the motion, unless otherwise ordered by the presiding administrative law judge.

(c) A motion for forfeiture of a complainant's temporary relief bond in whole or part will be adjudicated by the administrative law judge in an initial determination with a 45-day effective date, which shall be subject to review under the provisions of §§ 210.42 through 210.45. In determining whether to grant the motion, the administrative law judge and the Commission will consider the following factors:

(1) The extent to which the Commission has determined that section 337 of the Tariff Act of 1930 has not been violated;

(2) Whether the presentation of the motion for temporary relief (or the portions thereof corresponding to the portions of the complaint that were not sustained on the merits) was justified under the standards of conduct articulated in § 210.4(c) and the guidelines in § 210.4(d) for determining whether those standards were violated;

(3) Whether forfeiture would be consistent with the legislative intent of the forfeiture authority (which is to provide a "disincentive" to the abuse of temporary relief by complainants);

(4) Whether forfeiture would be in the public interest; and

(5) Any other legal, equitable, or policy considerations that are relevant to the issue of forfeiture.

(d) Motions to stay forfeiture proceedings or the effective date of a forfeiture order pending the outcome of judicial review of the violation determination will not be granted. If the negative violation determination supporting the forfeiture order is reversed on judicial review, the Secretary will refund the appropriate amount of the forfeited bond to the complainant as expeditiously as possible in accordance with the governing Treasury procedures and regulations.

(e) If the investigation is terminated on the basis of a settlement agreement or a consent order with no concurrent determination concerning the violation of section 337 of the Tariff Act of 1930, forfeiture of the complainant's bond will not be ordered.

Subpart I—Enforcement Procedures and Advisory Opinions

§ 210.71 Information gathering.

(a) *Power to require information.* (1) Whenever the Commission issues an exclusion order, the Commission may require any person to report facts available to that person that will help the Commission assist the U.S. Customs Service in determining whether and to what extent there is compliance with the order or whether and to what extent the conditions that led to the order are changed. Similarly, whenever the Commission issues a cease and desist order or a consent order, it may require any person to report facts available to that person that will aid the Commission in determining whether and to what extent there is compliance with the order or whether and to what extent the conditions that led to the order are changed.

(2) The Commission may also include provisions that exercise any other information-gathering power available to the Commission by law, regardless of whether the order at issue is an exclusion order, a cease and desist

order, or a consent order. The Commission may at any time request the cooperation of any person or agency in supplying it with information that will aid the Commission or the U.S. Customs Service in making the determinations described in paragraph (a)(1) of this section.

(b) *Form and detail of reports.* Reports under paragraph (a) of this section are to be in writing, under oath, and in such detail and in such form as the Commission prescribes.

(c) *Power to enforce informational requirements.* Terms and conditions of exclusion orders, cease and desist orders, and consent orders for reporting and information gathering shall be enforceable by the Commission by a civil action under 19 U.S.C. § 1333, or, at the Commission's discretion, in the same manner as any other provision of the exclusion order, cease and desist order, or consent order is enforced.

(d) *Term of reporting requirement.* An exclusion order, cease and desist order, or consent order may provide for the frequency of reporting or information gathering and the date on which these activities are to terminate. If no date for termination is provided, reporting and information gathering shall terminate when the exclusion order, cease and desist order, or consent order or any amendment to it expires by its own terms or is terminated.

§ 210.72 Confidentiality of information.

Confidential information (as defined in § 201.6(a) of this chapter) that is provided to the Commission pursuant to exclusion order, cease and desist order, or consent order will be received by the Commission in confidence. Requests for confidential treatment shall comply with § 201.6 of this chapter. The restrictions on disclosure and the procedures for handling such information (which are set out in §§ 210.5 and 210.39) shall apply and, in a proceeding under §§ 210.75 or 210.76, the Commission or the presiding administrative law judge may, upon motion or sua sponte, issue or continue appropriate protective orders.

§ 210.73 Review of reports.

(a) *Review to insure compliance.* The Commission, through the Office of Unfair Import Investigations, will review reports submitted pursuant to any exclusion order, cease and desist order, or consent order and conduct such further investigation as it deems necessary to insure compliance with its orders.

(b) *Extension of time.* The Director of the Office of Unfair Import Investigations may, for good cause shown, extend the time in which reports required by exclusion orders, cease and desist orders, and consent orders may be filed. An extension of time within which a report may be filed, or the filing of a report that does not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from its obligation under the law with respect to compliance with such order.

§ 210.74 Modification of reporting requirements.

(a) *Exclusion and cease and desist orders.* The Commission may modify reporting requirements of exclusion and cease and desist orders as necessary:

(1) To help the Commission assist the U.S. Customs Service in ascertaining that there has been compliance with an outstanding exclusion order;

(2) To help the Commission ascertain that there has been compliance with a cease and desist order;

(3) To take account of changed circumstances; or

(4) To minimize the burden of reporting or informational access.

An order to modify reporting requirements shall identify the reports involved and state the reason or reasons for modification. No reporting requirement will be suspended during the pendency of such a modification unless the Commission so orders. The Commission may, if the public interest warrants, announce that a modification of reporting is under consideration and ask for comment, but it may also modify any reporting requirement at any time without notice, consistent with the standards of this section.

(b) *Consent orders.* Consistent with the standards set forth in paragraph (a) of this section, the Commission may modify reporting requirements of consent orders. The Commission shall publish a notice of any proposed change in the Federal Register, together with the reporting requirements to be modified and the reasons therefor, and serve notice on each party subject to the consent order. Such parties shall be given the opportunity to submit briefs to the Commission, and the Commission may hold a hearing on the matter.

§ 210.75 Proceedings to enforce exclusion orders, cease and desist orders, consent orders, and other Commission orders.

(a) *Informal enforcement proceedings.* Informal enforcement proceedings may be conducted by the Commission, through the Office of Unfair Import Investigations, with respect to any act or omission by any person in possible violation of any provision of an exclusion order, cease and desist order, or consent order. Such matters may be handled by the Commission through correspondence or conference or in any other way that the Commission deems appropriate. The Commission may issue such orders as it deems appropriate to implement and insure compliance with the terms of an exclusion order, cease and desist order, or consent order, or any part thereof. Any matter not disposed of informally may be made the subject of a formal proceeding pursuant to this subpart.

(b) *Formal enforcement proceedings.* (1) The Commission may institute an enforcement proceeding at the Commission level upon the filing by the complainant in the original investigation or his successor in interest, by the Office of Unfair Import Investigations, or by the Commission of a complaint setting forth alleged violations of any exclusion order, cease and desist order, or consent order. If a proceeding is instituted, the complaint shall be served upon the alleged violator and a notice of institution published in the Federal Register. Within 15 days after the date of service of such a complaint, the named respondent shall file a response to it. Responses shall fully advise the Commission as to the nature of any defense and shall admit or deny each allegation of the complaint specifically and in detail unless the respondent is without knowledge, in which case its answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted may be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered.

(2) Upon the failure of a respondent to file and serve a response within the time and in the manner prescribed herein the Commission, in its discretion, may find the facts alleged in the complaint to be true and take such action as may be appropriate without notice or hearing, or, in its discretion, proceed without notice to take evidence on the allegations set forth in the complaint, provided that the Commission (or administrative law judge, if one is appointed) may permit late filings of an answer for good cause shown.

(3) The Commission, in the course of a formal enforcement proceeding under this section may hold a public hearing and afford the parties to the enforcement proceeding the opportunity to appear and be heard. The hearing will not be subject to sections 554, 555, 556, 557, and 702 of title 5 of the United States Code. The Commission may delegate the hearing to the chief administrative law judge for designation

of a presiding administrative law judge, who shall certify an initial determination to the Commission. That initial determination shall become the determination of the Commission 90 days after the date of service of the initial determination, unless the Commission, within 90 days after the date of such service shall have ordered review of the initial determination on certain issues therein, or by order shall have changed the effective date of the initial determination.

(4) Upon conclusion of a formal enforcement proceeding under this section, the Commission may:

(i) Modify a cease and desist order, consent order, and/or exclusion order in any manner necessary to prevent the unfair practices that were originally the basis for issuing such order;

(ii) Bring civil actions in a United States district court pursuant to paragraph (c) of this section (and section 337(f)(2) of the Tariff Act of 1930) requesting the imposition of a civil penalty or the issuance of injunctions incorporating the relief sought by the Commission; or

(iii) Revoke the cease and desist order or consent order and direct that the articles concerned be excluded from entry into the United States.

(5) Prior to effecting any modification, revocation, or exclusion under this section, the Commission shall consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.

(6) In lieu of or in addition to taking the action provided for in paragraph (b)(1) of this section, the Commission may issue, pursuant to section 337(i) of the Tariff Act of 1930, an order providing that any article imported in violation of the provisions of section 337 of the Tariff Act of 1930 and an outstanding final exclusion order issued pursuant to section 337(d) of the Tariff Act of 1930 be seized and forfeited to the United States, if the following conditions are satisfied:

(i) The owner, importer, or consignee of the article (or the agent of such person) previously attempted to import the article into the United States;

(ii) The article previously was denied entry into the United States by reason of a final exclusion order; and

(iii) Upon such previous denial of entry, the Secretary of the Treasury provided the owner, importer, or consignee of the article (or the agent of such person) with written notice of the aforesaid exclusion order and the fact that seizure and forfeiture would result from any further attempt to import the article into the United States.

(c) *Court enforcement.* To enforce an exclusion order, a cease and desist order, a consent order, or a sanctions order, the Commission may initiate a civil action in the U.S. district court pursuant to section 337(f)(2) of the Tariff Act of 1930, requesting the imposition of such civil penalty or the issuance of such injunctions as the Commission deems necessary to enforce its orders and protect the public interest. The Commission may initiate a proceeding to obtain judicial enforcement without any other type of proceeding otherwise available under section 337 or this subpart or without prior notice to any person, except as required by the court in which the civil action is initiated.

§ 210.76 Modification or rescission of exclusion orders, cease and desist orders, and consent orders.

(a) *Petitions for modification or rescission of exclusion orders, cease and desist orders, and consent orders.* (1) Whenever any person believes that changed conditions of fact or law, or the public interest, require that an exclusion order, cease and desist order, or consent order be modified or set aside, in whole or in part, such person may file with the Commission a petition requesting such relief. The Commission may also on its own initiative consider such action. The petition shall state the changes desired and the changed circumstances warranting such action, shall include materials and argument in support thereof, and shall be served on all parties to the investigation in which the exclusion order, cease and desist order, or consent order was issued. Any person may file an opposition to the petition within 10 days of service of the petition.

(2) If the petitioner previously has been found by the Commission to be in violation of section 337 of the Tariff Act of 1930 and if its petition requests a Commission determination that the petitioner is no longer in violation of that section or requests modification or rescission of an order issued pursuant to section 337 (d), (e), (f), (g), or (i) of the Tariff Act of 1930, the burden of proof in any proceeding initiated in response to the petition pursuant to paragraph (b) of this section shall be on the petitioner. In accordance with section 337(k)(2) of the Tariff Act, relief may be granted by the Commission with respect to such petition on the basis of new evidence or evidence that could not have been presented at the prior proceeding or on grounds that would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

(b) *Commission action upon receipt of petition.* The Commission may thereafter institute a proceeding to modify or rescind the exclusion order, cease and desist order, or consent order by publishing a notice of the proceeding in the **Federal Register**. The Commission may hold a public hearing and afford interested persons the opportunity to appear and be heard. After consideration of the petition, any responses thereto, and any information placed on the record at a public hearing or otherwise, the Commission shall take such action as it deems appropriate. The Commission may delegate any hearing under this section to the chief administrative law judge for designation of a presiding administrative law judge, who shall certify a recommended determination to the Commission.

§ 210.77 Temporary emergency action.

(a) Whenever the Commission determines, pending a formal enforcement proceeding under § 210.75(b), that without immediate action a violation of an exclusion order, cease and desist order, or consent order will occur and that subsequent action by the Commission would not adequately repair substantial harm caused by such violation, the Commission may immediately and without hearing or notice modify or revoke such order and, if it is revoked, replace the order with an appropriate exclusion order.

(b) Prior to taking any action under this section, the Commission shall consider the effect of such action upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. The Commission shall, if it has not already done so, institute a formal enforcement proceeding under § 210.75(b) at the time of taking action under this section or as soon as possible thereafter, in order to give the alleged violator and other interested parties a full opportunity to present information and views regarding the continuation, modification, or revocation of Commission action taken under this section.

§ 210.78 Notice of enforcement action to Government agencies.

(a) *Consultation.* The Commission may consult with or seek information from any Government agency when taking any action under this subpart.

(b) *Notification of Treasury.* The Commission shall notify the Secretary of the Treasury of any action under this subpart that results in a permanent or temporary exclusion of articles from entry, or the revocation of an order to

such effect, or the issuance of an order compelling seizure and forfeiture of imported articles.

§ 210.79 Advisory opinions.

(a) *Advisory opinions.* Upon request of any person, the Commission may, upon such investigation as it deems necessary, issue an advisory opinion as to whether the person's proposed course of action or conduct would violate a Commission exclusion order, cease and desist order, or consent order. The Commission will consider whether the issuance of such an advisory opinion would facilitate the enforcement of section 337 of the Tariff Act of 1930, would be in the public interest, and would benefit consumers and competitive conditions in the United States, and whether the person has a compelling business need for the advice and has framed his request as fully and accurately as possible. Advisory opinion proceedings are not subject to sections 554, 555, 556, 557, and 702 of title 5 of the United States Code.

(b) *Revocation.* The Commission may at any time reconsider any advice given under this section and, where the public interest requires, revoke its prior advice. In such event the person will be given notice of the Commission's intent to revoke as well as an opportunity to submit its views to the Commission. The Commission will not proceed against a person for violation of an exclusion order, cease and desist order, or consent order with respect to any action that was taken in good faith reliance upon the Commission's advice under this section, if all relevant facts were accurately presented to the Commission and such action was promptly discontinued upon notification of revocation of the Commission's advice.

PART 211—[REMOVED]

Issued: July 14, 1994.

By Order of The Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 94–17643 Filed 7–29–94; 8:45 am]

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Monday
August 1, 1994

Part III

Department of Housing and Urban Development

Assistant Secretary for Public and Indian Housing

24 CFR Parts 905 and 950
Indian Housing Program; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Assistant Secretary for Public and Indian Housing

24 CFR Parts 905 and 950

[Docket No. R-94-1742; FR-3646-P-01]

RIN 2577-AB43

Indian Housing Program: Proposed Amendments

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would add a new part 950 to HUD's regulations. New part 950 would contain the Indian Housing Consolidated regulations that are currently set forth in 24 CFR part 905. In addition to moving the Indian Housing Consolidated regulations from part 905 to part 950, the proposed rule would make a number of amendments to the Indian Housing Consolidated regulations to simplify program processes, reduce the number of regulatory requirements, and provide more flexibility to local Tribal and Indian housing authority officials in the administration of the Indian Housing program.

DATES: Comments due date: September 30, 1994.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410-0500. Communications should refer to the above docket number and title. Facsimile (FAX) comments *are* not acceptable. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. to 5:30 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Dominic Nessi, Director, Office of Native American Programs, Public and Indian Housing, Room 4140, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410, telephone (202) 708-1015, or (202) 708-0850 (these are not toll-free numbers). Hearing- or speech-impaired persons may use the TDD number by contacting the Federal Information Relay Service on 1-800-877-TDDY (1-800-877-8339) (a toll-free number) or 202-708-9300 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Burden

This proposed rule does not add to the information collection requirements currently contained in 24 CFR part 905, and that already have been approved and assigned OMB control numbers under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520). These numbers are shown under the applicable sections.

II. Background

Title II of the United States Housing Act of 1937 (42 U.S.C. 1437aa) ("the Act"), as amended provides for the establishment of the Indian Housing program. The Indian Housing program includes the Rental program and the Mutual Help and Turnkey III Homeownership Opportunity Programs. A number of regulatory revisions have been made to the Indian Housing program in the past four years designed to provide IHAs with more administrative flexibility. Most recently, a final rule for "Indian Housing: Revised Consolidated Program Regulations" was published on June 24, 1992 (56 FR 28250) and became effective on October 3, 1992. This proposed rule published today continues that trend.

The move from part 905 to part 950 will allow HUD's Office of Native American Programs to consolidate all Native American program regulations in consecutive CFR parts. HUD's Community Development Block Grant regulations that are applicable to Indian tribes and currently codified in 24 CFR part 571 will eventually be moved to 24 CFR part 951.

III. Program Streamlining

A. Administrative Actions and Pre-Publication Comments

The primary goal in undertaking these revisions to the Indian Housing Program regulations is to provide greater discretion and responsibility to IHAs in carrying out their housing programs, thereby returning them to local control. Since September 1993, the six Native American Program Field Offices have been conducting an extensive consultation with IHAs and Tribal officials. A significant number of comments were submitted which constitute the basis for the revisions contained in this proposed rule.

A consultation session to discuss these changes and to provide for additional input was held in Washington, DC, with the National American Indian Housing Council, eight regional IHA associations, as well as a number of representatives from other IHAs. Additional verbal comments were received from the Native American housing community at that time.

Each regional Indian housing association received a full set of the comments submitted by other IHAs. Interested parties should contact their respective regional associations for a copy of these comments.

Consistent with the principles of Executive Order 12866, HUD has reviewed the existing Indian Housing regulations, and has proposed modifications that are designed to make these regulations more effective, consistent, understandable and sensible.

B. Proposed Amendments

The following describes the amendments proposed to be made to the Indian Housing regulations. Unless otherwise indicated, the references to regulatory sections and subparts are to those in the existing regulations in 24 CFR part 905. Additionally, unless otherwise indicated, the section numbers in new part 950 will remain the same as currently set forth in part 905 (e.g., § 905.105 will be renumbered § 950.150).

SUBPART A—GENERAL

905.105 Types of low income housing projects. The types of low income housing projects contained in this section has been removed in an effort to streamline the regulations. The definitions will be included in the Indian Housing Management Handbook.

905.115 Applicability of civil rights. The civil rights requirements contained in this section would be amended to include a reference to title II of the Americans with Disabilities Act (42 U.S.C. 12131).

905.126 Establishment of IHAs by Tribal ordinance. The model Tribal Ordinance contained in this section have been removed and will be placed in a handbook for reference. The revised language will state, "The form of Tribal ordinance shall be determined by the Tribe and reviewed by the ONAP Administrator. The IHA must also demonstrate that it has the legal capacity to develop, own and operate a public housing project under the Act. A sample format will be provided by HUD."

905.135 Administrative capability. Verbal, as well as written comments, recommended that the system could be simplified to benefit both HUD and the IHAs. No specific written comments were given. Comments received during the Washington, D.C. consultation were mixed as to the need for change. Based on the discussions during the meeting, slight revisions have been made to the

language in new § 950.135(a) which could provide flexibility in the future regarding determinations of administrative capability. The appeal process contained in this section also has been revised based on HUD's recent reorganization.

905.140 Certification of housing managers. The certification of housing managers as a Federal requirement has been removed. HUD encourages the Indian housing community to continue the effort to professionalize the industry.

Subpart B—Procurement

General

In the current regulation, subparts B and C of part 905 contain numerous references to approval by HUD for "high risk" IHAs. This proposed rule provides for the assumption that procurement and development processing will be completed by IHAs that are not designated "high risk". Procedures addressing processing for "high risk" IHAs are contained in § 905.210. This modification has resulted in significant editing of subparts B and C but has no other impact on program requirements. Additionally, both subparts B and C have been reorganized to more closely follow processing steps.

905.160 Procurement standards. This section has been reworded to clarify that an IHA Board of Commissioners must assure that program requirements have been satisfied before execution of contracts. Previous wording required the Board to certify to compliance before a contract is executed. The proposed language allows compliance with this requirement if the IHA Board of Commissioners develops procurement policies in accordance with this subpart and 24 CFR part 85 and reviews compliance with these policies on a regular basis.

The requirement for submission of a bidding package or a certification of compliance prior to the solicitation of bids/proposals is proposed to be removed. Such certification is to be submitted after award of contract (see new § 950.260).

905.165 Indian preference requirements [Renumbered 950.175]. The Indian Preference (IP) part has been completely re-written and simplified. The re-written section closely follows the IP requirements included in the Indian CDBG regulations in 24 CFR part 571. It is anticipated that standardization of IP requirements between the Indian Housing, CDBG and HOME programs will provide improved flexibility to IHAs and tribes and will be simpler to understand and comply with for both grantees and contractors/suppliers.

The proposed rule would remove HUD's involvement in the Indian Preference complaint process. Complaint resolution, including appeals and administrative hearings, is proposed to be contained at the IHA level. HUD will continue to monitor IHA compliance with Indian Preference requirements during periodic performance monitoring reviews. This proposal is made to expedite the complaint process and to vest full authority for compliance with Indian Preference with local officials.

905.175 Methods of procurement [Renumbered 950.165]. The "X" factor method has been removed and will be addressed in the program handbook. The section "Methods of procurement" was a continuation of the IP requirements of the program. With the simplification of IP (see new § 950.160) this part has been modified to recite the provisions of 24 CFR 85.36(d).

905.180 Training and employment requirements [Renumbered 950.175]. This section would be relocated to the Indian Preference section (noted earlier in this preamble) and simplified to enable IHAs to develop programs which can more adequately reflect local conditions and needs.

Subpart C—Development

905.210 Development priorities. The requirements for development priorities were removed from U.S. Housing Act of 1937, as amended, by the Housing and Community Development Act of 1992. Accordingly, the requirements currently contained in existing § 905.210 are not contained in the proposed rule.

905.212 Authority for proceeding without HUD approval [Renumbered 950.210]. As part of the revisions to subparts B and C of part 905, to remove specific requirements for "high risk" IHA processing, this section had been modified to provide for HUD to require an IHA to obtain approval for additional processing steps where it is determined necessary. The section includes three circumstances where HUD may impose additional requirements on an IHA during the development period.

905.215 Production methods and requirements [Retitled "Production methods"]. The explanations of the usual methods of development used by IHAs have been abbreviated in the proposed rule and a clarification has been made that an IHA can use whatever method of development it chooses so long as the method is not counter to the requirements of 24 CFR part 85. HUD believes that this revision expands the opportunities for IHAs to utilize new and innovative means of producing housing and may result in lower cost housing developed in shorter time periods.

The listing of public advertisement requirements has been removed. These requirements are more fully covered in 24 CFR part 85 and the program handbooks.

905.220 Application procedures [Renumbered 950.225, and retitled "Application"]. Timeframes for beginning review of applications; initial review and request for supplemental information steps; and other processing instructions have been removed from this section. Processing steps such as these are more appropriately covered in the program handbook and, if necessary, in the program NOFA.

The term "ranked" in existing paragraph (c) of this section has been replaced with the correct term—"rated" Projects are rated by program type but ranked together to arrive at an ordered list for funding determinations.

The proposed rule clarifies that project funds cannot be used for expenses of another project except for comprehensive planning. This requirement is in the current regulations but is not clear.

The limitation on planning funds of 3 percent of the program reservation has been removed. Experience has shown that an arbitrary percentage is impractical with the result being that many IHAs either requesting a waiver of the 3 percent limitation or delaying payment of incurred expenses. The proposed language specifies that IHAs must justify the level of funding for planning regardless of the amount requested.

The word "cluster" has been removed from examples contained in the comprehensive housing plan section. The removal of this term clarifies that comprehensive planning is not limited to cluster or subdivision housing sites.

950.230 Project coordination [New section]. A new section has been added to address project coordination. The new section specifies that IHAs must plan for the development with the tribe, utility companies, and other state or Federal agencies and schedule completion of these activities. While IHAs have always participated in the coordination of project planning, HUD frequently took a leadership role in the past. With the removal of HUD from most aspects of planning coordination relative to all projects unless otherwise specified (§ 905.210), this section clarifies that the IHA is fully responsible for project coordination. The section

also requires that a project coordination schedule be provided to HUD for monitoring purposes.

905.225 IHA development program [Renumbered 950.260]. A clarification was made to this section to specify that the Development Program is to be submitted in accordance with the project schedule. This was added to emphasize that the IHA is responsible for planning its project and implementing the plan.

905.230 Site selection criteria [Renumbered 950.235]. The requirements contained in this section have been significantly modified to reduced regulatory requirements. These changes include (1) simplifying this section to state that all utilities needed for the project will be committed before final site approval; (2) removing requirements for topography, subsurface conditions and natural hazards, flooding, and multi-unit and scattered sites (these items are either addressed under other requirements of this part (flooding) or are more appropriately addressed in the program handbook); and (3) changing maximum site size from one acre to a local determination based on needs of housing occupants.

905.235 Types of interest in land [Renumbered 950.240]. A clarification was made to this section, to be consistent with the statute, that all property included in the project must be exempt from state or local real and personal property tax.

905.240 Appraisals [Renumbered 950.245]. This section was simplified to require compliance with the Uniform Relocation and Assistance Act. The part of this section which attempted to instruct the IHA on how to perform an appraisal was removed.

Additionally, clarification was provided that an appraisal is not required for any donated property that has a value of $1,500 or less, regardless of the source of the donation.

The requirement for HUD approval of appraisals was removed. If a Field Office determines that a project should be processed under the "assisted" method, review of appraisals can be required.

905.245 Site approval [Renumbered 950.250]. This section has been restructured to clarify the site approval process. Revised provisions include (1) clarification that the IHA may submit a site approval certification with the development program in lieu of the supporting documents; (2) clarification of the method to be followed by the IHA in determining tentative site approval; and (3) clarification of the environmental clearance process and how it will be conducted jointly by HUD and the IHA; and, removal of the requirement that HUD inspect all sites.

905.250 Design criteria [Renumbered 950.255]. This section was modified to include (1) Model Energy Code requirements; (2) IHA Board of Commissioners designation of applicable codes in the absence of tribal adoption; (3) clarification that designs must be approved by local or tribal regulatory agencies and the BIA and/or IHS, where applicable. Additionally, the moderate housing design requirement was moved to this section.

905.255 Total development cost standard [Renumbered 950.220 and retitled "Total development cost"]. HUD processing and procedure requirements were removed from this section. These requirements are more appropriately located in the program handbook or notices.

Wording was added to clarify that tenant training includes homebuyers and tenants. This has been previously authorized under the program with tenant counseling discussed here, and a parallel authorization for homebuyers under subpart E of part 905.

Provisions have been added to allow for the escrow of insurance premium funds to assist in closeout of development programs. Currently, a development program must be held open until all expenses have been incurred and paid. This change will allow for certain development programs to be closed in a shorter period.

905.260 Construction and inspections [Renumbered 950.265]. The submission requirements of plans, specifications, and other contract documents have been listed to clarify when the submissions must be made and what is to be included. Clarification also has been added that submissions are not due to be provided to HUD until after award of a contract by the IHA.

A new subsection has been added clarifying that the IHA has the responsibility to coordinate construction inspections with other agencies.

A new subsection, "Construction completion and settlement," has been added to distinguish between the construction period and the closeout period of project development. Provisions from existing § 905.260 that address completion and settlement will be addressed in this section. In addition the following has been modified to provide clarification and structure to the process:

HUD's involvement in the final inspection process for standard method IHAs has been removed. Other agencies who may be required to attend the final inspection have been added to the participant list for the final inspection.

This section also has been revised to clarify the procedures for contract settlement to include an interim and final certificate of completion, and to clarify that IHAs may make payment to contractors without prior HUD approval.

Submittal requirements for completion documents to HUD have been included in this section.

905.265 Warranty inspections and enforcement [Renumbered 950.275]. This section was revised to clarify that two inspections are the minimum requirement during the warranty period; one within six months of the start of the warranty period and one prior to the expiration of the warranty. This is not a new requirement but the wording of this section was modified to remove possible confusion.

905.270 Correcting deficiencies [Renumbered 950.280]. This section was revised to clarify that modernization funds or IHA held funds may be used to correct design or construction deficiencies. This is not a new authority but serves to list in one place the potential funding sources to address design or construction deficiencies (DCDs). This section also was revised to clarify that HUD is under no obligation to fund correction of DCDs.

Subpart D—Operation

General Changes

The subpart has been generally revised to provide for a clearer organization of information.

Specific Changes

905.301 Admission policies. The "broad range of incomes" language in § 950.301(a)(2)(ii) would include reference to the statutory change in section 501 of National Affordable Housing Act (NAHA) that now requires adherence to the requirement to attain a tenant mix with a broad range of incomes "to the maximum extent feasible."

Additionally, § 950.301(a)(2)(iv) would include the increase from 10 percent to 30 percent of non-Federal preference holders eligible for admission to Indian housing programs as permitted under section 501 of the NAHA.

905.335 Rent and homebuyer payment collection policy. This section has been revised to include the phrase "and homebuyer" after the word "rent" to emphasize that collection payment policies apply to Mutual Help (MH).

Subpart E—Mutual Help Homeownership Opportunity Program

General Changes

HUD recognized that changes were needed to the Indian program, such as Mutual Help (MH), to assure that services provided to the Tribes and the residents continue to be in their best interests. Accordingly, the changes made to this subpart were directed to make the MH program more efficient.

905.404 Program framework. In an effort to streamline the regulation, this section has been removed. As commenters indicated, the information outlined here is already located in subparts C and E of part 905. This does not eliminate the necessity for an ACC, MHO Agreement or Construction Contract, however.

905.407 Application. This section has been removed. (See new § 950.225, Application, discussed earlier in this preamble.)

905.410 HUD review of application. This section has been removed.

905.416 Selection of MH homebuyers. The provisions of § 905.301(a)(3)(vi) would be contained in § 950.416(a)(3) and revised to reflect changes made in this subpart regarding the determination of purchase prices and the designation of a successor. Paragraph (a)(3) of new § 950.416 provides that the IHA's admission policies for MH projects should be different from those for its rental or Turnkey III projects. The policies for the MH program should provide standards for determining a homebuyer's:

—Ability to provide maintenance for the unit;
— Potential for maintaining at least the current income return—successor to a unit at the time of an "event." ("Event" should also be defined by the IHA in its policy); and
— Initial purchase price and the purchase price for a subsequent homebuyer.

Paragraph (e) of new § 950.416 would be strengthened and clarified to address the comments received. The following language has been added to this section: "Ownership or use of a decent, safe and sanitary residence other than the MH home at the time of occupancy or acquisition during occupancy would disqualify a family from the MH program."

905.419 MH Contribution. The requirement in existing § 905.419(3) for HUD approval has been removed in the new § 950.419(3).

905.425 Inspections, responsibility for items covered by warranty. The language in paragraph (a) of this section has been revised in new § 950.425(a) to clarify that the homebuyer move-in inspection could be the final inspection with the contractor, IHA, and homebuyer or a separate inspection with the IHA and homebuyer.

Paragraph (c) of existing § 905.425 has been removed since it is contained in § 950.428.

905.427 Homebuyer payments—post-1976 projects. This section has been revised to eliminate HUD approval of the amount of monthly payment for New MH program developments and HUD approval of the specific percentage the IHA will use to determine the monthly payment in Mutual Help.

905.431 Operating reserve. The language in this section that requires HUD approval of unanticipated costs has been removed.

950.432 Operating budget submission and approval [New section]. A new section has been added to this subpart to provide for the operating budget submission for Mutual Help. Subpart J does not apply to the Mutual Help program. Therefore, no guidance is given for IHAs submitting budgets for this program.

905.434 Operating subsidy. HUD is proposing a revision to the current method of determining subsidy for counseling and training. HUD proposes the use of a formula for providing subsidy to IHAs in these two areas, and seeks comment from the Indian housing community on the specific formula to be used. The formula approach will eliminate the need for IHAs to submit specific training and counseling budgets annually.

Subject to appropriations, an additional category of subsidy eligibility is also being added. Funding of up to $25 per unit per year would be made available to an IHA with a duly elected resident organization for resident participation activities. Of this amount, $15 per unit per year shall fund resident participation activities of the resident organization. IHAs should refer to 905.965, Funding Resident Participation and 905.967, Eligible TOP Activities.

905.437 Homebuyer reserves and accounts. The Voluntary Equity Payments Account (VEPA) has been removed from this section since it was not necessary and seldom used.

Substantial revision was made to the provision concerning reserves in this section. Several requests were made to revise the section on investment of equity funds to allow IHAs to utilize the homebuyer's monthly equity payments account (MEPA), provided that a portion is maintained as a reserve. It was suggested that a sufficient amount of funds should be maintained in a secured investment for use if homebuyers terminate the mutual help and occupancy agreement (MHOA) and equity funds are to be disbursed. HUD agrees with the comment but also believes that HUD local office approval should be a part of the process to insure that the IHA has administrative capability prior to using the equity funds. Proposed regulatory language is as follows:

> Notwithstanding other provisions of this subpart and subject to HUD Field Office approval, an IHA may use a portion of the homebuyers' equity accounts for low-income housing purposes provided that a reserve of homebuyers' MEPA is maintained. The reserve must be at a percentage established by the IHA and approved by the HUD Field Office.

905.440 Purchase of home. In paragraph (a) of this section, the reference to 24 CFR 203.43(h) was removed. In new § 950.440(b), the details on determining the purchase price have been streamlined. The proposed language is as follows: "(1) Initial purchase price. The initial purchase price of a home for a homebuyer shall be determined by the IHA."

In paragraph (b)(2) of this section, the reference to the prevailing interest rate for VA guaranteed mortgage loans at the time the schedule is established was removed because VA no longer sets this amount.

Paragraph (d) of this section concerning notice of eligibility for financing was removed. Section 905.443/950.443 already outlines the IHA homeownership financing guidelines. The need to notify families at the time of each reexamination is burdensome.

In paragraph (e)(7) of this section, the last sentence regarding the relationship with the homebuyer has been removed. It is repeated in § 950.443.

In paragraph (e)(8) of this section, the following language has been added, "Notwithstanding the above requirements, an IHA may complete emergency and statutorily or regulatorily required modernization work on a unit which is paid off but not conveyed, during the term of the repayment schedule."

Paragraph (e)(9)(ii) has been revised to read, "Upon repayment of the total delinquency, the IHA may, in accordance with § 950.602(e)(2), complete non-emergency modernization work on a unit prior to conveyance."

905.443 IHA homeownership financing. The homeownership financing requirements have been streamlined. Additional guidance on

IHA financing will be provided in a handbook.

905.449 Succession upon death or mental incapacity [Renamed "Succession"]. Revisions to this section are as follows:

In paragraph (a), language has been revised as follows, ""Event" means the death, mental incapacity, or other conditions as determined by the IHA, of all of the persons who have executed the MHO Agreement as homebuyers."

In paragraph (b), language was added as follows: "A homebuyer may designate a successor who, at the time of the "event" would assume the status of homebuyer, provided that the successor meets the conditions established by the IHA which shall include satisfying program eligibility requirements." The designation may be made at the time of execution of the MHO Agreement, and the homebuyer may change the designation at any later time by written notice to the IHA.

Paragraph (c) was revised to read, "Upon occurrence of an 'event', the person designated as the successor shall succeed to the former homebuyer's rights and responsibilities under the MHO Agreement if the designated successor meets the criteria established by the IHA which shall include program eligibility requirements."

Paragraphs (c)(i) through (iv) and (c)(2) of this section were removed. These paragraphs address current regulatory conditions applicable to HUD.

Paragraph (d) was revised. The clause "or if any of the conditions in paragraph (c) of this section are not met by the designated successor" has been removed.

905.453 Counseling of homebuyers. Funding of counseling has been modified to eliminate the $500 maximum contained in the current regulation for development. Counseling cost will now be determined by the IHA with no minimum or maximum amount. The maximum amount will be a factor of the IHA's needs and the availability of funds within the development program.

Additionally, all portions of this section with the exception of (1) the requirement to submit a counseling program to the HUD Field Office for approval, (2) the requirement for an annual report and (3) the termination process have been removed. The IHA will have the flexibility to design a program to meet their needs.

Subpart F—Self-Help Development in the Mutual Help Homeownership Opportunity Program

905.463 Basic requirements [renumbered 950.475] Section 950.463(d) has been removed. A detailed discussion is already in the program handbook.

Paragraph (d) of this section has been removed. Construction tasks are more appropriately included in the program handbook.

Subpart G—Turnkey III Program

The revisions to this subpart are designed to streamline the Turnkey III program regulations as appropriate to the present status of the program, which is limited to the management, operation, conversion and sale of the remaining unsold Turnkey III units only. Accordingly, language concerning development and initial occupancy of new projects was removed.

At the present time, there are only about 30 IHAs with active Turnkey III programs, and the total inventory of Turnkey III homes still in management nationwide amounts to 1,749 units. It is anticipated that the remaining program inventory will be rapidly reduced, and the rest of the Turnkey III homes will be sold or converted to Mutual Help and the program completely closed out within the next few years.

905.501 Introduction. This section was streamlined to provide only essential elements of the Turnkey III program.

A new paragraph (5), "Program Overview," was added to provide a brief description of how the Turnkey III Program works. This paragraph is added for the orientation of the reader who wants basic information about the general nature of the program.

905.503 Conversions of Turnkey III units and transfer of occupants [Retitled "Conversion of Turnkey III developments"]. The requirements of this section have been streamlined. The conversion procedures are now similar to those in §§ 950.455 and 950.458 which cover conversions of rental and Mutual Help programs, and simplify the process and provide consistency from one program to another.

905.505 Selection of Turnkey III homebuyers [Retitled "Eligibility and selection of Turnkey III homebuyers"]. This section was retitled to clarify basic provisions on homebuyer requirements.

Paragraph (a) of this section was retitled "Applications" to clarify basic provisions on homebuyer requirements.

The "Turnkey III waiting list" provisions have been eliminated from this section, and replaced with streamlined requirements in paragraph (b) titled "Selection and notification of homebuyers."

905.507 Homebuyer Ownership Opportunity Agreements (HOOA). Paragraph (c) of this section, "New agreements", has been removed because the information is adequately covered in other sections of the regulation.

905.511 Homebuyers' association and homeowners' association [Retitled "Homebuyers Association (HBA)"]. This section has been retitled to reflect that this section only addresses information on the HBA. Homeowners' associations are addressed in § 950.512. Additionally, the requirements in paragraph (a) of this section have been streamlined.

950.512 Homeowners' association (HOA) [New section]. This section has been added to discuss HOAs.

905.513 Break-even amount and application of monthly payments. The requirements of this section have been streamlined and paragraph (d) has been revised to insert limits on EHPA/NRMR credits in circumstances specified.

905.515 Monthly operating expense. Paragraph (c) of this section titled "Provision for common property maintenance" has been removed.

905.517 Earned Home Payments Account (EHPA). Paragraphs (c)(1) (i), (ii), (iii) and (2) concerning exercise of option and required amount in EHPA have been removed for the purpose of expediting sale to subsequent homebuyers without their having to wait two years.

905.521 Operating reserve. Paragraph (b) of this section titled "Nonroutine maintenance—common property (contribution to operating reserve)" has been revised to remove all references to maximum operating reserve. Paragraph (c) of this section has been removed.

905.525 Achievement of Ownership [Retitled "Purchase price and methods of purchase"]. Revisions have been made to this section regarding the terms of sale to original and subsequent homebuyers. Based on comments received, the procedures for determining the purchase price and the term of the purchase price schedule have been changed to agree with the Mutual Help program.

A new subparagraph (c)(5) has been added to make clear that IHA financing is allowed, without the need for HUD approval, just like in the MH program (see § 950.440, Purchase of Home).

905.527 Payment upon resale at profit. A new paragraph (c) titled "Death of Homeowner" has been added to respond to any questions concerning the death of the homebuyer before the end

of the five-year period of the promissory note.

Subpart I—Modernization

The Comprehensive Grant Program (CGP) portion of this subpart has been revised in an effort to simplify and streamline the CGP process. The revised CGP regulation, which includes both the Indian housing and public housing CGP regulations, was published as a proposed rule on March 8, 1994 (59 FR 10876). The revisions were made in consultation with the housing authorities and interest groups which included representation from the National American Indian Housing Council (NAIHC). Additional changes to the proposed version of the CGP regulation are included in this proposed rule. Indian Housing Authorities (IHAs) are encouraged to provide any additional comments they may have on this program. Additionally, in this proposed part 950 rule, changes to the General Provisions and Comprehensive Improvement Assistance Program (CIAP) sections of subpart I are also proposed to be made.

A recommendation to remove the CIAP requirement that states that each development for which work is proposed must be at least three years old from the end of the initial operating period has been adopted in the proposed revisions to the CIAP regulation.

905.602 Special requirements for TKIII and Mutual Help developments. The requirements for TKIII homebuyers to be charged for the cost of modernization work have been removed.

This section also has been revised to allow IHAs to modernize Mutual Help units which are paid off but not conveyed.

Changes have been made to allow IHAs to do work necessary to meet statutory or regulatory requirements in TKIII units which are paid off, so long as the work is completed prior to conveyance

Comprehensive Improvement Assistance Program (CIAP)

905.618 Procedures for obtaining approval of a modernization program. The following requirements have been removed from this section: (1) that developments proposed for work must be at least three years old from the date of EIOP; (2) that the submission of a fiscal audit is an eligibility requirement; and (3) the use of a Declaration of Trust as a requirement for Mutual Help units.

905.624 Resident and homebuyer participation. This section consolidates homebuyer consultation requirements in one section by removing special consultation requirements for TKIII homebuyers where the cost of modernization work increased the amortization period of the home.

905.633 Special requirements for section 23 leased housing bond-financed development [Removed]. This section has been removed since there is no longer any Section 23 housing management by IHAs.

905.635 Initiation of modernization activities. The requirement for prior HUD approval of force account work has been removed from this section.

Comprehensive Grant Program

Revisions have been made to make the $75 million set-aside for emergencies and disasters available to CIAP housing authorities as well as CGP housing authorities.

Also, changes were made to continue the rolling base concept of the Five-Year Action Plan. The regulations now allow for full interchangability of work items in any of the five years.

The following provisions have been removed from the CGP requirements:

1. The annual Statement by making the level of detail for describing work items the same for each year of the Five-Year Plan;
2. The concept of "major changes" has been eliminated since IHAs would be able to move work items within any of the five years of the plan; however, amendments to the Annual Work Statement would be required where any work items are added which are not in the Five-Year Action Plan;
3. The optional two-year Annual Statement;
4. The presumptive estimate by providing only a final formula amount;
5. The requirement for an initial notice and specific notification of democratically elected presidents of resident organizations but public notice is required prior to the advance meeting and public hearing;
6. The specified three week time frame for holding the advance meeting before the public hearing;
7. The requirement for use of a Declaration of Trust for Mutual help units;
8. The Executive Summary as a separate document; and
9. The requirement for prior approval of force account work.

The percentage limitation on management improvements from 10 to 20 percent has been increased for all IHAs. IHAs determined by the ONAP to be "high performing" would have no percentage limitation on management improvements.

The revisions proposed allow IHAs to hold the advance meeting for residents and the public hearing earlier in the year by using the formula amount for the current year as the planning level for the coming year.

905.666 Eligible costs. The charge to TKIII homebuyers for the cost of health and safety work items has been removed from this section. Also removed from this section is the requirement for IHAs to keep records by unit of the substantial rehabilitation of TKIII units, and the requirement for IHAs to demonstrate that the proposed substantial rehabilitation of vacant or non-homebuyer occupied TKIII units will bring the units into full compliance with the homeownership objectives of subpart G. Additionally, the proposed rule removes the language requiring that to the "maximum extent feasible" IHAs should use their management improvement funds to train residents.

Subpart J—Operating Subsidy

905.715 Computation of utilities expense level. Revisions have been made to this section to extend, for a period not to exceed an additional six (6) years, the existing arrangement under which an IHA may share equally with HUD any cost reductions due to the differences between projected and actual utility rates in the first year reductions occur. Similar changes were made in § 905/950.730, discussed below.

950.720 Other costs. Revisions were made to paragraph (b)(2) of this section. The revisions include removing the need for a waiver before operating subsidy may be paid for certain units approved for nondwelling use to promote economic self-sufficiency and anti-drug activities.

905.730 Adjustments. The 60 day deadline in this section for requesting a revision of an IHA's Allowable Expense Level in 950.730(f)(3)) has been removed.

905.740 Operating reserves. The maximum operating reserve requirement has been removed from this section. IHAs will be required to maintain sufficient working capital for future nonroutine maintenance requirements, insurance premiums and unanticipated project requirements.

905.772 Operating subsidy eligibility for projects owned by IHAs in Alaska [Renumbered 950.774]. In the proposed rule, the provisions of this section are in § 950.774. Additionally, the provisions of subpart N have been incorporated into subpart J to address Alaska's non PFS status and the need for them to

comply with budget submission requirements.

950.772 Financial management systems, monitoring and reporting. In the existing regulations, these provisions are found in § 905.950 of subpart N. In the proposed rule, these provisions are in § 950.772 and apply to all programs.

Subpart K—Energy Audits, Energy Conservation Measures and Utility Allowances General Changes

In the majority of sections in this subpart, the examples of methodologies of performing energy audits have removed. These examples will be placed, more appropriately, in the Indian Housing Management Handbook.

Descriptions of specific energy saving items, such as ceiling insulation and timers for hot water heaters, have been removed from this subpart and also will be addressed in the Handbook.

905.807 Energy conservation measures [Removed]. This section will be moved in its entirety to the Handbook.

905.810 Order of funding. Paragraphs (b) and (c) of this section have been removed, and their provisions will be addressed in the Handbook.

905.815 Energy conservation equipment (renamed Energy conservation equipment and practices). The list of energy conservation equipment has been removed and will be placed in the Handbook.

905.822 Compliance schedule, and *905.848 Compliance schedule.* Both sections have been revised to eliminate dates that have passed, and therefore are no longer applicable.

905.842 Benefit/cost analysis. The methodology for performing a benefit/cost analysis has been removed and will be addressed in the Handbook.

905.870 Standards for allowances for utilities. This section has been edited to remove duplicative language.

Subpart L—Operation of Projects After Expiration of Initial ACC Term

No comments were received on this subpart from IHAs and Tribal officials, and no changes are proposed. Therefore, this subpart is not being published for comment.

Subpart M—Disposition or Demolition of Projects

General Changes

This subpart has been streamlined by removing sections and subsections that are more appropriate in a handbook (those regulatory provisions that merely provide examples). The removed provisions will be incorporated in the Indian Housing Management Handbook.

Specific Changes

905.925 Relocation of displaced tenants [Removed]. This section was removed by a technical amendment and replaced by § 950.117.

950.925 Resident organization opportunity to purchase [New section]. A new § 950.925 which implements the new statutory requirements on this subject contained in the **Federal Register** of October 6, 1992 (57 FR 46074), has been added.

905.933 Use of Proceeds. Paragraph (a)(2) of this section titled "Proceeds of a Disposition" was revised to reflect the statutory requirement for application of a proportional ratio in scattered site housing when satisfying outstanding debt obligations of a project.

950.937 Reports and records [Removed]. This section was removed and the subject matter of this section will be addressed in the Handbook.

Subpart O—Resident Participation and Opportunities

General Changes

The proposed rule on Resident Participation and Opportunities in Indian Housing, 24 CFR 905, subpart O, was published in the **Federal Register** on April 19, 1994 (59 FR 18666). Comments were due May 19, 1994. HUD anticipates publishing a final rule on subpart O that takes into consideration public comment in the summer of 1994. Because the proposed rule on subpart O was recently published, this proposed rule does not republish subpart O.

Subpart P—Section 5(h) Homeownership Program

HUD is currently preparing the final rule on section 5(h) for publication. The interim rule was published September 20, 1991 (56 FR 47866), made effective October 21, 1991, and is codified at 24 CFR part 906, and part 905, subpart P. The final rule makes the following changes:

1. It streamlines the rules for the Section 5(h) Program;
2. It allows more flexibility in the regulatory requirements of the Section 5(h) Program; and
3. It requires only what is statutory according to the United States Housing Act of 1937 and provides additional technical guidance will be provided in a forthcoming handbook.

The major change to be made in the final rule is the clarification that the section 5(h) program applies to the Mutual Help and Turnkey III programs.

No comments were received from the Native American community during the comment period of the interim rule, or during the recent consultation with IHAs and Tribal officials. Accordingly, subpart P is not republished in this proposed rule for further comment.

Subpart R—Indian Housing Family Self-Sufficiency (FSS) Program

HUD proposes to make very few changes to the regulation implementing the FSS program because the current regulation reflects the statutory provisions of section 23 of the U.S. Housing Act of 1937 (42 U.S.C. 1437u). However, the following minor changes have been made to streamline the policies and procedures applicable to the FSS program under HUD's Indian housing program.

905.3012 Program Coordinating Committee (PCC). In paragraph (b)(1) of this section, the heading "Required Membership" has been removed as the statutory provision does not contain language that directs IHAs to have a required membership. In this paragraph, the word "must" in the phrase "The PCC must" has been removed and the word "may" has been substituted. The U.S. Housing Act of 1937 does not require IHA representatives or residents of the IHA to be members of the PCC.

Paragraph (b)(2) states that "the PCC should . . .". The "should has been removed and word "may" substituted for the same reasons stated above.

IV. Other Matters

Finding of No Significant Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection and copying during regular business hours (7:30 a.m. to 5:00 p.m. weekdays) in the Office of the Rules Docket Clerk, Room 10272, 451 Seventh Street, S.W., Washington, D.C. 20410.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and by approving it certifies that this proposed rule does not have a significant economic impact on a substantial number of small entities. The proposed rule would make a number of amendments to the Indian Housing Consolidated regulations to simplify program processes, reduce the

number of regulatory requirements, and to provide more flexibility to local Tribal and Indian housing authority officials in the administration of the Indian Housing program.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this proposed rule will not have substantial direct effects on states or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the proposed rule is not subject to review under the order.

Executive Order 12606, the Family

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this proposed rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the order. No significant change in existing HUD policies or programs will result from promulgation of this rule, as those policies and programs relate to family concerns.

Regulatory Agenda

This proposed rule was listed as sequence number 1681 in the Department's Semiannual Regulatory Agenda published on April 25, 1994 (59 FR 20424, 20468) in accordance with Executive Order 12866 and the Regulatory Flexibility Act.

The Catalog of Domestic Assistance numbers for the programs affected by this proposed rule are 14.146, 14.147, 14.850, 14.851, 14.852, and 15.141.

List of Subjects in 24 CFR Part 950

Aged, Grant programs—housing and community development, Grant programs—Indians, Disability, Homeownership, Indians, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

Accordingly, and under the authority of 42 U.S.C. 3535(d), title 24 of the Code of Federal Regulations would be amended by:

1. Redesignating part 905 as part 950;

2. Revising the table of contents for the newly designated part 950;

3. Revising subparts A—G, I, J, K, and M;

4. Reserving subpart Q; and

5. Adding a new subpart R, consisting of §§ 950.3001 through 950.3030, as follows:

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Subpart A—General

§ 950.101 Applicability and scope.

(a) *General.* (1) Under title II of the United States Housing Act of 1937, as added by the Indian Housing Act of 1988 (42 U.S.C. 1437aa, *et seq.*), the U.S. Department of Housing and Urban Development (HUD) provides financial and technical assistance to Indian Housing Authorities (IHAs), for the development and operation of low income housing projects in Indian areas. This part is applicable to such projects developed or operated by an IHA in an Indian area, as defined in § 950.102.

(2) If assistance under this part is not available to a low income family because the family desires housing in an area within which no IHA is authorized to provide housing, or if for any other reason a family desires housing assistance other than under this part, a family may seek housing assistance under other HUD programs: (See 24 CFR part 203, chapter VIII of this title, as well as the remainder of chapter IX of this title.)

(b) *Other HUD regulations and requirements.* The provisions of this part are a complete statement of HUD regulations affecting the development and operation of low income housing by IHAs except as supplemented by parts in other chapters of this title, which are referenced in this part.

§ 950.102 Definitions.

ACC expiration date. The last day of the term during which a particular Indian housing project is subject to all or any of the provisions of the ACC.

Act. The United States Housing Act of 1937 (42 U.S.C. 1437–1440).

Action plan. A plan of the actions to be funded by an IHA over a period of five years (including an IHA's proposed allocation of its modernization funds to a reserve established under § 950.666(a)(3)) to make the necessary physical and management improvements identified in the IHA's comprehensive plan under subpart I of this part. The plan shall be based upon HUD's and the IHA's best estimates of the funding reasonably expected to become available over the next five-year period. The action plan is updated annually to reflect a rolling five-year base.

Adjusted income. Annual income less the following allowances, determined in accordance with HUD instructions:

(1) $480 for each dependent;

(2) $400 for any elderly family;

(3) For any family that is not an elderly family but has a handicapped or disabled member other than the head of household or spouse, handicapped assistance expenses in excess of three percent of annual income, but this allowance may not exceed the employment income received by family members who are 18 years of age or older as a result of the assistance to the handicapped or disabled person;

(4) For any elderly family—

(i) That has no handicapped assistance expenses (as defined in this section), an allowance for medical expenses (as defined in this section) equal to the amount by which the medical expenses exceed three percent of annual income;

(ii) That has handicapped assistance expenses greater than or equal to three percent of annual income, an allowance for handicapped assistance expenses computed in accordance with paragraph (3) of this definition, plus an allowance for medical expenses that is equal to the family's medical expenses;

(iii) That has handicapped assistance expenses that are less than three percent of annual income, an allowance for combined handicapped assistance expenses and medical expenses that is equal to the amount by which the sum of these expenses exceeds three percent of annual income; and

(5) Child care expenses, as defined in this section; and

(6) Excessive travel expenses, not to exceed $25 per family per week, for employment- or education-related travel.

Administration charge. In Mutual Help projects, the amount budgeted per-unit per-month for operating expense, exclusive of the cost of HUD-approved expenditures for which operating subsidy is being provided in accordance with § 950.434 (see § 950.427(c)).

Administrative capability assessment (ACA). An annual evaluation of the IHA's administrative capability to administer programs in compliance with the Act and all applicable HUD regulations, contracts, HUD handbooks, and other applicable requirements (see § 950.135).

Allowable expense level. In rental projects, the per-unit per-month dollar amount of expenses (excluding utilities, and expenses allowed under § 950.720) computed in accordance with § 950.710, which is used to compute the amount of operating subsidy.

Allowable utilities consumption level (AUCL). In rental projects, the amount of utilities expected to be consumed per-unit per-month by the IHA during the requested budget year, which is equal to the average amount consumed per-unit per-month during the rolling base period. After the end of the requested budget year, the AUCL of the utility (ies) used for space heating will be adjusted by a change factor, which is defined in this section.

Annual contributions contract (ACC). A contract under the Act between HUD and the IHA containing the terms and conditions under which HUD assists the IHA in providing decent, safe, and sanitary housing for low income families. The ACC must be in a form prescribed by HUD under which HUD agrees to provide assistance in the development, modernization and/or operation of a low income housing project under the Act, and the IHA agrees to develop, modernize and operate the project in compliance with all provisions of the ACC and the Act, and all HUD regulations and implementing requirements and procedures.

Annual income. Annual income is the anticipated total income from all sources received by the family head and spouse (even if temporarily absent) and by each additional member of the family, including all net income derived from assets, for the 12-month period following the effective date of the initial determination or reexamination of income, exclusive of certain types of income as provided in paragraph (2) of this definition.

(1) Annual income includes, but is not limited to:

(i) The full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services;

(ii) The net income from operation of a business or profession. Expenditures for business expansion or amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation of assets used in a business or profession may be deducted, based on straight line depreciation, as provided in Internal Revenue Service regulations. Any withdrawal of cash or assets from the operation of a business or profession will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested in the operation by the family;

(iii) Interest, dividends, and other net income of any kind from real or personal property. Expenditures for amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation is permitted only as authorized in paragraph (1)(ii) of this definition. Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of

cash or assets invested by the family. Where the family has net family assets in excess of $5,000, annual income shall include the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate as determined by HUD;

(iv) The full amount of periodic payments received from social security, annuities, insurance policies, retirement funds, pensions, disability or death benefits and other similar types of periodic receipts, including a lump-sum payment for the delayed start of a periodic payment;

(v) Payments in lieu of earnings, such as unemployment and disability compensation, worker's compensation and severance pay (but see paragraph (2)(iii) of this definition);

(vi) Welfare assistance. If the welfare assistance payment includes an amount specifically designated for shelter and utilities that is subject to adjustment by the welfare assistance agency in accordance with the actual cost of shelter and utilities, the amount of welfare assistance income to be included as income shall consist of:

(A) The amount of the allowance or grant exclusive of the amount specifically designated for shelter or utilities, plus

(B) The maximum amount that the welfare assistance agency could, in fact, allow the family for shelter and utilities. If the family's welfare assistance is ratably reduced from the standard of need by applying a percentage, the amount calculated under paragraph (1)(vi)(B) of this definition shall be the amount resulting from one application of the percentage;

(vii) Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the dwelling; and

(viii) All regular pay, special pay and allowances of a member of the Armed Forces (but see paragraph (2)(vii) of this section).

(2) Annual income does not include the following:

(i) Income from employment of children (including foster children) under the age of 18 years;

(ii) Payments received for the care of foster children;

(iii) Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains and settlement for personal or property losses (but see paragraph (1)(v) of this definition);

(iv) Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member;

(v) Income of a live-in aide;

(vi) Amounts of educational scholarships paid directly to the student or to the educational institution, and amounts paid by the Government to a veteran, for use in meeting the costs of tuition, fees, books, equipment, materials, supplies, transportation and miscellaneous personal expenses of the student. Any amount of such scholarship or payment to a veteran that is made available for subsistence is to be included in income;

(vii) The special pay to a family member serving in the Armed Forces who is exposed to hostile fire;

(viii) (A) Amounts received under training programs funded by HUD;

(B) Amounts received by a disabled person that are disregarded for a limited time for purposes of Supplemental Security Income eligibility and benefits because they are set aside for use under a Plan for Achieving Self-Support (PASS); or

(C) Amounts received by a participant in other publicly assisted programs which are specifically for or in reimbursement of out-of-pocket expenses incurred (special equipment, clothing, transportation, child care, etc.) and which are made solely to allow participation in a specific program;

(ix) Temporary, nonrecurring or sporadic income (including gifts);

(x) For all initial determinations and reexaminations of income carried out on or after April 23, 1993, reparation payments paid by a foreign government pursuant to claims filed under the laws of that government by persons who were persecuted during the Nazi era; or

(xi) Amounts specifically excluded by any other Federal statute from consideration as income for purposes of determining eligibility or benefits under a category of assistance programs that includes assistance under the United States Housing Act of 1937. A notice is published from time to time in the Federal Register and distributed to IHAs identifying the benefits that qualify for this exclusion. Updates will be published and distributed when necessary.

(3) If it is not feasible to anticipate a level of income over a 12-month period, the income anticipated for a shorter period may be annualized subject to a redetermination at the end of the shorter period.

(4) Any family receiving the reparation payments referred to in paragraph (2)(x) of this definition of Annual Income that has been requested to repay assistance under this part as a result of receipt of such payments shall not be required to make further repayments on or after April 23, 1993.

Applicable surface. All intact and nonintact interior and exterior painted surfaces of a residential structure.

Assisted dwelling unit. A dwelling unit assisted under the programs covered by this part 950.

Base year. The IHA's fiscal year immediately preceding its first fiscal year under PFS.

Base-year expense level. The expense level (excluding utilities, audits, and certain other items) for the year, computed as provided in §950.710(a)

Benefit/cost analysis. For purposes of subpart K of this part, a direct comparison of the present worth of any savings generated by a given system during the expected useful life of the system or the estimated remaining life of the project, whichever is the shortest number of years, to the cost of the change.

BIA. The Bureau of Indian Affairs in the Department of the Interior.

Change factor. The ratio of the affected IHA fiscal year heating degree days (HDD) divided by the average annual HDD of the rolling base period. (Affected year HDD divided by rolling base period average HDD).

Checkmeter. A device for measuring utility consumption of each individual dwelling unit where the utility service is supplied through a mastermeter system. The IHA pays the utility supplier on the basis of the mastermeter readings and uses the checkmeters to determine whether and to what extent utility consumption of each dwelling unit is in excess of the allowance for IHA-furnished utilities, established in accordance with subpart K of this part.

Chewable surface. All chewable protruding painted surfaces up to five feet from the floor or ground, which are readily accessible to children under seven years of age, e.g., protruding corners, windowsills and frames, doors and frames, and other protruding woodwork.

Chief executive officer (CEO). The CEO of a unit of general local government means the elected official or the legally designated official who has the primary responsibility for the conduct of that entity's governmental affairs. Examples of the CEO of a unit of general local government are: the elected mayor of a municipality; the elected county executive of a county; the chairperson of a county commission or board in a county that has no elected county executive; or the official designated pursuant to law by the governing body of a unit of general local

government (e.g., Tribal administrator). The CEO for an Indian Tribe is the Tribal governing official.

Child care expenses. Amounts anticipated to be paid by the family for the care of children under 13 years of age during the period for which annual income is computed, but only where such care is necessary to enable a family member to be gainfully employed or to further his or her education only to the extent such amounts are not reimbursed. The amount deducted shall reflect reasonable charges for child care, and, in the case of child care necessary to permit employment, the amount deducted shall not exceed the amount of income received from such employment.

Common property. The non-dwelling structures and equipment, common areas, community facilities, and in some cases certain component parts of dwelling structures, which are contained in the development. It also may include common property as defined in a cooperative form of ownership, as determined by the IHA.

Comprehensive grant number. A grant number that is unique to each work statement (under subpart I of this part) covering the improvements to one or more existing Indian housing projects.

Comprehensive Plan. A plan prepared by an IHA, and approved by HUD, under the Comprehensive Grant Program setting forth all of the physical and management improvement needs of the IHA and its Indian housing developments, indicating the relative urgency of needs, and which includes the IHA's action plan, cost estimates, and required local government and IHA certifications. The Comprehensive Plan may be revised, as necessary, but must be revised at least every sixth year. (See subpart I of this part.)

Construction contract. The contract for construction in the case of the conventional method, or the contract of sale in the case of the Turnkey method.

Cooperation agreement. An agreement between an IHA and a local governing (taxing) body that assures exemption from real and personal property taxes and provides for payments in lieu of taxes by the IHA; and that provides for cooperation with respect to the development and operation of low income housing owned by the IHA.

Cost effective. As used in subpart K of this part, an energy conservation measure with a pay-back period of fifteen years or shorter shall be considered cost effective.

Current budget year. The IHA fiscal year in which the IHA is operating.

Defective lead-based paint surface. Paint on applicable surfaces having a lead content of greater than or equal to 1 mg/cm2, that is cracking, scaling, chipping, peeling or loose.

Defective paint surface. Paint on applicable surfaces that is cracking, scaling, chipping, peeling or loose.

Demolition. The razing in whole, or in part, of one or more permanent buildings of an Indian housing project.

Dependent. A member of the family household (excluding foster children) other than the family head or spouse, who is under 18 years of age or is a disabled person or handicapped person; or is a full-time student.

Deprogramming. Removal from the IHA's inventory under the ACC, pursuant to the IHA's formal request and HUD's approval, of a dwelling unit no longer used for dwelling purposes or a nondwelling structure or a unit used for nondwelling purposes that the IHA has determined will no longer be used for IHA purposes.

Development. Any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low income housing project.

Disabled person. A person who is under a disability as defined in section 223 of the Social Security Act (42 U.S.C. 423), or who has a developmental disability as defined in section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001(7)).

Displaced person. A person displaced by governmental action, or a person whose dwelling has been extensively damaged or destroyed as a result of a disaster declared or otherwise formally recognized under Federal disaster relief laws.

Disposition. The conveyance or other transfer by the IHA, by sale or other transaction, of any interest in the real estate of an Indian housing project, excluding transfers of property described in § 950.921(b)(1)(i) through (vii).

Earned home payments account (EHPA). In the Turnkey III program (subpart G of this part), this account is established and maintained pursuant to § 950.517 by the IHA based on a portion of the homebuyer's required monthly payment. The EHPA should equal the IHA's estimate of the monthly cost for routine maintenance of the home.

Elderly family. A family whose head or spouse (or sole member) is an elderly, disabled, or handicapped person, as defined in this section. It may include two or more elderly, disabled or handicapped persons living together, or one or more of these persons living with one or more live-in aides, as defined in this section.

Elderly person. A person who is at least 62 years of age.

Elevated blood lead level or EBL. Excessive absorption of lead, that is, a confirmed concentration of lead in whole blood of 25 ug/dl (micrograms of lead per deciliter of whole blood) or greater.

Emergency Modernization (CIAP). A type of modernization program for a development that is limited to physical work items of an emergency nature, posing an immediate threat to the health or safety of residents or related to fire safety, which must be corrected within one year of CIAP funding approval.

Emergency work. Physical work items of an emergency nature, posing an immediate threat to the health or safety of residents, which must be completed within one year of funding. Under the Comprehensive Grant program, management improvements are not eligible as emergency work and, therefore, must be covered by the Comprehensive Plan (including the action plan), before the IHA may carry them out. See subpart I of this part.

Energy audit. A process carried out in accordance with subpart K of this part, which identifies and specifies the energy and cost savings that are estimated to result from installing or accomplishing an energy conservation measure.

Energy conservation measures (ECMs). Physical improvements or modifications that, if undertaken for a building or facility, or its equipment, are likely to reduce the cost of energy in an amount sufficient to recover the installation costs in a period no longer than the useful life of the measure. (See subpart K of this part.)

Family. Family includes but is not limited to:

(1) An elderly family or single person as defined in this part;

(2) The remaining member of a tenant family; and

(3) A displaced person.

Family project. Any project assisted under section 9 of the Act (42 U.S.C. 1437g) that is not an elderly project. For this purpose, an elderly project is one that was designated for occupancy by the elderly at its inception (and has retained that character) or, although not so designated, for which the IHA gives preference in tenant selection (with HUD approval) for all units in the project to elderly families. A building within a mixed-use project that meets these qualifications shall, for purposes of this definition, be excluded from any family project, as shall zero bedroom units.

Federally recognized tribe. Any Indian tribe, band, nation or other

organized group or community, including any Alaska Native village or regional corporation or village as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

FFY. Federal Fiscal Year (starting with October 1, and ending with September 30, and designated by the calendar year in which it ends).

Force account labor. Labor directly employed by the IHA on either a permanent or a temporary basis.

Formula. The formula prescribed by HUD to be used in the Performance Funding System to estimate the cost of operating an average unit in an IHA's inventory. (See subpart J of this part.)

Formula expense level. The per-unit per-month dollar amount of expenses (excluding utilities and audits) computed under the formula, in accordance with § 950.710.

Full-time student. A person who is carrying a subject load that is considered full-time for day students under the standards and practices of the educational institution attended. An educational institution includes a vocational school with a diploma or certificate program, as well as an institution offering a college degree.

Handicapped assistance expenses. Reasonable expenses that are anticipated, during the period for which annual income is computed, for attendant care and auxiliary apparatus for a handicapped or disabled family member and that are necessary to enable a family member (including the handicapped or disabled member) to be employed, provided that the expenses are neither paid to a member of the family nor reimbursed by an outside source.

Handicapped person. A person having a physical or mental impairment that:

(1) Is expected to be of long-continued and indefinite duration;

(2) Substantially impedes his or her ability to live independently; and

(3) Is of such a nature that such ability could be improved by more suitable housing conditions.

Hard costs. The physical improvement costs in development accounts 1450 through 1475 of the Low-Rent Housing Accounting Handbook, 7510.1, as revised, which include: Account 1450 Site Improvements; Account 1460 Dwelling Structures; Account 1465.1 Dwelling Equipment—Nonexpendable; Account 1470 Nondwelling Structures; and Account 1475 Nondwelling Equipment.

Heating degree days (HDD). The annual arithmetic sum of the positive differences (those under 65 degrees) of the average of the lowest and highest daily outside temperature in degrees Fahrenheit, subtracted from 65 degrees Fahrenheit.

High-risk. See 24 CFR 85.12 and § 950.135.

Home. A dwelling unit covered by a homebuyer agreement.

Homebuyer. The member or members of a low income family who have executed a homebuyer agreement with the IHA and who have not yet achieved homeownership.

Homebuyer agreement. A Mutual Help and Occupancy Agreement or a Turnkey III Homebuyer's Ownership Opportunity Agreement.

Homebuyer Association. In the Turnkey III program this means an incorporated organization (as defined in § 950.511) composed of all of the families who are entitled to occupancy pursuant to a Homebuyer Ownership Opportunity Agreement or who are homeowners.

Homeowner. A former homebuyer who has achieved ownership of his or her home and acquired title to the home.

HUD: The Department of Housing and Urban Development, including the Field Offices that have been delegated authority under the Act to perform functions pertaining to this part for the area in which the IHA is located.

HUD Field Office. The HUD Offices in Chicago, Oklahoma City, Denver, Phoenix, Seattle, and Anchorage, which have been delegated authority to administer programs under the United States Housing Act of 1937 for the area in which the IHA is located.

IHA homeownership financing. IHA financing for purchase of a home by an eligible homebuyer who gives the IHA a promissory note and mortgage for the balance of the purchase price.

IHS. The Indian Health Service in the Department of Health and Human Services.

Indian. Any person recognized as being an Indian or Alaska Native by an Indian Tribe, the Federal Government, or any State.

Indian area. The area within which an Indian Housing Authority is authorized to provide low income housing.

Indian Housing Authority (IHA). An entity that is authorized to engage in or assist in the development or operation of low income housing for Indians that is established either:

(1) By exercise of the power of self-government of an Indian Tribe independent of State law; or

(2) By operation of State law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

Indian Tribe. Any Tribe, band, pueblo, group, community, or nation of Indians or Alaska Natives.

Interdepartmental agreement. The agreement among HUD, the Department of Health and Human Services, the Department of Interior, and other appropriate agencies, concerning assistance to projects developed and operated under the Act.

Latent defect. A design or construction deficiency that could not reasonably have been foreseen by the IHA or the Office of Indian Programs.

Lead-based paint. A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1.0 mg/cm2, or .5 percent by weight.

Live-in aide. A person who resides with an elderly, disabled, or handicapped person or persons and who:

(1) Is determined by the IHA to be essential to the care and well-being of the person(s);

(2) Is not obligated for support of the person(s); and

(3) Would not be living in the unit except to provide necessary supportive services. (See definition of annual income for treatment of a live-in aide's income.)

Local inflation factor. The weighted average percentage increase in local government wages and salaries for the area in which the IHA is located and non-wage expenses based upon the implicit price deflator for State and local government purchases of goods and services. This weighted average percentage will be supplied by HUD. HUD anticipates that it will update the local inflation factor each year.

Low-income family. A family whose annual income does not exceed 80 percent of the median income for the area, as determined by HUD with adjustments for smaller and larger families. HUD may establish income limits higher or lower than 80 percent of the median income for an Indian area on the basis of its finding that such variations are necessary because of the prevailing levels of construction costs or unusually high or lower family incomes.

Management capability. (1) An IHA has management capability if it is:

(i) Not designated as High Risk under § 950.135; or

(ii) Designated as High Risk, but has a reasonable prospect of acquiring management capability which may

include modernization-funded management improvements.

(2) An IHA may be considered for funding of non-emergency physical improvements where it is making reasonable progress toward meeting the goals established in its management improvement plan under § 950.135.

Management improvement plan. A document developed by the IHA in accordance with § 950.135 which specifies the actions to be taken, including timetables, to correct deficiencies identified as a result of a management assessment.

Mastermeter system. A utility distribution system in which an IHA is supplied utility service by a utility supplier through a meter or meters and the IHA then distributes the utility to its tenants.

Medical expenses. Those medical expenses, including medical insurance premiums, that are anticipated during the period for which annual income is computed, and that are not covered by insurance.

Meter loop. A device provided to accommodate future installation of a utility meter. (See subpart K of this part).

Modernization capability. An IHA has modernization capability for CIAP if it is capable of effectively carrying out the proposed modernization improvements. Where an IHA does not have a funded modernization program in progress, HUD will determine whether the IHA has a reasonable prospect of acquiring modernization capability through hiring staff or contracting for assistance. (See § 950.135.)

Modernization funds. Funds derived from an allocation of budget authority for the purpose of funding physical and management improvements.

Modernization program. An IHA's program for carrying out modernization, as set forth in the approved CIAP budget for modernization funds. (See subpart I (CIAP) of this part.)

Modernization project. The improvement of one or more existing Indian housing developments under a new number designated for that modernization program (CIAP). For each modernization project, HUD and the IHA shall enter into an ACC amendment, requiring low-income use of the housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC).

Monthly adjusted income. One twelfth of adjusted income.

Monthly Equity Payments Account (MEPA). A homebuyer account in the Mutual Help Homeownership Opportunity program credited with the amount by which each required monthly payment exceeds the administration charge.

Monthly income. One twelfth of annual income.

MH. Mutual Help.

MH Construction Contract. A construction contract for an MH project, which shall be on a form prescribed by HUD.

MH Contribution. Land, labor, cash, materials, or equipment—or a combination of these—contributed toward the development cost of a project in accordance with a homebuyer's MHO Agreement, credit for which is to be used toward purchase of a home.

MH Program. The MH Homeownership Opportunity Program.

MHO Agreement. A Mutual Help and Occupancy Agreement between an IHA and a homebuyer.

Near elderly family. A family whose head or spouse (or sole member) is at least 50 years of age but below the age of 62 years.

Net family assets. Net cash value after deducting reasonable costs that would be incurred in disposing of real property, savings, stocks, bonds, and other forms of capital investment, excluding interests in Indian trust land and excluding equity accounts in HUD homeownership programs. The value of necessary items of personal property such as furniture and automobiles are excluded, and, in the case of a family in which any member is actively engaged in a business or farming operation, the assets that are a part of the business or farming operation are excluded. In cases where a trust fund, such as individual Indian monies held by the BIA, has been established and the trust is not revocable by, or under the control of, any member of the family or household, the value of the trust fund will not be considered an asset so long as the fund continues to be held in trust. In determining net family assets, IHAs shall include the value of any business or family assets disposed of by an applicant or tenant for less than fair market value (including a disposition in trust, but not in a foreclosure or bankruptcy sale) during the two years preceding the date of application for the program or reexamination, as applicable, in excess of the consideration received therefor. In the case of a disposition as part of a separation or divorce settlement, the disposition will not be considered to be for less than fair market value if the applicant or tenant receives important consideration not measurable in dollar terms.

Nonroutine maintenance. (1) For purposes of the Turnkey III Program (Nonroutine Maintenance Reserve), nonroutine maintenance refers to infrequent and costly items of maintenance and replacement, including dwelling equipment such as a range or refrigerator, or major components such as heating or plumbing systems or a roof. Specifically excluded are maintenance expenses attributable to homebuyer negligence or to defective materials or workmanship.

(2) For purposes of the CIAP and Comprehensive Grant Modernization Programs under subpart I of this part and the applicability of wage rates, nonroutine maintenance refers to work items that ordinarily would be performed on a regular basis in the course of upkeep of a property, but have become substantial in scope because they have been put off, and that involve expenditures that would otherwise materially distort the level trend of maintenance expenses. Replacement of equipment and materials rendered unsatisfactory because of normal wear and tear by items of substantially the same kind does qualify, but reconstruction, substantial improvement in the quality or kind of original equipment and materials, or remodeling that alters the nature or type of housing units does not qualify.

NRMR. The nonroutine maintenance reserve account in the Turnkey III Program established and maintained in accordance with § 950.519.

Operating budget. The IHA's operating budget (HUD form 52564) and all related documents, required by HUD to be submitted pursuant to the ACC.

Operating subsidy. Annual contributions for IHA operations made by HUD under the authority of section 9 of the Act. (See subpart J of this part with respect to rental projects. See also § 950.434 (Mutual Help Operating Subsidy) and § 950.523 (Turnkey III Operating Subsidy).)

Other income. Income to the IHA other than dwelling rental income and income from investments, except that, for purposes of determining operating subsidy eligibility, the following items are excluded: Grants and gifts for operations, other than for utility expenses, received from Federal, State, and local governments, individuals or private organizations; amounts charged to tenants for repairs for which the IHA incurs an offsetting expense; and legal fees in connection with eviction proceedings, when those fees are lawfully charged to tenants.

Other Modernization (modernization other than emergency). A type of modernization program under the

Comprehensive Improvement Assistance Program (CIAP) for a development that includes one or more physical work items, where HUD determines that the physical improvements are necessary and sufficient to extend substantially the useful life of the development, and/or one or more management work items (including planning costs), and/or testing, professional risk assessments, interim containment, and abatement of lead-based paint.

Partnership process. A specific and ongoing process that is designed to ensure that residents, resident groups, and the IHA work in a cooperative and collaborative manner to develop, implement and monitor the CIAP or Comprehensive Grant Program. At a minimum, an IHA shall ensure that the partnership process incorporates full resident participation in each of the required program components.

Pay-back period. The number of years required to accumulate net savings to equal the cost of an energy conservation measure.

Performance funding system (PFS). The standards, policies and procedures established by HUD for determining the amount of operating subsidy an IHA is eligible to receive for its owned rental projects, based on the costs of operating a comparable well-managed project.

Pilot. Payment in lieu of taxes. Includes all payments made by an IHA to the local governing body (or other taxing jurisdiction) for the provision of certain municipal services, including that portion of payments in lieu of taxes which is to be applied as a reimbursement of payments of offsite utilities. The amount charged is determined by the cooperation agreement which is generally defined as 10 percent of shelter rent. Shelter rent is defined as dwelling rentals less total utility expenses.

Program reservation. A written notification by HUD to an IHA, which is not a legal obligation, but which expresses HUD's determination, subject to fulfillment by an IHA of all legal and administrative requirements within a stated time, that HUD will enter into a new or amended ACC covering the stated number of housing units, or such other number as is consistent with funding reserved by HUD for the project.

Project. Housing developed, acquired, or assisted by an IHA under the Act, and the improvement of this housing.

Project for elderly families. A rental project or portion of a rental project assisted under the U.S. Housing Act of 1937 that was designated for occupancy by the elderly at its inception (and that has retained that character) or, although not so designated, for which the IHA gives preference in tenant selection (with HUD approval) for all units in the project, or for a portion of the units in the project, to elderly families.

Project units. All dwelling units of an IHA's projects.

Projected operating income level. The per unit per month dollar amount of dwelling rental income plus nondwelling income, computed as provided in § 950.725.

Reasonable cost. Total unfunded hard cost needs for a development that do not exceed 90 percent of the computed total development cost limit for a new development with the same structure type and number and size of units in the market area.

Requested budget year. The budget year (fiscal year) of an IHA following the current budget year.

Resident groups. Democratically elected resident groups such as IHA-wide resident groups, area-wide resident groups, single development resident groups, or RMCs.

Retail service. Purchase of utility service by IHA tenants directly from the utility supplier.

Rolling base period. The 36-month period that ends 12 months before the beginning of the IHA requested budget year, which is used to determine the allowable utilities consumption level used to compute the utilities expense level.

Single person. A person who lives alone or intends to live alone, and who does not qualify as:

(1) An elderly family;

(2) A displaced person (as defined in this section); or

(3) The remaining member of a tenant family.

Soft costs. The non-physical improvement costs, which exclude any costs in development accounts 1450 through 1475.

State. Any of the several States of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, the Trust Territory of the Pacific Islands, and Indian Tribes.

Subsequent homebuyer. Any homebuyer other than the homebuyer who first occupies a home pursuant to an MHO agreement.

Substantial rehabilitation. A modernization program for a project that provides for all physical and management improvements needed to meet the modernization and energy conservation standards and to ensure long-term physical and social viability.

Successor homebuyer. A person eligible to become a homebuyer who has been designated by a current homebuyer to succeed to an interest under a homeownership agreement in the event of the current homebuyer's death or mental incapacity.

Surcharge. The amount charged by the IHA to a tenant, in addition to the Tenant Rent, for consumption of utilities in excess of the allowance for IHA-furnished utilities or for estimated consumption attributable to tenant-owned major appliances or to optional functions of IHA-furnished equipment. Surcharges calculated pursuant to subpart K, based on estimated consumption where checkmeters have not been installed, are referred to as "scheduled surcharges."

Tenant-purchased utilities. Utilities purchased by the tenant directly from a utility supplier.

Tenant rent. The amount payable monthly by the family as rent to the IHA. Where all utilities (except telephone) and other essential housing services are supplied by the IHA, tenant rent equals total tenant payment. Where some or all utilities (except telephone) and other essential housing services are not supplied by the IHA and the cost thereof is not included in the amount paid as rent, tenant rent equals total tenant payment less the utility allowance.

Total development cost. The sum of all HUD-approved costs for a project including all undertakings necessary for administration, planning, site acquisition, demolition, construction or equipment and financing (including the payment of carrying charges), and for otherwise carrying out the development of the project. The maximum total development cost excludes offsite water and sewer facilities development costs; costs normally paid for by other entities, but included in the development cost budget for the project for contracting or accounting convenience; and any donations received from public or private sources.

Total tenant payment. The monthly amount calculated under subpart D of this part. Total tenant payment does not include any surcharge for excess utility consumption or other miscellaneous charges (see subpart K of this part).

Unit approved for deprogramming. (1) A dwelling unit for which HUD has approved the IHA's formal request to remove the dwelling unit from the IHA's inventory and the Annual Contributions Contract but for which removal, i.e. deprogramming, has not yet been completed; or

(2) A nondwelling structure or a dwelling unit used for nondwelling purposes which the IHA has determined will no longer be used for IHA purposes

and which HUD has approved for removal from the IHA's inventory and Annual Contributions Contract.

Unit months available. Project units multiplied by the number of months the project units are expected to be available for occupancy during a given IHA fiscal year. Except as provided in the following sentence, for purposes of this part, a unit is considered available for occupancy from the date on which the end of the initial operating period for the project is established until the time it is approved by HUD for deprogramming and is vacated or approved for nondwelling use. On or after July 1, 1991, a unit is not considered available for occupancy in any IHA Requested Budget Year if the unit is located in a vacant building in a project that HUD has determined is nonviable.

Utilities. For purposes of determining utility allowances, utilities include electricity, gas, heating fuel, water, sewerage service, septic tank pumping/maintenance, sewer system hookup charges (after development), and trash and garbage collection. Telephone service is not included as a utility. For purposes of IHA accounting, PFS and non-PFS, trash and garbage collection and maintenance and repair of any systems are considered maintenance expenses and not utility expenses.

Utilities expense level. The per-unit per-month dollar amount of utilities expense used in calculation of operating subsidy, as provided in § 950.715.

Utility allowance. An allowance for IHA-furnished utilities represents the maximum consumption units (e.g., kilowatt hours of electricity), that may be used by a dwelling unit without a surcharge against the tenant for excess consumption. An allowance for tenant-purchased utilities is a fixed dollar amount that is deducted from the total tenant payment otherwise chargeable to a tenant who has retail service, whether the charges are more or less than the amounts of the allowance. (See §§ 950.865 and 950.870.)

Utility reimbursement. The amount, if any, by which the utility allowance for tenant-purchased utilities for the unit, if applicable, exceeds the family's total tenant payment.

Very low-income family. A low-income family whose annual income does not exceed 50 percent of the median income for the area, as determined by HUD, with adjustments for smaller and larger families. HUD may establish income limits higher or lower than 50 percent of the median income for an Indian area on the basis of its finding that such variations are necessary because of unusually high or low family incomes.

Welfare assistance. Welfare or other payments to families or individuals, based on need, that are made under programs funded, separately or jointly, by Federal, State or local governments.

Work item. Any separately identifiable unit of work constituting a part of a modernization program.

§ 950.110 Assistance from Indian Health Service and Bureau of Indian Affairs.

Because HUD assistance under this part is not limited to IHAs of federally recognized Tribes, provisions in this part relating to assistance from BIA or IHS, or to required approvals, actions or determinations by these agencies in connection with such assistance, are applicable only to projects undertaken by IHAs of federally recognized Tribes or by regional housing authorities created by Alaska state law. These projects shall be developed promptly and operated in accordance with the provisions of this part and the Interdepartmental Agreement.

§ 950.115 Applicability of civil rights requirements.

(a) *Indian Civil Rights Act.* (1) The Indian Civil Rights Act (title II of the Civil Rights Act of 1968, 25 U.S.C. 1301–1303) provides, among other things, that "no Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." The Indian Civil Rights Act (ICRA) applies to any tribe, band, or other group of Indians subject to the jurisdiction of the United States in the exercise of recognized powers of self-government. The ICRA is applicable in all cases where an IHA has been established by exercise of Tribal powers of self-government.

(2) In the case of IHAs established pursuant to State law, determinations by HUD of the applicability of the ICRA on a case-by-case basis may consider such factors as the existence of recognized powers of self-government; the scope and jurisdiction of such powers; and the applicability of such powers to the area of operation of a particular IHA. Generally, determinations by HUD of the existence of recognized powers of self-government and the jurisdiction of such powers will be made in consultation with the Department of Interior-Bureau of Indian Affairs, and may consider applicable legislation, treaties and judicial decisions. The area of operation of an IHA may be determined by the jurisdiction of the governing body creating the IHA, any limitations within the enabling legislation, and judicial decisions.

(3) Projects of IHAs subject to the ICRA shall be developed and operated in compliance with its provisions and all HUD regulations and handbooks thereunder.

(b) *Nonapplicability of Title VI, the Fair Housing Act, and title II of the Americans with Disabilities Act.* Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), which prohibits discrimination on the basis of race, color or national origin in federally assisted programs, the Fair Housing Act (42 U.S.C. 3601–3619), which prohibits discrimination based on race, color, religion, sex or national origin in the sale or rental of housing, and title II of the Americans with Disabilities Act (42 U.S.C. 12131) do not apply to IHAs established by exercise of a Tribe's powers of self-government. HUD regulations implementing Title VI and the Fair Housing Act (24 CFR parts 1 and 100) and 49 CFR part 24 which implements title II of the Americans with Disabilities Act shall not be applicable to development or operation of projects by such IHAs. Any determination by HUD of the applicability of Title VI, the Fair Housing Act and title II of the Americans with Disabilities Act on a case-by-case basis shall consider the applicability of the Indian Civil Rights Act under paragraph (a) of this section. Actions taken by an IHA to implement the statutory admission restriction in favor of Indian families in the MH program, as set forth in § 950.416, shall not be considered a violation of any provision of either Title VI, the Fair Housing Act, or title II of the Americans with Disabilities Act.

(c) *Indian Housing Act of 1988—Mutual Help program admissions.* For provisions generally limiting admission to the Mutual Help Homeownership Opportunity program to Indians and requiring findings of need for admission of non-Indians, see § 950.416.

(d) *Disability.* (1) Under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended, HUD is required to assure that no otherwise-qualified disabled person is excluded from participation, denied benefits, or discriminated against under any program or activity receiving Federal financial assistance, solely by reason of his or her disability. IHAs must comply with implementing instructions in 24 CFR part 8.

(2) The IHA shall comply with the Architectural Barriers Act of 1968 (42 U.S.C. 4151–4157), and HUD

implementing regulations (24 CFR part 40).

(e) *Minority Business Enterprise Development and Women's Business Enterprise Policy.* Executive Orders 12432 (3 CFR, 1983 Comp., p. 198) and 12138 (3 CFR, 1979 Comp. p. 39), respectively, apply to Indian Housing Authorities.

§ 950.117 Displacement, relocation, and acquisition.

(a) *Minimizing displacement.* Consistent with the other goals and objectives of this part, IHAs shall assure that they have taken all reasonable steps to minimize the displacement of persons (families, individuals, businesses, nonprofit organizations, and farms) as a result of a project assisted under this part.

(b) *Temporary relocation.* Residents who will not be required to move permanently, but who must relocate temporarily (e.g., to permit rehabilitation), shall be provided:

(1) Reimbursement for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporary housing and any increase in monthly rent/utility costs.

(2) Appropriate advisory services, including reasonable advance written notice of:

(i) The date and approximate duration of the temporary relocation;

(ii) The location of the suitable, decent, safe and sanitary housing to be made available for the temporary period;

(iii) The terms and conditions under which the resident may lease and occupy a suitable, decent, safe, and sanitary dwelling in the development following its completion; and

(iv) The provisions of paragraph (b)(1) of this section.

(c) *Relocation assistance for displaced persons.* (1) A "displaced person" (defined in paragraph (g) of this section) must be provided relocation assistance at the levels described in, and in accordance with the requirements of, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) (42 U.S.C. 4601–4655) and implementing regulations at 49 CFR part 24.

(2) A comparable Indian housing unit, project-based Section 8 housing or a privately-owned dwelling made affordable by a Section 8 Rental Certificate or Rental Voucher, may qualify as a comparable replacement dwelling for a person displaced from an Indian housing unit.

(d) *Real property acquisition requirements.* The acquisition of real property for a development is subject to the URA and the requirements described in 49 CFR part 24, subpart B, whether the acquiring entity is organized under State law or Tribal law.

(e) *Appeals.* A person who disagrees with the IHA's determination concerning whether the person qualifies as a "displaced person," or the amount of relocation assistance for which the person is eligible, may file a written appeal of that determination with the IHA. A lower-income person who is dissatisfied with the IHA's determination on his or her appeal may submit a written request for review of that determination to the HUD Field Office.

(f) *Responsibility of IHA.* (1) The IHA shall certify (i.e., provide assurance of compliance, as required by 49 CFR part 24) that it will comply with the URA, the regulations at 49 CFR part 24, and the requirements of this section, and shall ensure such compliance notwithstanding any third party's contractual obligation to the IHA to comply with those provisions.

(2) The cost of required relocation assistance is an eligible project cost in the same manner and to the same extent as other project costs. However such assistance also may be paid from funds available from other sources.

(3) The IHA shall maintain records in sufficient detail to demonstrate compliance with the requirements of this section.

(g) *Definition of displaced person.* (1) For purposes of this section, the term "displaced person" means a person (family, individual, business, nonprofit organization, or farm) that moves from real property, or moves personal property from real property, permanently, as a direct result of acquisition, rehabilitation, demolition, or conversion of a unit to homeownership (Mutual Help Homeownership Opportunity (MH) Program) for a project assisted under this part or as a direct result of disposition in accordance with subpart M of this part. This includes any permanent, involuntary move for an assisted project including any permanent move from the development that is made:

(i) After notice to the person by the IHA or property owner to move permanently from the property, if the move occurs on or after:

(A) For the comprehensive improvement assistance program (CIAP) and the comprehensive grant program (CGP) under subpart I of this part, 45 calendar days from before:

(1) The IHA issues the invitation for bids for the project, or

(2) The start of force account work, whichever is applicable; or

(B) For the disposition or demolition of Indian housing under subpart M of this part, the date of HUD approval of the IHA's proposal; or

(C) For other projects subject to this section, the date HUD approves the site for the project; or, if HUD site approval is not required, the date the IHA approves the site for the project;

(ii) Before the date described in paragraph (g)(1)(i) of this section, if the IHA or HUD determines that the displacement resulted directly from acquisition, rehabilitation, demolition, or conversion for the assisted project; or

(iii) By a resident of a dwelling unit, if any one of the following three situations occurs:

(A) The resident moves after the "initiation of negotiations" and the move occurs before the resident is provided written notice offering him or her the opportunity to lease and occupy a suitable, decent, safe, and sanitary dwelling in the same development, under reasonable terms and conditions, upon its completion. Such reasonable terms and conditions include a monthly rent and estimated average monthly utility costs that do not exceed the amount determined in accordance with § 950.325; or

(B) The resident is required to relocate temporarily, does not return to the development, and either:

(1) The resident is not offered payment for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, or

(2) Other conditions of the temporary relocation are not reasonable; or

(C) The resident is required to move to another dwelling unit in the same development but is not offered reimbursement for all reasonable out-of-pocket expenses incurred in connection with the move, or other conditions of the move are not reasonable.

(2) Notwithstanding the provisions of paragraph (g)(1) of this section, a person does not qualify as a "displaced person" (and is not eligible for relocation assistance under the URA or this section), if:

(i) The person has been evicted for serious or repeated violation of the terms and conditions of the lease or occupancy agreement, violation of applicable Federal, State, tribal, or local law, or other good cause, and HUD determines that the eviction was not undertaken for the purpose of evading the obligation to provide relocation assistance;

(ii) The person moved into the property after the date described in paragraph (g)(1)(i) of this section and,

before commencing occupancy, was provided written notice of the project, its possible impact on the person (e.g., the person may be displaced, temporarily relocated, or suffer a rent increase) and the fact that he or she will not qualify as a "displaced person" (or for assistance under this section) as a result of the project:

(iii) The person is ineligible under 49 CFR 24.2(g)(2); or

(iv) HUD determines that the person was not displaced as a direct result of acquisition, rehabilitation, demolition, or conversion for the project.

(3) The IHA may, at any time, ask HUD to determine whether a displacement is or would be covered by this section.

(h) *Definition of initiation of negotiations.* For purposes of determining the formula for computing the replacement housing assistance to be provided to a resident, the term "initiation of negotiations" means the following action:

(1) For the comprehensive improvement assistance program (CIAP) or comprehensive grant program (CGP) under subpart I of this part, 45 calendar days before:

(i) The IHA's issuance of the invitation for bids for the project; or

(ii) The start of force account work, whichever is applicable;

(2) For an IHA purchase through an arm's-length transaction as described in 49 CFR 24.101(a)(1), the seller's acceptance of the IHA's written offer to purchase the property;

(3) For an IHA purchase that does not qualify as an arm's-length transaction, the delivery of the initial written purchase offer from the IHA to the Owner of the property. However, if the IHA issues a notice of intent to acquire the property, and a person moves after that notice, but before the initial written purchase offer, the "initiation of negotiations" is the actual move of the person from the property;

(4) For disposition or demolition of Indian housing under subpart M of this part, HUD approval of the IHA's proposal; or

(5) For other programs under this part 950, the notice to the occupant that he or she must move permanently, or, if there is no notice, the person's actual move from the property.

(Approved by the Office of Management and Budget under control number 2506–0121)

§ 950.120 Compliance with other Federal requirements.

(a) *Environmental clearance.* Before approving a proposed development program or modernization project, HUD will comply with the requirements of 24 CFR part 50.

(b) *Flood insurance protection.* HUD will not approve financial assistance for acquisition, construction, reconstruction, repair, or improvement of a building located in an area that has been identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless the following conditions are met:

(1) Flood insurance on the building is obtained in compliance with section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(a)); and

(2) The community in which the area is situated is participating in the National Flood Insurance Program in accord with section 202(a) of the Act (42 U.S.C. 4106(a)), or less than a year has passed since FEMA notification regarding such flood hazards. For this purpose, the "community" is the jurisdiction, such as an Indian Tribe or authorized Tribal organization, an Alaska native village or authorized native organization, or a municipality or county, that has authority to adopt and enforce flood plain management regulations for the area.

(c) *Wage rates for laborers and mechanics.* (1) With respect to construction work on a project, including a modernization project (except for nonroutine maintenance work, as described in paragraph (2) of the definition of "nonroutine maintenance" in § 950.102), the IHA and its contractors shall pay not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a through 276a–5), to all laborers and mechanics who are employed by an IHA or its contractors for work or contracts over $2,000.

(2) With respect to all maintenance work on a project, including nonroutine maintenance work (as described in paragraph (2) of the definition of "nonroutine maintenance" in § 950.102) on a modernization project, the IHA and its contractors shall pay not less than the wages prevailing in the locality, as determined or adopted (after a determination under State, Tribal or local law) by HUD pursuant to section 12 of the United States Housing Act of 1937 (42 U.S.C. 1437j), to all laborers and mechanics who are employed by an IHA or its contractors.

(3) Prevailing wage rates determined under State or Tribal law are inapplicable under the circumstances set out in § 950.172(b).

(d) *Professional and technical wage rates.* All architects, technical engineers, draftsmen and technicians employed in the development of a project shall be paid not less than the wages prevailing in the locality, as determined or adopted (after a determination under applicable State, Tribal, or local law) by HUD.

(e) *Access to records: audits.* (1) HUD and the Comptroller General of the United States shall have access to all books, documents, papers, and other records that are pertinent to the activities carried out under this part, in order to make audit examinations, excerpts, and transcripts, in accordance with 24 CFR 85.42.

(2) IHAs that receive financial assistance under this part must comply with the audit requirements of 24 CFR part 44. If an IHA has failed to submit an acceptable audit on a timely basis in accordance with that part, HUD may arrange for, and pay the costs of, the audit. In such circumstances, HUD may withhold, from assistance otherwise payable to the IHA under this part, amounts sufficient to pay for the reasonable costs of conducting an acceptable audit, including, when appropriate, the reasonable costs of accounting services necessary to place the IHA's books and records into auditable condition. The costs to place the IHA's books and records into auditable condition do not generate additional subsidy eligibility under this part.

(f) *Uniform administrative requirements.* The Uniform Administrative Requirements for Grants and Cooperative Agreements to States, Local, and Federally Recognized Indian Tribal Governments, as set forth in 24 CFR part 85, are applicable to grants under this part, except as specified in this part. However, the provisions of 24 CFR 85.36 have been incorporated in the procurement subpart (subpart B) of this part.

(g) *Lead based paint poisoning prevention.* See 24 CFR part 35 and subpart H of this part.

(h) *Coastal barriers.* In accordance with the Coastal Barriers Resources Act (16 U.S.C. 3501), no financial assistance under this part may be made available within the Coastal Barrier Resources System.

(i) *Economic opportunities for low and very low-income persons.* IHAs shall comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and the regulations in part 135, as provided in part 135, to the maximum extent consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). (See also 24 CFR 950.170(c).)

§ 950.125 Establishment of IHAs pursuant to State law.

An IHA may be established pursuant to a State law that provides for the establishment of IHAs by State or federally recognized Indian tribes with all necessary legal powers to carry out low-income housing projects for Indians.

§ 950.126 Establishment of IHAs by Tribal ordinance.

(a) *Legal capacity of Tribe to establish IHA.* Where an Indian Tribe has governmental police power to promote the general welfare, including the power to create a housing authority, an IHA may be established by Tribal ordinance enacted by the governing body of the Tribe.

(b) *Form of ordinance.* The form of Tribal ordinance shall be determined by the Tribe and reviewed by the ONAP Administrator. The IHA must also demonstrate that it has the legal authority to develop, own, and operate a public housing project under the Act. A sample format will be provided by HUD.

(c) *Approval or review of ordinance.* HUD shall not enter into an undertaking for assistance to an IHA formed by Tribal ordinance unless such ordinance has been submitted to HUD, accompanied by evidence that the Tribe's enactment of the ordinance either has been approved by the Department of the Interior or has been reviewed and not objected to by that Department.

(d) *Submission to HUD of documents establishing IHA.* The Tribal ordinance, evidence of Department of the Interior approval or review, and the following documentation relating to the initial organization of the IHA shall be submitted to HUD prior to receiving financial assistance. This includes:

(1) Certificate of appointment of Commissioners;

(2) Commissioner's oath of office;

(3) Notice of organization;

(4) Consent to meeting;

(5) Minutes of meeting;

(6) Resolutions establishing the IHA, adopting the by-laws, adopting the seal, designating a regular place of meeting, and designating officers;

(7) By-Laws;

(8) Certificate of Secretary as to authenticity of documents; and

(9) General certificate of Housing Authority.

§ 950.130 IHA Commissioners who are tenants or homebuyers.

(a) *Tenant or homebuyer commissioners.* No person shall be barred from serving on an IHA's Board of Commissioners because he or she is a tenant or homebuyer in a housing project of the IHA. A Commissioner who is a tenant or homebuyer shall be entitled to participate fully in all meetings concerning matters that affect all of the tenants or homebuyers, even though such matters affect him or her as well. However, no such Commissioner shall be entitled or permitted to participate in or be present at any meeting (except in his or her capacity as a tenant or homebuyer), or be counted or treated as a member of the Board, concerning any matter involving his or her individual rights, obligations, or status as a tenant or homebuyer.

(b) *Commissioner as IHA employee.* A member of the IHA's Board of Commissioners shall not be eligible for employment by the IHA, except under extremely unusual circumstances where it is documented that no one except the commissioner is qualified for the position and where the HUD Field Office approves in advance of the hiring.

§ 950.135 Administrative capability.

(a) *HUD determination.* At least annually, HUD shall carry out such reviews of the performance of each IHA, including remote reviews, on-site limited and full reviews, audits, surveys, and a formal annual review or risk analysis assessment, as may be necessary or appropriate to make the determinations required by this section, taking into consideration all available evidence. HUD will evaluate an IHA's compliance in the areas of development, modernization, and operations, including such functions as administration, financial management, occupancy, and maintenance.

(b) *Obligation to maintain.* (1) An IHA must maintain administrative capability at all times throughout the term of the ACC. In order to be considered administratively capable, an IHA must administer the Indian housing program in accordance with applicable statutory requirements, HUD regulations, contracts, HUD handbooks and other program requirements with no serious deficiencies. If any of the following conditions exist, it shall be considered a serious deficiency:

(i) The IHA is not financially stable, based on the most recent Administrative Capability Assessment, annual audit, technical assistance visit, or other reliable information;

(ii) An audit, conducted in accordance with 24 CFR part 44 and with § 950.120, or HUD reviews (including monitoring findings) reveal deficiencies that HUD reasonably believes require corrective action and/or that corrective actions are not taken in accordance with established timeframes;

(iii) The IHA has management systems that do not meet the standards as set forth in 24 CFR part 85, and the lack of such systems may result in mismanagement or misuse of Federal funds;

(iv) The IHA has not conformed to the terms and conditions of previous awards, including for new construction, the Comprehensive Improvement Assistance Program or the use of Operating Subsidies;

(v) The IHA lacks properly trained and competent personnel at key management positions of the IHA; or

(vi) The IHA is in violation of the terms of applicable statutes, regulations, Annual Contributions Contracts or handbooks.

(2) If an IHA has serious deficiencies, HUD shall take any or all of the following actions:

(i) Issue a notice of deficiency;

(ii) Issue a corrective action order; or

(iii) Classify the IHA as "high risk" (see 24 CFR part 85).

(c) *Notice of deficiency.* Based on HUD reviews of IHA performance and findings of any of the deficiencies in paragraph (b)(1) of this section, HUD may issue to the IHA a notice of deficiency, stating the specific program requirements that the IHA has violated and requesting the IHA to take appropriate action. The notification shall be in writing and contain the following:

(1) The deficiencies, i.e., the IHA actions and the statutory, regulatory, handbook or other requirements that have been violated;

(2) Recommended actions that may be taken by the IHA and a timeframe for completion;

(3) The documentation necessary for evidence that all actions have been completed.

(d) *Corrective action order.* (1) Based on HUD reviews of IHA performance and findings of any of the deficiencies described in paragraph (b)(1) of this section, HUD may issue to the IHA a corrective action order. An order may be issued, whether or not a notice of deficiency previously has been issued with regard to the specific deficiency on which the corrective action order is based. HUD may order corrective action at any time by notifying the IHA of the specific program requirements that the IHA has violated, and by specifying the corrective actions that must be taken. HUD shall design corrective action to prevent a continuation of the deficiency, mitigate any adverse effects of the deficiency to the extent possible, and

prevent a recurrence of the same or similar deficiencies.

(2) Before ordering corrective action, HUD will notify the IHA and give it an opportunity to consult with HUD regarding the proposed action.

(3) Any corrective action ordered by HUD shall become a condition of the ACC grant agreement.

(4) The order shall be in writing and shall contain the following:

(i) The deficiencies, i.e., the IHA actions and the statutory, regulatory, handbook or other requirements that have been violated;

(ii) The corrective action(s) that must be taken by the IHA and the time allowed for completing the corrective action(s);

(iii) The method of requesting reconsideration of the HUD action and the documentation necessary to evidence that all corrective actions have been completed.

(e) *Management improvement plan.* (1) When an IHA receives a corrective action order, it must respond to the determination, in writing. This response must include a management improvement plan to correct existing deficiencies. The plan shall describe in detail the method to be used and the time schedule to be maintained, shall be approved by the IHA Board of Commissioners, and is subject to HUD approval.

(2) After receiving the response from the IHA, HUD may direct the IHA to take one or more of the following actions:

(i) Submit additional information: (A) Concerning the IHA's administrative, planning, budgeting, accounting, management, and evaluation functions, to determine the cause for the IHA having deficiencies, as described in paragraph (b)(1) of this section;

(B) Explaining any steps the IHA is taking to correct the deficiencies;

(C) Documenting that IHA activities were not inconsistent with the IHA's annual statement or other applicable statutes, regulations, or program requirements;

(ii) Submit schedules for completing the work identified in the MIP;

(iii) Submit additional material in support of one or more of the statements, resolutions, and certifications submitted as part of the IHA's MIP;

(iv) Not incur financial obligations, or to suspend payments for one or more activities;

(v) Reimburse, from non-HUD sources, one or more program accounts for any amounts improperly expended; or

(vi) Take such other corrective actions as HUD determines appropriate to correct the IHA deficiencies.

(3) HUD shall determine whether the IHA has satisfied, or has made reasonable progress towards satisfying, the management improvement plan.

(4) If the IHA does not satisfy the terms of the plan or does not act in good faith to meet the timeframes included in its MIP, HUD may impose additional restrictions. In addition, existing projects may be terminated, or other action may be instituted, as appropriate.

(f) *High risk determination.* An IHA may be classified as "high risk" and determined ineligible for certain types of future funding related to the classification of risk, or may be determined eligible for future funding but subject to special conditions or restrictions corresponding to the high risk classification. A corrective action order listing the specific violation shall accompany the "high risk" designation.

(1) If an IHA is determined to be high risk, the conditions that form the basis for that determination shall be sufficiently serious to warrant a determination to exclude the IHA from future funding of a particular type. The determination of high risk shall state the cause for that finding.

(2) An IHA may continue to be eligible for funding despite a finding that it is high risk—subject to special conditions and/or restrictions corresponding to the deficiencies found—if it has submitted a management improvement plan that was approved by HUD, and it has exhibited substantial compliance with the plan or a good faith effort to comply with the plan. If HUD determines that it is necessary to impose special conditions or restrictions, it will notify the IHA in writing of the applicable conditions or restrictions. One or more of the following special conditions or restrictions may be imposed:

(i) Submission to HUD of additional documentation;

(ii) Submission to HUD of additional or more detailed financial reports;

(iii) Additional project monitoring from the HUD Field Office;

(iv) Additional requirements for technical assistance, from HUD or another entity approved by HUD;

(v) Establishing additional approvals by HUD;

(vi) Withholding some or all of the IHA's grant;

(vii) Declaring a breach of the ACC grant amendment with respect to some or all of the IHA's functions; or

(viii) Any other sanction authorized by law or regulation.

(g) *Appeals.* (1) An IHA may appeal a corrective action order or a determination of high risk status to the local HUD Administrator, Office of Native American Programs (ONAP). All appeals must be made in writing, within 30 calendar days of notice to the IHA of the HUD action and must state clearly any justification or evidence that the action is unwarranted or too severe. If an appeal is filed concerning one or more action(s), the action(s) shall not take effect until HUD makes a final determination on the appeal or notifies the IHA that special circumstances exist that warrant giving immediate effect to the announced HUD action. The HUD Administrator must respond to the appeal within 30 days of receipt of the appeal.

(2) An IHA may appeal a decision of the Administrator to the ONAP, Headquarters, only if the case involves actions related to a determination of ineligibility of funding for the upcoming funding cycle. An appeal of the Administrator's decision must be made to ONAP, Headquarters in writing, stating the justification or evidence, and must be received within 21 days of the date of the Administrator's decision. Decisions reviewed by Headquarters will be evaluated based on the facts as presented to the Administrator and on any aggravating or extenuating circumstances.

(3) The IHA's Board of Commissioners must notify the Tribal government of HUD's final determination to withhold or suspend funds or declare a breach of the ACC grant agreement, as well as the basis for, and consequences resulting from, such a determination.

Subpart B—Procurement

§ 950.160 Procurement standards.

(a) *HUD standards.* (1) *Applicability.* This subpart sets forth Federal requirements to be followed by IHAs in the procurement of services, supplies, and goods.

(2) *Contracting authorization.* An IHA may execute contracts without HUD approval for the procurement of work, materials, equipment and/or professional services, in accordance with paragraph (a)(3)(ii) of this section. Before the execution of contracts, the IHA Board of Commissioners will insure that systems are in place to ensure program requirements are satisfied before the execution of contracts and will periodically review compliance with such systems.

(3) *Limitations.* (i) An IHA shall not award a contract for the project until the prospective contractor has demonstrated, to the satisfaction of the

IHA, the technical, administrative and financial capability to perform contract work of the size and type involved and within the time provided under the contract. The IHA shall not award a contract to a person or firm on the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* compiled, maintained and distributed by the General Services Administration (GSA) or to a person or firm that is subject to a limited denial of participation issued by the HUD Office of Native American Programs. (See 24 CFR part 24.)

(ii) The IHA may execute or approve any agreement or contract for personnel, management, legal, or other services with any person or firm without the prior written approval of HUD, except under the following circumstances:

(A) Where the term of the agreement or contract (including renewal) is in excess of two years; or

(B) Where the amount of the agreement or contract is in excess of the amount included for such purpose in the HUD-approved development cost budget, or operating budget or an amount specified from time to time by HUD, as the case may be; or

(C) Where the agreement or contract is for legal or other services in connection with litigation if the estimated cost exceeds $25,000; or

(D) For contracts in excess of $25,000 in the aggregate where the IHA proposes to award a contract based upon a single bid or proposal received.

(4) *Records.* An IHA shall maintain records sufficient to detail the significant history of a procurement. The IHA shall maintain evidence in its files:

(i) That the solicitation and award procedures were conducted in compliance with State, Tribal, or local laws and Federal requirements, including requirements for Indian preference and wage rates;

(ii) That the award does not exceed the approved budget amount and is not being made on the basis of a single bid or proposal; and

(iii) That the IHA reviewed the contractor's qualifications; checked to ensure that the contractor is not listed on the GSA *List of Parties Excluded from Federal Procurement and Nonprocurement Programs;* and determined that the contractor has the capacity to successfully complete the work or services under the terms and conditions of the contract. This determination shall consider the contractor's record of past performance, integrity, compliance with public policy, and financial and technical resources.

(5) *Contract administration.* An IHA is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement.

(6) *Competition.* All procurement transactions must be conducted in a manner providing full and open competition.

(7) *Contract cost and price.* An IHA must perform a cost or price analysis in connection with every procurement action, including contract modifications.

(b) *IHA standards—(1) IHA procedures.* Each IHA shall adopt, promulgate, and comply with, rules or regulations for the procurement and administration of supplies, materials, services and equipment in connection with the development and operation of projects. Upon adoption or modification, the IHA will promptly furnish a copy of these rules or regulations to HUD. These rules or regulations shall contain provisions on at least the following subjects:

(i) Procedures to ensure that all procurement transactions are conducted in a full and open competitive manner, consistent with the standards of 24 CFR 85.36;

(ii) Identification (by position title) of IHA officials authorized to enter into and approve contracts on a competitive basis as authorized by 24 CFR 85.36(d)(4);

(iii) Procedures for inventory control;

(iv) Procedures for storage and protection of goods and supplies;

(v) Procedures for issuance of, or other disposition of, supplies and equipment;

(vi) Procedures for implementing Indian preference requirements;

(vii) Procedures for handling complaints and protests regarding procurement;

(viii) Standards of conduct governing IHA directors, board members, officers and employees; and

(ix) Conflict of interest provisions governing directors, officers, employees, contractors/developers and others doing business with the IHA.

(2) *Contract administration system.* An IHA shall maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts and purchase orders.

(c) *Government-wide contract requirements.* A HUD regulation found at 24 CFR part 85 embodies government-wide administrative requirements for grants to State, local and Federally recognized Indian Tribal governments (including grants received by IHAs). The contract provisions listed in 24 CFR 85.36(i) of that regulation are to be included in any IHA contracts.

§ 950.165 Methods of procurement.

(a) *Small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(b) *Procurement by sealed bids (Invitations for Bid (IFB)).* Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 950.165(b)(1) apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

(i) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(ii) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(iii) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(iv) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(c) *Procurement by competitive proposals (Request for Proposals (RFP)).* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when

conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(1) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(2) Proposals will be solicited from an adequate number of qualified sources;

(3) IHAs will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) IHAs may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(d) *Procurement by noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or where after solicitation of a number of sources, competition is determined inadequate.

(1) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(i) The item is available only from a single source;

(ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(iii) HUD authorizes noncompetitive proposals; or

(iv) After solicitation of a number of sources, competition is determined inadequate.

(2) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

§ 950.170 Other requirements applicable to development contracts.

(a) *Bonding requirements.* For construction contracts for more than $100,000, each contractor shall be required to provide bid guarantees and adequate assurance of performance and payment acceptable to HUD in accordance with 24 CFR 85.36(h). The following methods may be used to provide performance and payment assurance:

(1) Performance and payment bonds for 100 percent of the total contract price.

(2) Deposit with the IHA of a cash escrow of not less than 20 percent of the total contract price, subject to reduction during the warranty period, commensurate with potential risk.

(3) Letter of credit for 25 percent of the total contract price, unconditionally payable upon demand of the IHA, subject to reduction during the warranty period commensurate with potential risk.

(4) Letter of credit for 10 percent of the total contract price and compliance with the procedures for monitoring of disbursements by the contractor. In the case of a Mutual Help project, the term total contract price as used with respect to each of the above assurance methods includes the value of all Mutual Help contributions for work, materials, or equipment to be provided to the contractor for use in performing the contract work.

(b) *Executive Order 11246 (equal employment opportunity).* Contracts for construction work in connection with Projects under this part are subject to Executive Order 11246 (3 CFR, 1964–65 Comp., p. 339), and Executive Order 11375 (3 CFR, 1966–70 Comp., p. 684), and to applicable implementing regulations (24 CFR part 130; 41 CFR chapter 60), rules, and orders of HUD and the Office of Federal Contract Compliance Programs of the Department of Labor. Executive Order 11246 prohibits discrimination and requires affirmative action to ensure that employees or applicants for employment are treated without regard to their race, color, religion, sex, or national origin. Compliance with E.O. 11246, and related regulations, orders and requirements shall be to the maximum extent consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act.

(c) *Local area residents.* In accordance with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and the implementing regulations in 24 CFR part 135, IHAs, their contractors and subcontractors shall make best efforts, consistent with existing Federal, State, and local laws and regulations (including section 7(b) of the Indian Self-Determination and Education Assistance Act, to give low- and very low-income persons the training and employment opportunities generated by section 3 covered assistance (as this term is defined in 24 CFR 135.7) and to give section 3 business concerns the contracting opportunities generated by section 3 covered assistance.

§ 950.172 Wage rates.

(a) *Determination of prevailing wage rates.* For the applicable method of determination of the prevailing wage rates to be paid laborers and mechanics, see § 950.120(c).

(b) *Preemption of prevailing wage rates.* (1) A prevailing wage rate determined under State or Tribal law shall be inapplicable to a contract or IHA-performed work item for the development, maintenance or modernization of a project whenever:

(i) The contract or the work item is otherwise subject to State or Tribal law requiring the payment of wage rates determined by a State, local, or Tribal government or agency to be prevailing and is for a project assisted with funds for low-income housing under the Act; and

(ii) The wage rate (the basic hourly rate and any fringe benefits) determined under State or Tribal law to be prevailing with respect to an employee in any trade or position employed in the development, maintenance, or improvement of a project exceeds whichever of the following Federal wage rates is applicable:

(A) The wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a, *et seq.*) to be prevailing in the locality with respect to such trade;

(B) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency;

(C) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(D) The wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(2) For the purpose of ascertaining whether a wage rate determined under State or Tribal law for a trade or position exceeds the Federal wage rate:

(i) Where a rate determined by the Secretary of Labor or an apprentice or trainee wage rate based thereon is applicable, the total wage rate determined under State or Tribal law, including fringe benefits (if any) and basic hourly rate, shall be compared to the total wage rate determined by the

Secretary of Labor or apprentice or trainee wage rate; and

(ii) Where a rate determined by the Secretary of HUD is applicable, any fringe benefits determined under State or Tribal law shall be excluded from the comparison with the rate determined by the Secretary of HUD.

(3) Whenever paragraph (b)(1)(i) of this section is applicable:

(i) Any solicitation issued by the IHA and any contract executed by the IHA for development, maintenance or modernization of the project shall include a statement as prescribed in this paragraph and failure to include this statement may constitute grounds for requiring re-solicitation. The statement that any prevailing wage rate (including basic hourly rate and any fringe benefits) determined under State or Tribal law to be prevailing with respect to an employee in any trade or position employed under the contract is inapplicable to the contract and shall not be enforced against the contractor or any subcontractor with respect to employees engaged under the contract must be included whenever either of the following occurs:

(A) Such nonfederal prevailing wage rate exceeds:

(*1*) The applicable wage rate determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 276a, *et seq.*) to be prevailing in the locality with respect to such trade;

(*2*) An applicable apprentice wage rate based thereon specified in an apprenticeship program registered with the Department of Labor or a DOL-recognized State Apprenticeship Agency; or

(*3*) An applicable trainee wage rate based thereon specified in a DOL-certified trainee program; or

(B) Such nonfederal prevailing wage rate, exclusive of any fringe benefits, exceeds the applicable wage rate determined by the Secretary of HUD to be prevailing in the locality with respect to such trade or position.

(ii) The IHA itself shall not be required to pay the basic hourly rate or any fringe benefits comprising a prevailing wage rate determined under State or Tribal law and described in paragraph (b)(2) of this section to any of its own employees who may be engaged in the development, maintenance or modernization of the project; and

(iii) Neither the basic hourly rate nor any fringe benefits comprising a prevailing wage rate determined under State or Tribal law and described in paragraph (b)(2) of this section shall be enforced against the IHA or any of its contractors or subcontractors with respect to employees engaged in the contract or IHA-performed work item for development, maintenance or modernization of the project.

(4) Nothing in paragraph (b) of this section shall affect the applicability of any wage rate established in a collective bargaining agreement with an IHA or its contractors or subcontractors where such wage rate equals or exceeds the applicable Federal wage rate referred to in paragraph (b)(1)(ii) of this section, nor does paragraph (b) of this section impose a ceiling on wage rates an IHA or its contractors or subcontractors may choose to pay independent of State law.

(5) The provisions of paragraph (b) of this section shall apply to work performed under any prime contract entered into as a result of a solicitation of bids or proposals issued on or after October 6, 1988 and to any work performed by employees of an IHA on or after October 6, 1988.

§ 950.175 Indian preference requirements.

(a) *Applicability.* HUD has determined that grants under this part are subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)), which requires that, to the greatest extent feasible:

(1) Preference and opportunities for training and employment shall be given to Indians; and

(2) Preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

(b) *Definitions.* Indian organizations and Indian-owned economic enterprises include both of the following:

(1) Any economic enterprise as defined in section 3(e) of the Indian Financing Act of 1974 (25 U.S.C. 1452); that is, "any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit provided that such Indian ownership and control shall constitute not less than 51 percent of the enterprise"; and

(2) Any "Tribal organizations" as defined in section 4(c) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 1453); that is, "the recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organizations and which includes the maximum participation of Indians in all phases of its activities."

(c) *Preference employment and training.* To the greatest extent feasible, IHAs and their contractors and subcontractors shall give preference and opportunities for training and employment in connection with the administration of grants awarded under this part to Indians and Alaskan natives.

(d) *Preference in contracting.* To the greatest extent feasible, IHAs shall give preference in the award of contracts for projects funded under this part to Indian organizations and Indian-owned economic enterprises.

(1) Each IHA shall: (i) Advertise for bids or proposals limited to qualified Indian organizations and Indian-owned enterprises; or

(ii) Use a two-stage preference procedure, as follows:

(A) *Stage 1.* Invite or otherwise solicit Indian-owned economic enterprises to submit a statement of intent to respond to a bid announcement limited to Indian-owned firms.

(B) *Stage 2.* If responses are received from more than one Indian enterprise found to be qualified, advertise for bids or proposals limited to Indian organizations and Indian-owned economic enterprises; or

(iii) Develop and incorporate into their procurement policy, subject to HUD Field Office one-time approval, the IHA's method of providing preference. In no instance shall HUD approve a method which provides preference based upon affiliation or membership in a particular tribe or group of tribes.

(2) If the IHA selects a method of providing preference that results in fewer than two responsible qualified organizations or enterprises submitting a statement of intent, a bid or a proposal to perform the contract at a reasonable cost, then the IHA shall:

(i) Re-compete the contract, using any of the methods described in paragraph (e)(1) of this section; or

(ii) Re-compete the contract without limiting the advertisement for bids or proposals to Indian organizations and Indian-owned economic enterprises; or

(iii) If only one bid or proposal is received, request Field Office review and approval of the proposed contract and related procurement documents, in accordance with 24 CFR 85.36, in order to award the contract to the single source.

(3) Procurements that are within the dollar limitations established for small purchases under 24 CFR 85.36(d)(1) need not follow the formal requirements for public announcement and advertising for bids or proposals as provided in paragraph (d)(1) of this section. However, an IHA small purchase procurement shall, to the greatest extent feasible, provide Indian preference in the award of contracts.

(4) All preferences shall be publicly announced in the advertisement and in the solicitation and the contract documents.

(5) An IHA, at its discretion, may require information of prospective contractors seeking to qualify as Indian organizations or Indian-owned economic enterprises. IHAs may require prospective contractors to submit information prior to submitting a bid or proposal, or at the time of submission. Information requested by the IHA may include but is not limited to the following:

(i) Evidence showing fully the extent of Indian ownership, control, and interest;

(ii) Evidence of structure, management and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; materials or equipment supply arrangements; and management salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest; and

(iii) Evidence sufficient to demonstrate to the satisfaction of the IHA that the prospective contractor has the technical, administrative, and financial capability to perform contract work of the size and type involved.

(6) The IHA shall incorporate the following clause (referred to as the Section 7(b) clause) in each contract awarded in connection with a project funded under this part:

(i) The work to be performed under this contract is on a project subject to Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) (Indian Act). Section 7(b) requires that to the greatest extent feasible:

(A) Preferences and opportunities for training and employment shall be given to Indians, and

(B) Preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

(ii) The parties to this contract shall comply with the provisions of section 7(b) of the Indian Act.

(iii) In connection with this contract, the contractor shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned economic enterprises, and preferences and opportunities for training and employment to Indians and Alaskan natives.

(iv) The contractor shall include this Section 7(b) clause in every subcontract in connection with the project, and shall, at the direction of the IHA, take appropriate action pursuant to the subcontract upon a finding by the IHA or HUD that the subcontractor has violated the Section 7(b) clause of the Indian Act.

(e) *Additional Indian preference requirements.* An IHA may, with prior HUD approval, provide for additional Indian preference requirements as conditions for the award of, or in the terms of, any contract in connection with a project funded under this part. The additional Indian preference requirements shall be consistent with the objectives of the Section 7(b) clause of the Indian Act and shall not result in a significantly higher cost or greater risk of non-performance or longer period of performance. The additional Indian preference requirements permitted by this part do not include the imposition of geographic preferences or restrictions to the procurement process.

(f) *Complaint procedures.* The following complaint procedures are applicable to complaints arising out of any of the methods of providing for Indian preference contained in this subpart, including alternate methods enacted and approved in the manner described in this subpart.

(1) Each complaint shall be in writing, signed, and filed with the IHA.

(2) A complaint must be filed with the IHA no later than 20 calendar days from the date of the action (or omission) upon which the complaint is based.

(3) Upon receipt of a complaint, the IHA shall promptly stamp the date and time of receipt upon the complaint, and immediately acknowledge its receipt.

(4) Within 20 calendar days of receipt of a complaint, the IHA shall either meet, or communicate by mail or telephone, with the complaining party in an effort to resolve the matter. The IHA shall make a determination on a complaint and notify the complainant, in writing, within 30 calendar days of submittal of the complaint to the IHA. The decision of the IHA shall constitute final administrative action on the complaint.

§ 950.190 Insurance.

(a) *Purpose.* This section implements policies concerning insurance coverage required under the Annual Contributions Contract (ACC) or Mutual Help Annual Contributions Contract (MHACC) between HUD and an IHA. These contracts require (in section 305 of the ACC and Article IX of the MHACC) that IHAs maintain specified insurance coverage for property and casualty losses that would jeopardize the financial stability of the IHAs. The insurance coverage is required to be obtained under procedures that provide "for open and competitive bidding." The HUD Appropriations Act for Fiscal Year 1992 (Pub.L. 102–368) provided that an IHA could purchase insurance coverage without regard to competitive selection procedures when it purchases it from a nonprofit insurance entity owned and controlled by IHAs approved by HUD in accordance with standards established by regulation. This section specifies the standards.

(b) *Method of selection of insurance coverage.* While 24 CFR part 85 requires that grantees solicit full and open competition for their procurements, the HUD Appropriations Act for Fiscal Year 1992 (Pub.L. 102–368) provides an exception to this requirement. IHAs are authorized to obtain any line of insurance from a nonprofit insurance entity that is owned and controlled by IHAs and approved by HUD in accordance with this section, without regard to competitive selection procedures. Procurement of insurance from other entities is subject to competitive selection procedures.

(c) *Approval of a nonprofit insurance entity.* Under the following conditions, HUD will approve a nonprofit self-funded insurance entity created by IHAs that limits participation to IHAs (and to nonprofit entities associated with IHAs that engage in activities or perform functions only for housing authorities or housing authority residents):

(1) An insurance company (including a risk retention group).

(i) The insurance company maintains a current license or is authorized to do business in the State or Tribal area by the State Insurance Commissioner or Indian Tribal governing body and has submitted documentation of this authority to HUD and

(ii) The insurance company has not been suspended from providing insurance coverage in the State or Tribal area or been suspended or debarred from doing business with the federal government. The insurance company is obligated to send to HUD a copy of any action taken by the authorizing official to withdraw the license or authorization.

(2) An entity not organized as an insurance company.

(i) The entity has competent underwriting staff (hired directly or engaged by contract with a third party), as evidenced by professionals with an average of at least five years of experience in large risk (exceeding $100,000 in annual premiums) commercial underwriting or at least five years of experience in the underwriting of risks for public entity risk pools. This standard may be satisfied by submission of evidence of competent underwriting

staff, including copies of resumes of underwriting staff for the entity;

(ii) The entity has efficient and qualified management (hired directly or engaged by contract with a third party), as evidenced by the report submitted to HUD in accordance with paragraph (d)(3) of this section and by having at least one senior staff person who has a minimum of five years of experience:

(A) At the management level of Vice President of a property/casualty insurance entity;

(B) As a senior branch manager of a branch office with annual property/casualty premiums exceeding $5 million; or

(C) As a senior manager of a public entity risk pool. Documentation for this standard must include copies of resumes of key management personnel responsible for oversight and for the day-to-day operation of the entity;

(iii) The entity maintains internal controls and cost containment measures, as evidenced by an annual budget;

(iv) The entity maintains sound investments consistent with:

(A) The State insurance commissioner's requirements for licensed insurance companies, or other State statutory requirements controlling investments of public entities in the State in which the entity is organized, investing only in assets that qualify as "admitted assets"; or

(B) Any applicable provisions of Indian Tribal law concerning investments, in the case of an IHA that is not subject to such State law;

(v) The entity maintains adequate surplus and reserves for undischarged liabilities of all types, as evidenced by a current audited financial statement and an actuarial review conducted in accordance with paragraph (d) of this section; and

(vi) Upon application for initial approval, the entity has proper organizational documentation, as evidenced by copies of the articles of incorporation, by-laws, business plans, copies of contracts with third party administrators, and an opinion from legal counsel that establishment of the entity conforms with all legal requirements under Federal and State, or Tribal law. Any material changes made to these documents after initial approval must be submitted for review and approval before becoming effective.

(d) *Professional evaluations of performance.* Audits and actuarial reviews are required to be prepared and submitted annually to the HUD Office of Public and Indian Housing, for review and appropriate action, by nonprofit insurance entities that are not insurance companies approved under paragraph (c)(1) of this section. Selection of entities to perform such reviews shall comply with the competitive requirements of 24 CFR 85.36. In addition, an evaluation of other management factors is required to be performed by an insurance professional every three years. For fiscal years ending on or after December 31, 1993, the initial audit, actuarial review, and insurance management review required for a nonprofit insurance entity must be submitted to HUD within 90 days after the end of entity's fiscal year.

(1) The annual financial statement prepared in accordance with generally accepted accounting principles (including any supplementary data required by GASB 10) is to be audited by an independent auditor (see 24 CFR part 44), in accordance with generally accepted auditing standards. The independent auditor shall express an opinion on whether the entity's financial statement is presented fairly in accordance with generally accepted accounting principles. A copy of this audit must be submitted to HUD.

(2) The actuarial review must be done consistent with requirements established by the National Association of Insurance Commissioners and must be conducted by an independent property/casualty actuary who is an Associate or Fellow of a recognized professional actuarial organization, such as the Casualty Actuary Society. The report issued, a copy of which must be submitted to HUD, must include an opinion on any over or under reserving and the adequacy of the reserves maintained for the open claims and for incurred but unreported claims.

(3) A review must be conducted, a copy of which must be submitted to HUD, by an independent insurance consulting firm that has at least one person on staff who has received the professional designation of chartered property/casualty underwriter (CPCU), associate in risk management (ARM), of associate in claims (AIC), of the following:

(i) Efficiency of any Third Party Administrator;

(ii) Timeliness of the claim payments and reserving practices; and

(iii) The adequacy of reinsurance coverage.

(e) *Revocation of approval of a nonprofit insurance entity.* HUD may revoke its approval of a nonprofit insurance entity under this section when it no longer meets the requirements of this section. The nonprofit insurance entity will be notified in writing of the proposed revocation of its approval, and the manner and time in which to request a hearing to challenge the determination The procedure to be followed is specified in 24 CFR part 26.

Subpart C—Development

§ 950.200 Roles and responsibilities of Federal agencies.

HUD, IHS, BIA, and other appropriate agencies shall coordinate functions in accordance with the Interdepartmental Agreement. HUD shall take the lead role in any area specifically related to the construction of Indian housing under this part.

§ 950.205 Allocation.

HUD will allocate funds to Indian Field Offices using a systematic process that considers the relative need for housing in each HUD area or other geographic area, based on the most recent and reliable data available. (See 24 CFR part 791, subpart D.)

§ 950.210 Authority for proceeding without HUD approval.

(a) *IHA authority to proceed.* An IHA may proceed with development functions without obtaining HUD approval as otherwise specified in this part.

(b) *Rescinding authorization.* At any time during the development process, HUD may make a determination that an IHA, due to performance deficiencies, shall obtain HUD approval of additional processing steps. If such a determination is made, HUD shall explain in writing the reasons for the determination and specify any processing steps which are subject to additional technical assistance and prior approval by HUD. Processing under this "assisted" method of development may result from:

(1) A request from an IHA to receive additional assistance in the development process but only to the extent that HUD agrees that such assistance is necessary and has the resources available to provide such assistance;

(2) The result of monitoring an IHA's development performance pursuant to § 950.135. When identified deficiencies are corrected to the satisfaction of HUD, the IHA's development processing will return to the "standard" method of development or, with the agreement of the IHA and HUD, may continue to be processed under the "assisted" method of development in accordance with § 950.210(b).

(3) The IHA staff is inexperienced in or has had no recent experience in the development of new housing.

§ 950.215 Production methods.

Choice and approval of production method. The IHA may utilize any production method or combination of production methods to develop its projects as long as the production method(s) is not in conflict with the procurement requirements of 24 CFR 85.36 and subpart B of this part. The IHA shall advise HUD on the application for a project of its choice of production methods. Prior HUD approval is required if the method selected is force account or if the IHA proposes to utilize a noncompetitive procurement method. If HUD disapproves the IHA's preferred development method, it will furnish a statement of its reasons to the IHA. Historically, production methods utilized in the Indian Housing program are:

(a) *Conventional method.* Under the Conventional method, the IHA plans the project and prepares drawings and specifications. The IHA solicits competitive bids through public advertisement and awards the contract to the lowest responsible bidder.

(b) *Turnkey method.* Under the Turnkey method, the IHA advertises for developers to submit proposals to build a project described in the IHA's invitation for proposals. The invitation for proposals may prescribe the sites to be used. The IHA evaluates the proposals and selects the best proposal after considering price, design, site, the developer's experience and other evidence of the developer's ability to complete the project. Upon completion of the project (or stages thereof) in accordance with the contract of sale, the IHA purchases the project (or stage) from the developer.

(c) *Modified Turnkey.* Under this modified method, the procedure is similar to the conventional method, except that the developer/contractor usually receives no progress payments from the IHA and is responsible for acceptable completion before receiving any payment from the IHA.

(d) *Self-Help.* The Self-Help method is applicable only to the Mutual Help Homeownership Opportunity program. Under this method, with technical assistance and supervision and materials provided by the IHA, a small group of families build a substantial portion of the homes to be purchased by the families in the group. Their work is supplemented by skilled labor obtained under contract. See subpart F of this part for more details concerning this method.

(e) *Acquisition of existing housing (with or without rehabilitation).* Under the Acquisition method, the IHA purchases existing housing that may need only minor repairs or that may require substantial rehabilitation. Repair or rehabilitation may be accomplished before acquisition using Turnkey procedures or after acquisition using Conventional or Force Account procedures. An ACC may be executed before site approval, provided the IHA has documented evidence that adequate sites are available to accommodate the units contained in the program reservation.

(f) *Force account method.* (1) Under the Force Account method, an IHA performs construction or rehabilitation using its own work force, either entirely or in combination with contractors.

(2) The Force Account method may be used only if justified by the IHA and approved by the HUD Field Office. The IHA must demonstrate that it has the technical and administrative capabilities to complete the project within the projected time and budget. The HUD Field Office shall require that a Tribe or IHA agree in writing: to cover any costs in excess of the HUD-estimated construction costs; demonstrate that it has the financial resources to meet the excess costs up to a specified amount; and provide some form of security acceptable to HUD to cover excess costs. For this purpose, an IHA may use attachable assets including funds maintained in its reserve for replacements received from the sale of Mutual Help units.

§ 950.220 Total development cost.

(a) *Total development cost standard.* The total development cost (TDC) standard, which limits the allowable cost for developing Indian housing projects, is determined as a per unit cost for various unit sizes, structure types and geographic areas. It is developed by HUD by applying a simple multiplier to an average construction cost. The costs covered by the TDC approved for a project, which is subject to the TDC standard, include all costs associated with the project, except for costs of off-site water and sanitation facilities infrastructure and donations received from any public or private source. Costs for off-site water and sanitation facilities infrastructure and any donations received must be included in the project development cost budget but will be excluded from the calculation of the project TDC.

(b) *Creation of TDC areas.* HUD Field Offices shall periodically assess the adequacy of the existing TDC areas. The geographical area used as a TDC area shall be a single contiguous physical area with a clearly identified boundary line. TDC areas shall have a relatively consistent construction bidding environment, and they shall not overlap. An IHA may request or the HUD Field Office Administrator may initiate preparation of a recommendation for changing the TDC areas.

(c) *Approval of total development cost for a project.* The total development cost, as defined in § 950.102, is the amount approved by HUD for development of a particular project, and it will not exceed the TDC limit except as follows:

(1) The Secretary may provide that the TDC for a project may exceed the TDC limit by up to 10 percent of the published TDC for special situations such as, but not limited to, required relocation costs, start-up costs for on-site solid waste removal, and energy efficient housing design.

(2) In unusual circumstances, where the Secretary makes a written determination that there is good cause to exceed the limit of 110 percent of the maximum allowable TDC, the Secretary may approve a higher amount. An example of a circumstance that might form the basis for this type of determination is an unforeseen site improvement cost that is on-site only (not including any cost related to roads or driveways).

(3) Any approval to exceed the TDC limit for a development that is based on the published TDC standard shall be subject to fund availability.

(d) *In approving the total development cost,* HUD will approve a reasonable amount for preliminary planning.

(e) *Program reservations.* (1) Funds reserved for initial program reservations shall be based on reasonable costs for developments.

(2) After initial funding, the IHA may propose any reasonable housing design in their development program, as long as the building codes and other standards adopted by the IHA are not compromised and the cost of the units to HUD will not exceed the funds reserved.

(3) The IHA must commence construction within 30 months from the program reservation date. An IHA's failure to commence construction within 30 months constitutes grounds for termination of the project. Excluded from this computation is delay in construction caused by the failure of HUD to process such project within a reasonable period of time, any environmental review requirement, any legal action affecting the project, or any other factor beyond the control of the IHA.

(f) *Cost review.* HUD will review the development budget of each project for compliance with the maximum allowable TDC based on published TDC standards and with reasonable development costs, determined by a cost estimate prepared using HUD data on Indian housing developments actually constructed. The review will consider any conditions that may affect the cost analysis, such as logistical problems associated with developments of remote location, low density or scattered sites, the unavailability of skilled labor and acceptable materials, local customs, abnormal climatic conditions, and alternative heat sources, such as wood or coal.

(g) *Construction at reasonable cost.* The IHA shall complete development of each project at the lowest possible cost of construction and long-term operation of the project, and in no event may the cost of the project exceed the approved total development cost.

(h) *Training of residents.* The development cost budget submitted with the development program shall include an estimated amount for costs of a HUD-approved tenant counseling program. This counseling shall be subject to the provisions of § 950.453, substituting renter and prospective renter for Homebuyer, where applicable. Those provisions which by their nature are only applicable to MH projects are applicable only to a MH counseling program.

(i) *Initial insurance premiums.* The insurance premiums for the first three years may be included in development costs, with no obligation for reimbursement from operating receipts. The anticipated cost of such premiums may be charged to the development and placed in escrow by the IHA to enable closeout of the development program.

(Approved by the Office of Management and Budget under control number 2577–0101.)

§ 950.225 Application.

(a) *Submission to HUD.* (1) An IHA may submit an application for a project after HUD issues a general notification that funds are available.

(2) The application shall be on the form prescribed by HUD and shall be accompanied by all the legal and administrative attachments required by the form. The application must include comments by the Chief Executive Officer on behalf of the unit of local government where the project is to be located.

(3) Where the provisions for the necessary local government cooperation are not contained in the ordinance or other enactment creating the IHA, the IHA shall submit an executed cooperation agreement (or a copy of an existing one) for the location involved, which is sufficient to cover the number of units in the application.

(4) For an IHA that administers the Indian housing program for more than one specific Tribal government, or in the case of Alaska, more than one village, the IHA may submit an application on behalf of each distinct Tribal entity or village. An IHA administering the program in this manner is an "umbrella" IHA.

(5) An application which contains rental housing shall include:

(i) A certification that the IHA has reviewed the expected income and expenses of the proposed development and that the development is financially feasible at the current subsidy expense level; or

(ii) A request for an allowable expense level which will enable the project to be feasibly operated.

(6) An application which contains mutual help housing shall include a certification that there is a sufficient number of eligible homebuyers to ensure the viability of the project.

(b) In order to submit an application, the IHA must be eligible and have satisfied any requirements imposed in accordance with § 950.135. If an ineligible IHA submits an application, the HUD Field Office will return the application and will outline the specific reasons for the determination of ineligibility.

(c)(1) Applications will be rated and points will be awarded for the following categories:

(i) The relative unmet need for housing;

(ii) The relative IHA occupancy rate compared to the occupancy rates of other eligible IHAs submitting applications;

(iii) Length of time since the last program reservation date for each IHA compared to other eligible IHAs submitting applications;

(iv) Current IHA development pipeline activity; and

(v) Other factors identified in a notice of funding availability.

(2) After the completion of the rating process, applications will be listed together to produce an ordered ranking. An IHA that has not previously received housing assistance under this part will be given a preference over all previously funded IHAs. The application with the highest point total will be funded first; the next highest will be funded second; and the process will continue until funds are exhausted.

(d) *Program reservation.* (1) The program reservation will specify housing type, household type, development method, the funds reserved, the minimum and maximum number of total units, and units of each bedroom size to be developed. The program reservation will limit the total project development cost to the TDC level.

(2) As long as the total project development cost limit is not exceeded, the number of units may be changed by the IHA. If an IHA desires to change the number of units to be developed, it must submit to HUD a request to amend the program reservation, including documentation supporting the request. HUD will either approve the request or notify the IHA of the reason the request is not approved. Amendment funds may not be used to increase the project size.

(e) *Execution of ACC.* (1) Upon issuance of the program reservation by HUD, the IHA and HUD may execute an ACC to cover the costs of surveys and other HUD-approved planning activities with respect to the number of units covered by the program reservation. HUD may execute an ACC for an amount which the IHA demonstrates to the satisfaction of the HUD Field Office is required for the planning of the project. In support of a request for an ACC for planning, the IHA shall submit for HUD approval a preliminary budget showing anticipated expenditures and any needed supporting documentation. A preliminary budget for planning may include costs for comprehensive planning. (See paragraph (g) of this section).

(2) Funds for planning shall in no event be provided or used for purposes, or in amounts, that would not be approvable for inclusion in a development cost budget.

(3) Use of development funds of projects under ACC to cover costs for another project is strictly prohibited except as provided for under paragraph (g) of this section.

(f) *ACC amendment for construction and operation.* An amendment to the ACC to cover development and operation of a project shall not be executed until the IHA has adopted, and HUD has approved, the development program for the project. In no event may an IHA execute a contract for construction or development before the execution of an ACC amendment for construction or development.

(g) *Comprehensive housing plan.* At the request of an IHA, HUD may approve up to an additional one percent of the program reservation above the amount approved in accordance with paragraph (d)(1) of this section to establish and/or update a master housing plan for its area of operation. The plan should contain such elements

as proposed housing sites, existing and proposed off-site roads, existing and proposed water and sewer facilities. In addition, the plan should address geographical and topographical features, as well as socio-economic and cultural factors such as employment opportunities, schools and services which have an impact on the placement of residential housing. The plan should be approved by resolution of the Tribal council. The one percent cost for the comprehensive housing plan may be charged to the development and placed in an escrow or revolving fund account by the IHA to enable closeout of the development program and/or pooling of planning resources.

§ 950.230 Project coordination.

(a) *Project coordination meeting.* Upon notification of a Program Reservation, the IHA shall schedule a project coordination meeting to plan and schedule the steps needed to develop the project. The IHA will invite to the project coordination meeting the project designer (if known) and any Tribal, state or Federal officials who will participate in the development of the project. At the project coordination meeting, the IHA shall establish a schedule of planning activities including target date(s) for completion of key activities including the submission of the complete development program to HUD. The schedule, including any amendments thereto, shall be provided to meeting participant and to HUD to be used in planning and monitoring activities.

(b) *Citizen participation.* The IHA shall hold at least one public meeting at which comments are solicited on both the proposed sites and project design from potential occupants, as well as from other persons interested in the project. Such meeting may be held in conjunction with a regularly scheduled board meeting or may be held separately after adequate notice is provided to the public to enable full participation by interested parties. The IHA should give maximum consideration to all public comments in the design of the project. Minutes from the meeting and a summary of the IHA's action on public comments shall be included in the submission of the development program to HUD. Failure to hold a public meeting or to include the minutes of the meeting in the development program shall be grounds for disapproval of the development program.

§ 950.235 Site selection criteria.

(a) *Relation to Tribal, local and regional plans.* Selected sites must comply with all applicable Tribal, local and/or regional plans.

(b) *Access roads.* Access roads up to the boundaries of multi-unit sites shall be provided by the BIA, the Tribe or other appropriate agency and shall not be an eligible cost of the project. Access roads up to the boundaries of individual homesites in a scattered site project shall be provided by the homebuyer, the Tribe, or other appropriate agency and shall not be an eligible cost of the project. Access roads shall be maintained by a responsible local entity to provide safe and suitable vehicular access at all times. No site may be approved unless such access roads exist, or a written assurance has been obtained from the responsible entity that roads will be constructed before commencement of project construction.

(c) *Utilities.* Before final site approval, the IHA must demonstrate that all utility services necessary for the operation of the project are available or will be available at the time of project occupancy and that no legal, political, geographical, or contractual obstacles exist that will prevent access to these utility services.

(d) *Physical characteristics of site.* The physical characteristics of a site shall facilitate overall economy in site preparation, construction, and management. Only reasonable costs for surveys, planning, test borings, and test wells shall be included in the development cost of the project.

(e) *Size of sites.* An individual homesite, whether a scattered site or included in a multi-unit site, shall not exceed the size determined by the IHA or by Tribal or local policy to be necessary for the use and occupancy by the resident of the dwelling unit.

(f) *Alternate sites.* In order to minimize delay to the project in the event of the withdrawal of a selected homebuyer or an approved site, the IHA should have a reasonable number of alternates available. Each homesite shall be legally and practicably available for use by another homebuyer. If a site is part of other land owned by the prospective homebuyer, the lease or other conveyance to the IHA shall include the legal right of access to the site by any substitute homebuyer.

§ 950.240 Types of interest in land.

(a) *Trust or restricted land.* Sites on Tribally or individually owned trust or restricted land (as defined in 25 CFR 151.2) shall be leased to the IHA for a term of not less than 50 years (25 years, automatically renewable for an additional term of 25 years) on a HUD approved form of lease, which will provide that the lease cannot be terminated before its expiration without the consent of the IHA, or, while the site remains under the ACC, by HUD.

(b) *Unrestricted land.* Sites on unrestricted land shall be either conveyed to the IHA in fee or leased to the IHA on a HUD approved form of lease for a term of not less than 50 years.

(c) *Other.* Not withstanding the type of interest in land, all project property shall be exempt from local or state imposed real or personal property tax in accordance with section 6(d) of the U.S. Housing Act of 1937 (42 U.S.C. 1437d(d)).

§ 950.245 Appraisals.

(a) When the cost of a site is to be charged to the IHA's development cost, an appraisal shall be made in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. 4601–4655). Government-wide implementing regulations are at 49 CFR part 24. The cost of donated land may be assumed to be $1,500 per unit. An appraisal of donated land must be performed only if the IHA determines that the value to be attributed to the site exceeds $1,500.

(b) When the interest to be appraised is a leasehold interest in Tribally or individually owned trust or restricted land and comparable leasehold transactions are not available, the appraiser shall estimate the value of the land as if alienable in fee, based on a comparison of the land being valued with sales of fee interests in comparable land in the same or competing market areas.

§ 950.250 Site approval.

(a) *IHA certification.* Prior to or concurrent with the submission of the Development Program, the IHA shall submit a written certification to HUD that all conditions which would prevent the site from being included in the project have been satisfactorily addressed and there are no legal or physical reasons which would interfere with the occupancy and use of the site during the term of the ACC. Such certification shall be conditioned only upon final acquisition or execution of a lease on the property.

(b) *Tentative site approval.* (1) When a site is proposed for use, the IHA shall inspect the property to ascertain its suitability for development. Where appropriate, the IHA shall request an inspection of any proposed site by utility suppliers, the BIA, the IHS, and a representative of the local governing body and shall include each agency's comments in a list of potential site approval concerns. If the IHA

determines that a site does not contain any legal or physical conditions which would exclude it from consideration for acquisition, the IHA shall prepare a listing of all conditions which must be corrected or addressed prior to acquisition of the site. The determination by the IHA and the preparation of the list of conditions shall be considered the tentative approval of the site.

(2) Tentative site approval will not be determined until the requirements for compliance with local governmental approval have been met. (See 24 CFR part 791.)

(3) Upon determination of tentative site approval, the IHA shall request environmental review by HUD. HUD may request the IHA to provide information or conduct surveys or studies which will assist in the determination by HUD of the environmental suitability of the site for development. Upon completion of the environmental review, HUD will provide the IHA with a copy of its Environmental Assessment, environmental review, Finding of No Significant Impact (FONSI) and/or with the reasons why the site was not environmentally satisfactory. The cost of completing environmental surveys or studies is an eligible project cost. Until HUD issues a FONSI, eligible planning costs are limited to those activities necessary to aid in the completion of the environmental assessment.

(c) *Final site approval.* (1) Final site approval occurs when a site satisfies all of the conditions stated in the tentative approval and, with respect to trust land or restricted land over which the BIA has authority, the BIA has given either unconditional concurrence for final site approval or concurrence conditioned only on subsequent execution of site leases or right-of-way easements. If the BIA has given final site approval conditioned on subsequent execution of site leases of rights-of-way, the IHA shall obtain from the BIA written assurance that a valid lease, executed by all the necessary parties, can be obtained within a reasonable time and before start of construction.

(2) Final site approval on all sites for the project must occur:

(i) Before execution of an ACC for construction and operation, except for a project developed under the acquisition method or for restricted land sites, in accordance with paragraph (c)(3) of this section;

(ii) Before any commitment is made to acquire or lease any site; and

(iii) Before construction is started. In addition, leases and necessary rights-of-way must be obtained before solicitation of construction bids or before construction may begin on any units.

(3) With respect to trust or restricted land sites, HUD may execute the ACC for construction and operation before final site approval of all sites only when the following conditions have been met:

(i) All sites for the project have tentative site approval;

(ii) At least 50 percent of the sites have final site approval;

(iii) HUD is satisfied that the balance of the sites will meet the requirements for final site approval no later than one year from execution of the construction contract; and

(iv) The construction contract provides that if all sites, finally approved and with executed leases, have not been delivered by the IHA to the contractor within one year from execution of the construction contract (or HUD-approved extension), the construction contract shall be reduced by the amount attributable to the units to be developed on the undelivered sites.

§ 950.255 Design criteria.

(a) *Applicable building code.* (1) *General.* For purposes of housing assisted under chapter IX of this title, the IHA must use the applicable Tribal or other local building code where it meets or exceeds standards of model national building codes; or if there is none, it must use a model building code, or a State or other locality's building code. Newly constructed housing shall meet or exceed the requirements of the latest Model Energy Code published by the Council of American Building Officials. The IHA must coordinate with the Tribe, or local government, if appropriate, to assure adoption of a code that satisfies the standards specified in paragraph (a)(2) of this section. The code may make special provisions for traditional and culturally oriented design features. In the absence of tribally adopted codes, the IHA shall determine, by Resolution of the Board of Commissioners, building codes to be followed in the development of its housing.

(2) *Required standards.* The code used must provide sufficient flexibility to permit the use of different designs and materials; must include standards for reasonable site designs; must include cost-effective energy conservation performance standards designed to ensure the lowest total construction and operating costs; must give proper consideration to the needs of physically handicapped persons for ready access to, and use of, housing assisted under this chapter (see 24 CFR part 8); and must be sufficient to produce a decent, safe and sanitary home.

(b) *Fuel and energy consumption.* In selecting from among design options for heating, cooking, and electrical systems, maximum attention shall be given to cost, adequacy, maintenance of the system, and the long term reliability of fuel supplies. Where fuel is not locally available at low cost, alternate systems such as wind, solar, or coal, may be used and included in the project cost.

(c) *Moderate housing design.* The design chosen by the IHA must be of moderate design standard taking into consideration anticipated long term operating costs.

(d) *Water provisions for Alaska.* Alaska Native housing assisted under this part shall be designed and constructed to include water storage tanks when the housing is not served by or scheduled to be served by piped utilities. These tanks shall be no less than 100 gallons in capacity and be constructed to be accessed from outside the house.

(e) *Design approval.* The IHA shall obtain the approval of project designs by all local or tribal regulatory agencies, by the BIA for on-site streets, and the IHS, where appropriate, for community water and/or sewer facilities. The IHA shall assure the design meets applicable building codes, that the project can be constructed within the amount of funds reserved for the development, and that the project is financially feasible including ongoing maintenance cost considerations.

§ 950.260 IHA development program.

An IHA development program is required for all development methods, and must be approved by HUD.

(a) *IHA submission.* (1) Submission of the development program shall be in accordance with the schedule established at the project coordination meeting. The IHA's failure to submit the complete development program in the form prescribed by HUD by the date established will be a factor in HUD's evaluation of an IHA's administrative capability in accordance with § 950.135.

(2) In order to achieve construction start within 30 months from the program reservation date (see § 950.220(e)(3), the development program should be submitted to HUD not later than 18 months from the program reservation date.

(b) *HUD review.* HUD will review the IHA development program upon receipt. HUD will advise the IHA of any deficiencies and will provide the IHA an opportunity to make corrections within 30 days of receipt of the notice of deficiencies. To be approvable, the

development program must demonstrate legal sufficiency, the financial feasibility of the project, and its compliance with all program requirements. Upon conclusion of HUD's review, the development program will be either approved or disapproved. If the development program is approved, the ACC will be executed or amended, as necessary, and the IHA will be authorized to acquire the units or prepare final plans for construction. If the initial submission is disapproved, HUD will notify the IHA of the reasons and allow the IHA to amend and resubmit the development program.

§ 950.265 Construction and inspections.

Following approval of the development program, the IHA shall commence final planning and begin construction within 12 months of the development program approval date. Unless there are circumstances beyond the IHA's control, as defined in § 950.220(e)(3), failure to commence construction within 30 months from the time of program reservation constitutes cause for HUD termination of the ACC and recapture of the reserved funds.

(a) *Conventional projects.* The IHA shall prepare the plans, advertise for bids, and award a construction contract. Within 10 days of the award of a construction contract, the IHA shall prepare and submit to HUD a certification that it has met all program requirements for site acquisition; the preparation of final plans and specifications; and the bidding, evaluation and award of the construction contract. Included in the submission to HUD, the IHA shall submit a copy of the set of construction plans and specifications, the bid advertisement, the construction contract, the notice to proceed and the contract award development cost budget.

(b) *Turnkey and modified turnkey projects.* The IHA shall execute the contract of sale. Within 10 days of execution of the contract of sale, the IHA shall prepare and submit to HUD a certification that it has met all program requirements for site acquisition; the review and acceptance of the final plans and specifications; and the execution of the contract of sale. The IHA shall submit a copy of the set of construction plans and specifications and the Contract of Sale and the contract award development cost budget with the certification to HUD.

(c) *Force account.* The IHA shall prepare the final construction plans and specifications; a detailed plan for constructing the project including the scope of work to be performed by the IHA staff or by subcontractors; and begin work. Within 10 days of the date construction activities begin, the IHA shall prepare and submit to HUD a certification that it has met all program requirements for site acquisition, the proper preparation of final plans and specifications and the preparation of its work plan. Included in the submission to HUD, the IHA shall provide a copy of the set of construction plans and specifications, the work plan developed to complete construction of the project, and the contract award development cost budget.

(d) *Inspections and monitoring.* (1) *IHA construction inspections.* Whatever the development method used, the IHA shall be responsible for obtaining inspections throughout the construction period. The frequency of inspections and the procedures to be used shall assure completion of quality housing in accordance with the contract documents. Inspections shall be performed by an architect, engineer, or other qualified person selected by the IHA.

(2) *Coordination of inspections.* The IHA shall coordinate inspections with tribal or local regulatory agencies and, where applicable, the BIA and/or IHS, to assure that all governing codes and other requirements are met.

(3) *HUD construction monitoring.* HUD representatives or agents may visit construction sites to evaluate the IHA's contract administration. These visits should not be construed by the IHA as construction inspections.

§ 950.270 Construction completion and settlement.

(a) *Final inspection.* The IHA shall assure that all work is satisfactorily completed, in accordance with the terms of the construction contract, prior to scheduling a final inspection. The final inspection shall be made jointly by the IHA and the contractor. Where appropriate, the IHA shall notify tribal or local regulatory agencies, the BIA, the IHS, and HUD before this inspection to provide them with the opportunity to participate in the final inspection of all or part of the work. In a MH project, homebuyers shall also be invited to participate in the inspection of their homes, but acceptance shall be by the IHA. Maximum consideration shall be given to all homebuyer concerns.

(b) *Contract settlement.* (1) If the final inspection discloses no deficiencies other than punch list items or seasonal completion items, the IHA shall, as soon as practical, develop an interim Certificate of Completion to enable partial settlement of the contract. The interim Certificate will detail the items remaining and set forth a schedule for their completion, and will allow the IHA to accept the units (or stage) for occupancy. Upon completion of the interim Certificate and receipt of the contractors Certificate and Release, the IHA shall release the monies due the contractor less withholdings in accordance with the construction contract.

(2) The contractor shall complete the punch list items in accordance with the time schedule contained in the interim Certificate of Completion. The IHA may pay the contractor for such items which are completed to the satisfaction of the IHA. If the IHA is satisfied that the applicable requirements of the construction contract and the interim Certificate have been met, the IHA shall prepare a final Certificate of Completion and release the amounts withheld to the contractor/developer.

(c) *Notification to HUD.* (1) Within 10 days of acceptance of the project or any part thereof, the IHA shall notify HUD of such action. Upon acceptance of all units within a project, the IHA shall provide a notification to HUD of the date the project was fully available for occupancy by residents.

(2) The IHA shall provide HUD notice of the end of the rent-up period within 10 days of such occurrence.

(3) The IHA shall provide HUD with a copy of all interim and final certificates of completion within 10 days of their execution.

§ 950.275 Warranty inspections and enforcement.

(a) The construction contract shall specify the warranty periods applicable to items completed as part of the contract. It shall also provide for assignment to the IHA of manufacturers' and suppliers' warranties covering equipment or supplies.

(b) The IHA shall conduct an inspection of each dwelling unit at least once not later than six months after the start of the contractor's warranty period. A separate or final warranty inspection shall be made in time to exercise the IHA's rights before expiration of the contractor's warranties. Each inspection shall cover all items under warranty at the time of the inspection, including items covered by manufacturers' and suppliers' warranties. At each inspection, the IHA shall obtain a signed statement from the occupants as to any deficiencies in the structure, equipment, grounds, etc., so that it may enforce any rights under applicable warranties.

§ 950.280 Correcting deficiencies.

(a) *Responsibility.* The IHA shall pursue correction of any deficiencies against the responsible party (e.g. architect, contractor or the MH homebuyer) as soon as possible after discovering the deficiencies. Where the costs of correcting deficiencies cannot be recovered from the responsible party and/or the deficiency requires immediate correction to protect life or safety or to avoid further damage to the project unit(s), the IHA may apply to HUD for amendment of the development budget to provide the funds required, or may request that operating receipts or other funds be authorized to be used to cover the costs. In any case, program funds shall not be used for this purpose without prior HUD approval. The IHA shall be responsible for correction of any deficiencies which could have been detected and/or corrected during the warranty period if the IHA had inspected at the appropriate time or had pursued correction of deficiencies against the responsible parties.

(b) *Amendments.* (1) HUD may, but is not obligated to provide additional funding to the IHA to correct deficiencies. The ACC may be amended to provide amounts needed to correct deficiencies (and any damage resulting there from) in design, construction, and equipment only where there is substantial evidence that it is not possible to obtain timely correction or payment by the responsible parties, including the source of the performance bond.

(2) In the case of a MH home, the additional cost for correcting deficiencies in design, construction or equipment (and any damage resulting therefrom) shall not result in an increase in the homebuyer's purchase price. If a homebuyer is not in compliance with the MHO Agreement, HUD shall require the IHA to reach agreement with the homebuyer to correct the noncompliance before approving the work.

§ 950.285 Fiscal closeout.

The IHA shall submit the actual development cost certificate within 24 months of the date of full availability (see § 950.270(c)(1)), or such later date as may be approved by HUD, in a form prescribed by HUD, to the HUD office for review, audit verification and approval. The audit shall follow the requirements of 24 CFR part 44 (Single Audit Act of 1984). If the audited development cost indicates that excess funds have been approved, the IHA shall dispose of the excess as HUD directs. If the audited development cost certificate discloses unauthorized expenditures, the IHA shall take such corrective actions as HUD directs.

Subpart D—Operation

§ 950.301 Admission policies.

(a) *Admission policies.* (1) The IHA shall adopt written policies for admission of participants. The policies shall cover all programs operated by the housing authority and, as applicable, will address the programs individually to meet their specific requirements (*i.e.*, Rental, MH, or Turnkey III). A copy of the policies shall be posted prominently in the IHA's office for examination by prospective participants, and shall be submitted to the HUD Field Office promptly after adoption by the IHA. (See § 950.416 with respect to Mutual Help admission policies.)

(2) The policies shall include tenant and homebuyer selection criteria designed to:

(i) Avoid concentrations of the most economically and socially deprived families in any one or all of the IHA's projects;

(ii) Ensure that, to the maximum extent feasible, the projects of the IHA include families with a broad range of incomes which generally reflect the range of incomes of those low-income families in the Indian area who would be qualified for admission to the type of project;

(iii) Preclude admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the participants or the project environment; and

(iv) For not less than 70 percent of the units made available for occupancy in a given fiscal year, to give a preference in the selection of participants (in accordance with § 950.305) who at the time they are seeking housing assistance, are involuntarily displaced, living in substandard housing, or paying more than 50 percent of family income for rent.

(3) The IHA admission policies shall include the following:

(i) Requirements for applications and waiting lists, including requirement for selection from the top of the list;

(ii) Procedures governing participant transfer between units, projects, and programs;

(iii) Other IHA priorities, if any, and a requirement that a participant is not eligible for voluntary transfer unless all obligations under the current program have been met, including payment of charges to the IHA and completion of maintenance requirements;

(iv) Compliance with 24 CFR part 750, which requires applicants and participants to disclose and verify social security numbers at the time eligibility is determined and at later income reexaminations; and

(v) Compliance with 24 CFR part 760, which requires applicants and participants to sign and submit consent forms for the obtaining of wage and claims information from State wage and information collection agencies.

(b) *Income limits.* (1) A family must be a Low-income Family, as defined in § 950.102, to be eligible for admission. (With respect to eligibility for the Mutual Help program, see special provisions of § 950.416.)

(2) In extremely unusual circumstances, the IHA may request that HUD increase or decrease income limits for low-income families or for very low-income families in the Indian area because of unusually high or low family incomes. Such a request can be granted only by joint approval of HUD's Assistant Secretary for Housing and Assistant Secretary for Public and Indian Housing, after consultation with the Secretary of Agriculture (if the income limits are being established for a "rural area" as defined in section 520 of the Housing Act of 1949 (42 U.S.C. 1490)).

(c) *Standards for IHA tenant/homebuyer selection criteria.* (1) The criteria to be established and information to be considered shall be reasonably related to individual attributes and behavior of an applicant, and shall not be related to those which may be imputed to a particular group or category of persons of which an applicant may be a member. The IHA's tenant/homebuyer selection criteria must be in accordance with HUD guidelines and submitted to the HUD Field Office. (With respect to the Mutual Help program, see special provisions of § 950.416.)

(2) In the event of any unfavorable information regarding an applicant, the IHA must take into consideration the time, nature, and extent of the past occurrence and reasonable probability of future favorable performance.

(d) *Admission of single persons—priority to elderly and displaced persons.* An IHA shall extend preference to elderly families (including disabled persons and handicapped persons) and displaced persons over single persons.

(e) *Selection preference with respect to projects for elderly families.* (1) In determining priority for admission to projects for elderly families, an IHA must give a preference to elderly families. When selecting applicants for admission from among elderly families, an IHA must follow its policies and

procedures for applying the Federal preferences contained in § 950.305.

(2) An IHA may give a preference to near elderly families in determining priority for admission to projects for elderly families when the IHA determines that there are not enough eligible elderly families to fill all the units that are currently vacant or expected to become vacant in the next 12 months. In no event may an IHA admit a near elderly family if there are eligible elderly families on the IHA's waiting list that would be willing to accept an offer for a suitable vacant unit in that project.

(3) Before electing the discretionary preference in paragraph (e)(2) of this section, an IHA must conduct outreach to attract eligible elderly families, including, where appropriate, elderly families residing in projects not designated as being for elderly families.

(4) If an IHA elects the discretionary preference in paragraph (e)(2) of this section, the IHA must follow its policies and procedures for applying the Federal preferences contained in § 950.305 when selecting applicants for admission from among near elderly families. Near elderly families that do not qualify for a Federal preference and that are given preference for admission under this section over other non-elderly families that qualify for such a Federal preference are not subject to the 30 percent limitation on admission of families without a Federal preference over families with such a Federal preference that may initially receive assistance in any one-year period, as set out in § 950.305(b)(2)(ii). If a near elderly applicant is a single person, the near elderly single person may be given a preference for admission over other single persons to projects for the elderly.

(f) *Verification of information and notification to applicants.*

(1) *Verification.* Adequate procedures shall be developed to obtain and verify information with respect to each applicant. Information relative to the acceptance or rejection of an applicant shall be documented and placed in the applicant's file.

(2) *Notification to applicants.* (i) If an applicant is determined to be ineligible for admission to a project, the IHA shall promptly notify the applicant of the basis for such determination and shall provide the applicant, upon request and within a reasonable time after the determination is made, with an opportunity for an informal hearing on such determination; and

(ii) When a determination has been made that an applicant is eligible and satisfies all requirements for admission including the tenant selection criteria, the applicant shall be notified of the approximate date of occupancy insofar as that date can be reasonably determined.

(Approved by the Office of Management and Budget under control number 2577–0063.)

§ 950.305 Federal selection preferences.

(a) *General.* (1) In selecting applicants for admission to its projects, each IHA must give preference to applicants who are otherwise eligible for assistance and who, at the time they are seeking housing assistance, are involuntarily displaced, living in substandard housing, or paying more than 50 percent of family income for rent.

(2)(i) The IHA must inform all applicants of the availability of the Federal preferences, and must give all applicants an opportunity to show that they qualify for a preference. For purposes of this paragraph (a)(2)(i) of this section, applicants include families on any waiting list maintained by the IHA when this section is implemented or thereafter.

(ii) If the IHA determines that the notification to all applicants on a waiting list required by paragraph (a)(2)(i) of this section is impracticable because of the length of the list, the IHA may provide this notification to fewer than all applicants on the list at any given time. The IHA must, however, have notified a sufficient number of applicants at any given time that, on the basis of the IHA's determination of the number of applicants on the waiting list who already claim a Federal preference, and the anticipated number of project admissions:

(A) There is an adequate pool of applicants who are likely to qualify for a Federal preference; and

(B) It is unlikely that, on the basis of the IHA's framework for applying the preferences under paragraph (b) of this section and the preferences claimed by those already on the waiting list, any applicant who has not been so notified would receive assistance before those who have received notification.

(3) An IHA must apply the definitions of "standard, permanent replacement housing"; "involuntary displacement"; "substandard housing" and "homeless family"; "family income"; and "rent" set forth in paragraphs (c)(5), (d), (f), (h), and (i), respectively, of this section, unless the IHA submits alternative definitions for HUD's review and approval. An IHA may apply the verification procedures found in paragraphs (e), (g), and (j) of this section, or it may, in its own discretion and without HUD approval, adopt verification procedures of its own.

(4) For purposes of this section, the term "Federal preference" means a tenant selection preference provided under this section. The term "preference" means a Federal preference, unless the context indicates otherwise.

(b) *Applying the Federal preferences.* (1) Each IHA must include the Federal preferences in its tenant selection policies and procedures. The IHA must apply the Federal preferences in a manner that is consistent with the provisions of this section, and other applicable requirements.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this section, the IHA must establish a system for applying the Federal preferences that provides that an applicant who qualifies for any of the Federal preferences is to be admitted before any other applicant who is not so qualified without regard to the other applicant's qualification for one or more preferences or priorities that are not provided by Federal law, place on the waiting list, or the time of submission of an application for admission.

(ii) The IHA's system for applying the Federal preferences may provide for circumstances in which applicants who do not qualify for a Federal preference are admitted before other applicants who are so qualified. Not more than 10 percent of the applicants who initially are admitted in any one-year period (or such shorter period selected by the IHA before the beginning of its first full year under this paragraph (b)(2)(ii)) of this section may be applicants referred to in the preceding sentence.

(iii) In applying the preferences under paragraph (b)(2) of this section, the IHA may determine the relative weight to be accorded the Federal preferences, through means such as:

(A) Applying non-Federal preferences or priorities (such as local residency preferences) as a way of ranking applicants who qualify (or claim qualification) for a Federal preference;

(B) Aggregating the Federal preferences (*i.e.*, two Federal preferences outweigh one and three outweigh two);

(C) Ranking the Federal preferences (*e.g.*, provide that an applicant living in substandard housing has greater need for housing than (and, therefore, would be considered for admission before) an applicant paying more than 50 percent of income for rent); or

(D) Ranking the Federal preferences definitional elements (*e.g.*, provide that those living in housing that is dilapidated or has been declared unfit for habitation by an agency or unit of government have a greater need for housing than, and take precedence over,

those whose housing is substandard only because it does not have a usable bathtub or shower inside the unit for the exclusive use of the family).

(3) To the extent that title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Fair Housing Act (42 U.S.C. 3601–3619) apply to a Tribal government, any selection preferences or priorities used by an IHA within such a Tribe's jurisdiction must be established and administered in a manner that is consistent with HUD's affirmative fair housing objectives and that is not incompatible with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d); the Fair Housing Act (42 U.S.C. 3601–3620); Executive Order 11063 on Equal Opportunity in Housing, (3 CFR, 1959–63 Comp., p. 652), as amended by Executive Order 12259 (3 CFR, 1980 Comp., p. 307); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975 (42 U.S.C. 6101–07); and HUD's regulations and requirements issued under these authorities.

(c) *Qualifying for a Federal preference.* (1) An applicant qualifies for a Federal preference if:

(i) The applicant has been involuntarily displaced and is not living in standard, permanent replacement housing, or within no more than six months from the date of certification under paragraph (c)(2) of this section or verification under paragraph (c)(3) of this section (as appropriate), the applicant will be involuntarily displaced;

(ii) The applicant is living in substandard housing; or

(iii) The applicant is paying more than 50 percent of family income for rent.

(2) Applicants may claim qualification for a Federal preference when they apply for admission to a project (or thereafter until they are offered a unit in the project) by certifying to the IHA that they qualify for a preference under paragraph (c)(1) of this section by virtue of the applicant's current status. The applicant's current status must be determined without regard to whether there has been a change in the applicant's qualification for a preference between the certification under paragraph (c)(2) of this section and admission to a project, including a change from one Federal preference category to another.

(3) Once an applicant's qualification for a Federal preference under paragraph (c)(1) of this section has been verified, an IHA need not require the applicant to verify such qualification again, unless, as determined by the IHA, such a long time has elapsed since verification as to make reverification desirable, or the IHA has reasonable grounds to believe that the applicant no longer qualifies for a Federal preference.

(4) For purposes of this paragraph (c), "standard, permanent replacement housing" is housing:

(i)(A) That is decent, safe, and sanitary;

(B) That is adequate for the family size; and

(C) That the family is occupying pursuant to a lease or occupancy agreement.

(ii) Such housing does not include transient facilities, such as motels, hotels, or temporary shelters for victims of domestic violence or homeless families, and in the case of domestic violence referred to in paragraph (d)(2) of this section, does not include the housing unit in which the applicant and the applicant's spouse or other member of the household who engages in such violence live.

(5) An applicant may not qualify for a Federal preference under paragraph (c)(1)(ii) of this section if the applicant is paying more than 50 percent of family income to rent a unit because the applicant's housing assistance under the United States Housing Act of 1937 (42 U.S.C. 1437–1440) or section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s) with respect to that unit has been terminated as a result of the applicant's refusal to comply with applicable program policies and procedures with respect to the occupancy of underoccupied and overcrowded units.

(d) *Definition of involuntary displacement.* (1) An applicant is or will be involuntarily displaced if the applicant has vacated or will have to vacate his or her housing unit as a result of one or more of the following actions:

(i) A disaster, such as a fire or flood, that results in the uninhabitability of an applicant's unit;

(ii) Activity carried on by an agency of the United States or by any State or local governmental body or agency in connection with code enforcement or a public improvement or development program; or

(iii) Action by a housing owner that results in an applicant's having to vacate his or her unit, where:

(A) The reason for the owner's action is beyond an applicant's ability to control or prevent;

(B) The action occurs despite an applicant's having met all previously imposed conditions of occupancy; and

(C) The action taken is other than a rent increase.

(2) An applicant also is involuntarily displaced if:

(i)(A) The applicant has vacated his or her housing unit as a result of actual or threatened physical violence directed against the applicant or one or more members of the applicant's family by a spouse or other member of the applicant's household; or

(B) The applicant lives in a housing unit with such an individual who engages in such violence.

(ii) For purposes of paragraph (d)(2) of this section, the actual or threatened violence must, as determined by the IHA in accordance with HUD's administrative instructions, have occurred recently or be of a continuing nature.

(3) For purposes of paragraph (d)(1)(iii) of this section, reasons for an applicant's having to vacate a housing unit include, but are not limited to, conversion of an applicant's housing unit to non-rental or non-residential use; closure of an applicant's housing unit for rehabilitation or for any other reason; notice to an applicant that he or she must vacate a unit because the owner wants the unit for the owner's personal or family use or occupancy; sale of a housing unit in which an applicant resides under an agreement that the unit must be vacant when possession is transferred; or any other legally authorized act that results or will result in the withdrawal by the owner of the unit or structure from the rental market. Such reasons do not include the vacating of a unit by a tenant as a result of actions taken because of the tenant's refusal:

(i) To comply with applicable program policies and procedures under this title with respect to the occupancy of underoccupied and overcrowded units, or

(ii) To accept a transfer to another housing unit in accordance with a court decree or in accordance with such policies and procedures under a HUD-approved desegregation plan.

(e) *Verification procedures for applicants involuntarily displaced.* Verification of an applicant's involuntary displacement is established by the certification, in a form prescribed by the Secretary:

(1) Made by a unit or agency of government that an applicant has been or will be displaced as a result of a disaster, as defined in paragraph (d)(1)(i) of this section;

(2) Made by a unit or agency of government that an applicant has been or will be displaced by government action, as defined in paragraph (d)(1)(ii) of this section;

(3) Made by an owner or owner's agent that an applicant had to, or will have to, vacate a unit by a date certain because of an owner action referred to in paragraph (d)(1)(iii) of this section; or

(4) Made by the local police department, social services agency, or court of competent jurisdiction, or a clergyman, physician, or public or private facility that provides shelter or counseling to the victims of domestic violence, that an applicant has been or is being displaced because of domestic violence, as described in paragraph (d)(2) of this section.

(f) *Definition of substandard housing.* (1) A unit is substandard if it:

(i) Is dilapidated;

(ii) Does not have operable indoor plumbing;

(iii) Does not have a usable flush toilet inside the unit for the exclusive use of a family;

(iv) Does not have a usable bathtub or shower inside the unit for the exclusive use of a family;

(v) Does not have electricity, or has inadequate or unsafe electrical service;

(vi) Does not have a safe or adequate source of heat;

(vii) Should, but does not, have a kitchen; or

(viii) Has been declared unfit for habitation by an agency or unit of government.

(2) For purposes of paragraph (f)(1) of this section, a housing unit is dilapidated if it does not provide safe and adequate shelter, and in its present condition endangers the health, safety, or well-being of a family, or it has one or more critical defects, or a combination of intermediate defects in sufficient number or extent to require considerable repair or rebuilding. The defects may involve original construction, or they may result from continued neglect or lack of repair or from serious damage to the structure.

(3) For purposes of paragraph (f) of this section, an applicant who is a "homeless family" is living in substandard housing. For purposes of the preceding sentence, a "homeless family" includes any individual or family who:

(i) Lacks a fixed, regular, and adequate nighttime residence; and

(ii) Has a primary nighttime residence that is:

(A) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(B) An institution that provides a temporary residence for individuals intended to be institutionalized; or

(C) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings. A "homeless family" does not include any individual imprisoned or otherwise detained pursuant to an Act of the Congress or a State law.

(4) For purposes of paragraph (f)(1) of this section, single room occupancy (SRO) housing, as defined in 24 CFR 882.102, is not substandard solely because it does not contain sanitary or food preparation facilities (or both).

(g) *Verification procedures for applicants living in substandard housing.* Verification that an applicant is living in substandard housing consists of certification, in a form prescribed by the Secretary, from a unit or agency of government or from an applicant's present landlord that the applicant's unit has one or more of the deficiencies listed in, or the unit's condition is as described in, paragraph (f)(1) or (f)(2) of this section. In the case of a "homeless family" (as described in paragraph (f)(3) of this section), verification consists of certification, in a form prescribed by the Secretary, of this status from a public or private facility that provides shelter for such individuals, or from the local police department or social services agency.

(h) *Definition of family income.* For purposes of this section, family income is "monthly income", which is one-twelfth of "annual income" as defined in § 950.102.

(i) *Definition of rent.* (1) For purposes of this section, rent is defined as:

(i) The actual amount due, calculated on a monthly basis, under a lease or occupancy agreement between a family and the family's current landlord; and

(ii) In the case of utilities purchased directly by tenants from utility providers;

(A) The IHA's reasonable estimate of tenant-purchased utilities (except telephone) and the other housing services that are normally included in rent; or

(B) If the family chooses, the average monthly payments that it actually made for these utilities and services for the most recent 12-month period or, if information is not obtainable for the entire period, for an appropriate recent period.

(2) For purposes of calculating rent under paragraph (i) of this section, amounts paid to or on behalf of a family under any energy assistance program must be subtracted from the otherwise applicable rental amount to the extent that they are not included in the family's income.

(3) In the case of an applicant who owns a manufactured home, but who rents the space upon which it is located, rent under paragraph (i) of this section includes the monthly payment to amortize the purchase price of the home, as calculated in accordance with HUD's requirements.

(4) In the case of members of a cooperative, rent under paragraph (i) of this section means the charges under the occupancy agreement between the members and the cooperative.

(j) *Verification of an applicant's income, rent, and utilities payments.* The IHA must verify that an applicant is paying more than 50 percent of family income for rent, as follows:

(1) The IHA must verify the family's income in accordance with the standards and procedures that it uses to verify income for the purpose of determining applicant eligibility and total tenant payment.

(2)(i) An IHA must verify the amount due to the family's landlord (or cooperative) under the lease or occupancy agreement:

(A) By requiring the family to furnish copies of its most recent rental (or cooperative charges) receipts (which may include cancelled checks or money order receipts) or a copy of the family's current lease or occupancy agreement; or

(B) By contacting the landlord (or cooperative) or its agent directly.

(ii) An IHA must verify the amount paid to amortize the purchase price of a manufactured home:

(A) By requiring the family to furnish copies of its most recent payment receipts (which may include cancelled checks or money order receipts) or a copy of the family's current purchase agreement; or

(B) By contacting the lienholder directly.

(3) To verify the actual amount that a family paid for utilities and other housing services, the IHA must require the family to provide copies of the appropriate bills or receipts, or must obtain the information directly from the utility or service supplier.

(k) *Notice and opportunity for a meeting where Federal preference is denied.* If the IHA determines that an applicant does not meet the criteria for receiving a Federal preference, the IHA must promptly provide the applicant with written notice of the determination. The notice must contain a brief statement of the reasons for the determination, and state that the applicant has the right to meet with the IHA's designee to review it. If requested, the meeting must be conducted by a person or persons designated by the

IHA. Those designated may be an officer or employee of the IHA, including the person who made or reviewed the determination, or his or her subordinate. The procedures specified in this paragraph must be carried out in accordance with HUD's requirements. The applicant may exercise other rights if the applicant believes that he or she has been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap.

(l) *Closure of waiting list.* Notwithstanding the fact that the IHA may not be accepting additional applications because of the length of the waiting list, the IHA may not refuse to place an applicant on the waiting list if the applicant is otherwise eligible for admission and claims that he or she qualifies for a Federal preference under this section, unless the IHA determines, on the basis of the number of applicants who are already on the waiting list and who claim a Federal preference, and the anticipated number of project admissions, that:

(1) There is an inadequate pool of applicants who are likely to qualify for a Federal preference; and

(2) It is unlikely that, on the basis of the IHA's system for applying the Federal preferences, the preference or preferences that the applicant claims, and the preferences claimed by applicants on the waiting list, the applicant would qualify for admission before other applicants on the waiting list.

§ 950.310 [Reserved]

§ 950.315 Initial determination, verification, and reexamination of family income and composition.

(a) *Income, family composition, and eligibility.* The IHA is responsible for determination of annual income and adjusted income, for determination of eligibility for admission and total tenant payment or homebuyer required monthly payment; and for reexamination of family income and composition at least annually for all tenants and homebuyers. The "effective date" of an examination or reexamination refers to:

(1) In the case of an examination for admission, the effective date of initial occupancy; and

(2) In the case of a reexamination of an existing tenant or homebuyer, the effective date of any change in tenant payment or required monthly payment resulting from the reexamination.

(3) If there is no change, the effective date is the date a change would have taken place if the reexamination had resulted in a change in payment.

(b) *Verification.* As a condition of admission to, or continued occupancy of, any assisted unit, the IHA shall require the family head and other such family members as it designates to execute a HUD-approved release and consent form (including any release and consent as required under 24 CFR part 760) authorizing any depository or private source of income, or any Federal, State, or local agency, to furnish or release to the IHA and to HUD such information as the IHA or HUD determines to be necessary. The IHA also shall require the family to submit directly the documentation determined to be necessary, including any information required under 24 CFR part 750. Information or documentation shall be determined to be necessary if it is required for purposes of determining or auditing a family's eligibility to receive housing assistance, for determining the family's adjusted income or tenant rent or required monthly payment, for verifying related information, or for monitoring compliance with equal opportunity requirements. The use or disclosure of information obtained from a family or from another source pursuant to this release and consent shall be limited to purposes directly connected with administration of this part or an application for assistance.

(c) *Rent and homebuyer payment adjustments.* After consultation with the family and upon verification of the information, the IHA shall make appropriate adjustments in the rent or homebuyer payment amount. The tenant or homebuyer shall comply with the IHA's policy regarding required interim reporting of changes in the family's income.

§ 950.320 Determination of rents and homebuyer payments.

(a) *Rental and Turnkey III projects.* The amount of rent required of a tenant in a rental project or the Turnkey III homebuyer payment amount for a homebuyer in a Turnkey III project for Turnkey III contracts executed after August 1, 1982, shall be equal to the total tenant payment as determined in accordance with § 950.325. For Turnkey III contracts executed on or before August 1, 1982, the Turnkey III homebuyer payment is determined in accordance with the contract. If the utility allowance exceeds the rent or required monthly payment, the IHA will pay the utility reimbursement as provided in § 950.325(b). In the case of a Turnkey III homebuyer, payment of a utility reimbursement may affect the IHA's evaluation of the Turnkey III homebuyer's homeownership potential. (See §§ 950.503(c)(3) and 950.529 regarding loss of homeownership potential and § 950.523 regarding funds to cover such reimbursements.)

(b) *MH projects.* The amount of the required monthly payment for a homebuyer in an MH project is determined in accordance with subpart E of this part.

§ 950.325 Total tenant payment—Rental and Turnkey III programs.

(a) *Total tenant payment.* Total tenant payment shall be the highest of the following, rounded to the nearest dollar:

(i) 30 percent of monthly adjusted income;

(ii) 10 percent of monthly income; or

(iii) If the family receives welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the monthly portion of such payments which is so designated.

(2) If the family's welfare assistance is ratably reduced from the standard of need by applying a percentage, the amount calculated under paragraph (a)(3) of this section shall be the amount resulting from one application of the percentage.

(b) *Utility reimbursement.* If the utility allowance exceeds the total tenant payment, the difference (the utility reimbursement) shall be due to the family. If the utility company consents, an IHA may, at its discretion, pay the utility reimbursement directly to the utility company.

§ 950.335 Rent and homebuyer payment collection policy.

Each IHA shall establish and adopt, and use its best efforts to obtain compliance with, written policies sufficient to assure the prompt payment and collection of rent and homebuyer payments. A copy of the written policies shall be posted prominently in the IHA office, and shall be provided upon request. Such policies must be in accordance with HUD guidelines and will be reviewed by HUD. Unless HUD has issued a corrective action order in accordance with § 950.135, HUD approval of the policy is not required.

§ 950.340 Grievance procedures and leases.

(a) *Grievance procedures.* (1) *General.* Each IHA shall adopt grievance procedures that are appropriate to local circumstances. These procedures shall comply with the Indian Civil Rights Act, if applicable, and section 6(k) of the Act, as applicable, and shall assure that tenants and homebuyers will:

(i) Be advised of the specific grounds of any proposed adverse action by the IHA;

(ii) Have an opportunity for a hearing before an impartial party upon timely request;

(iii) Have a reasonable opportunity to examine any documents, records or regulations related to the proposed action before the hearing (or trial in court);

(iv) Be entitled to be represented by another person of their choice at any hearing;

(v) Be entitled to ask questions of witnesses and have others make statements on their behalf; and

(vi) Be entitled to receive a written decision by the IHA on the proposed action.

(2) *Expedited grievance procedure.* An IHA may establish an expedited grievance procedure for any grievance concerning a termination of tenancy or eviction that involves:

(i) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the Indian housing development by other residents or employees of the IHA or,

(ii) Any drug-related criminal activity on or near the premises.

(3) *Exclusion of certain grievances.* (i) *General.* An IHA may pursue termination of tenancy or eviction without offering a grievance procedure where the termination or eviction is based on one of the grounds stated in paragraph (a)(2) of this section if applicable. Tribal or State law requires that, before eviction, a tenant (including a homebuyer under a homeownership agreement) be given a hearing in court, if HUD has determined that the Tribal or State procedures provide the basic elements of due process.

(ii) *Basic elements of due process.* The elements of due process against which the jurisdiction's procedures are measured by HUD are the following:

(A) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;

(B) Right of the tenant to be represented by counsel;

(C) Opportunity for the tenant to refute the evidence presented by the IHA, including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense that the tenant might have; and

(D) A decision on the merits.

(4) *Notice to post office of certain evictions.* When an IHA evicts an individual or family from a dwelling unit for engaging in criminal activity, including drug-related criminal activity, the IHA shall notify the local post office serving that dwelling unit that the evicted individual or family is no longer residing in the dwelling unit (so that the post office will terminate delivery of mail for such persons at the unit, and that such persons will not return to the unit to pick up mail).

(5) *Notice of procedures.* A copy of the grievance procedures shall be posted prominently in the IHA office, and shall be provided to any tenant, homebuyer, or applicant upon request.

(b) *Leases.* Each IHA shall use leases that:

(1) Do not contain unreasonable terms and conditions;

(2) Obligate the IHA to maintain the project in a decent, safe, and sanitary condition;

(3) Require the IHA to give adequate written notice of termination of the lease which shall not be less than—

(i) A reasonable time, but not to exceed 30 days, when the health or safety of other tenants or IHA employees is threatened;

(ii) Fourteen days in the case of nonpayment of rent; and

(iii) Thirty days in any other case;

(4) Require that the IHA may not terminate the tenancy except for serious or repeated violation of the terms or conditions of the lease or for other good cause;

(5) Provide that any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity, on or near the premises, engaged in by an Indian housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. For purposes of this section, the term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)); and

(6) Specify that respect to any notice of termination of tenancy or eviction, notwithstanding any applicable Tribal or State law, an Indian housing tenant shall be informed of the opportunity, before any hearing or trial, to examine any relevant documents, records or regulations directly related to the termination or eviction.

(Approved by the Office of Management and Budget under control number 2577–0171)

§ 950.345 Maintenance and improvements.

(a) *General.* Each IHA shall adopt, and use its best efforts to obtain compliance with, written policies to assure full performance of the respective maintenance responsibilities of the IHA and tenants. A copy of such policies shall be posted prominently in the IHA office, and shall be provided to an applicant or tenant upon entry into the program and upon request.

(b) *Provisions for rental projects.* For rental projects, the maintenance policies shall contain provisions on at least the following subjects:

(1) The responsibilities of tenants for normal care and maintenance of their dwelling units, and of the common property, if any;

(2) Procedures for handling maintenance service requests from tenants;

(3) Procedures for IHA inspections of dwelling units and common property;

(4) Special arrangements, if any, for obtaining maintenance services from outside workers or contractors; and

(5) Procedures for charging tenants for damages for which they are responsible.

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§ 950.346 Fire safety.

(a) *Applicability.* This section applies to all IHA-owned or leased housing, including Mutual Help and Turnkey III.

(b) *Smoke detectors.* (1) After October 30, 1992, each unit must be equipped with at least one battery-operated or hard-wired smoke detector, or such greater number as may be required by applicable State, local or Tribal codes, in working condition, on each level of the unit. In units occupied by hearing-impaired residents, smoke detectors must be hard-wired.

(2) After October 30, 1992, the public areas of all housing covered by this section must be equipped with a sufficient number, but not less than one for each area, of battery-operated or hard-wired smoke detectors to serve as adequate warning of fire. Public areas include, but are not limited to, laundry rooms, community rooms, day care centers, hallways, stairwells, and other common areas.

(3) The smoke detector for each individual unit must be located, to the extent practicable, in a hallway adjacent to the bedroom or bedrooms. In units occupied by hearing-impaired residents, hard-wired smoke detectors must be connected to an alarm system designed for hearing-impaired persons and installed in the bedroom or bedrooms occupied by the hearing-impaired residents. Individual units that are jointly occupied by both hearing and hearing-impaired residents must be equipped with both audible and visual types of alarm devices.

(4) If needed, battery-operated smoke detectors, except in units occupied by

hearing-impaired residents, may be installed as a temporary measure where no detectors are present in a unit. Temporary battery-operated smoke detectors must be replaced with hard-wired electric smoke detectors in the normal course of an IHA's planned CIAP or CGP program to meet the HUD Modernization Standards of applicable State, local or Tribal codes, whichever standard is stricter. Smoke detectors for units occupied by hearing-impaired residents must be installed in accordance with the acceptability criteria in paragraph (b)(3) of this section.

(5) IHAs shall use operating funds to provide battery-operated smoke detectors in units that do not have any smoke detectors in place. If operating funds or reserves are insufficient to accomplish this, IHAs may apply for emergency CIAP funding. IHAs may apply for CIAP or CGP funds to replace battery-operated smoke detectors with hard-wired smoke detectors in the normal course of a planned modernization program.

§ 950.360 IHA employment practices.

(a) *Indian preference.* Each IHA shall adopt written policies with respect to the IHA's own employment practices, which shall be in compliance with its obligations under section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)), and E.O. 11246 (3 CFR, 1964–65 Comp., p. 339) as amended by Executive Order 11375 (3 CFR, 1966–70 Comp., p. 684), where applicable. A copy of these policies shall be posted in the IHA office, and a copy shall be submitted to HUD promptly after adoption by the IHA. (Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), as amended, which prohibits discrimination in employment by making it unlawful for employers to engage in certain discriminatory practices, excludes Indian Tribes from the nondiscrimination requirements of Title VII. See also § 950.165(b)(2)(ii).)

(b) *Wage rates.* See § 950.120 (c) and (d) with respect to the wage rates applicable to IHA employees.

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Subpart E—Mutual Help Homeownership Opportunity Program

§ 950.401 Scope and applicability.

(a) *Scope.* This subpart sets forth the requirements that are applicable to the MH Homeownership Opportunity Program. For any matter not covered in this subpart, see the provisions of the other subparts contained in this part. Projects developed under the Self-Help development method must comply with the requirements of subparts E and F of this part.

(b) *Applicability.* The provisions of this subpart are applicable to all MH projects placed under ACC on or after March 9, 1976, and to any projects converted in accordance with §§ 950.455 or 950.503.

§ 950.413 Special provisions for development of an MH project.

(a) *MH construction contracts.* (1) *Special provisions to be included in advertisements.* The advertisement for a construction contract other than one used in Self-Help shall state that:

(i) The project is an MH project;

(ii) The contractor may obtain a copy of the proposed MH construction contract; and

(iii) The contractor may obtain a list of the sites.

(2) *Responsibility of contractor.* The construction contract shall provide that the contractor is responsible for acceptable completion of all the homes.

(b) *Consultation with homebuyers.* The IHA shall provide for soliciting comments from homebuyers and other interested parties, as provided in § 950.225(c), concerning the planning and design of the homes. Any changes resulting from such consultation shall be consistent with project standards and cost limitations.

(c) *Financial feasibility.* The application shall be supported by signed applications maintained in the IHA's office of a sufficient number of selected homebuyers who are able and willing to pay the projected administration charge, meet the other obligations under MHO Agreements (see § 950.416(b)), and enter into MHO Agreements. HUD may request submission of the applications, as necessary.

(d) *Rights under MHO agreement if project fails to proceed.* Any MHO Agreement shall be subject to revocation by the IHA if the IHA or HUD decides not to proceed with the development of the project in whole or in part. In such event, any contribution made by the homebuyer or Tribe shall be returned. If the contribution was a land contribution, it will be returned to the contributor.

(e) *Mutual Help contribution.* See § 950.419.

(f) *Insurance.* Upon occupancy, the homebuyer is responsible for payment of insurance coverage as part of its administration charge (see § 950.427(b)).

§ 950.416 Selection of MH homebuyers.

(a) *Admission policies.* (1) *Low-income families.* An IHA's written admission policies for the MH program, adopted in accordance with § 950.301, must limit admission to low-income families.

(i) An IHA may provide for admission of applicants whose family income exceeds the levels established for low-income families to the MH program operated on an Indian reservation or in an Indian area, if the IHA demonstrates to HUD's satisfaction that there is a need for housing for such families that cannot reasonably be met except under this program.

(ii) An IHA may provide for admission of a non-Indian applicant to the MH program operated on an Indian reservation or in an Indian area, if the IHA determines that the presence of the family on the Indian reservation or other Indian area is essential to the well-being of Indian families and the need for housing for the family cannot reasonably be met except under this program. If the IHA permits admission of non-Indians to its MH program, the IHA must specify the criteria it uses to determine whether a family's presence is essential in its admission policies.

(2) *Limitation on number of units for non-low income families.* The number of dwelling units in any project assisted under the MH program that may be occupied by or reserved for families on Indian reservations and other Indian areas whose incomes exceed the levels established for low-income families (*i.e.*, applicants admitted under paragraph (a)(1)(i) of this section) may not exceed whichever of the following is higher:

(i) Ten percent of the dwelling units in the project; or

(ii) Five dwelling units.

(3) *Different standards for MH program.* The IHA's admission policies for MH projects should be different from those for its rental or Turnkey III projects. The policies for the MH program should provide standards for determining a homebuyer's:

(i) Ability to provide maintenance for the unit;

(ii) Potential for maintaining at least the current income level;

(iii) Successor to a unit at the time of an "event" ("event" should also be defined by the IHA in its policy); and

(iv) Initial purchase price and the purchase price for a subsequent homebuyer.

(b) *Ability to meet homebuyer obligations.* A family shall not be selected for MH housing unless, in addition to meeting the income limits and other requirements for admission (see § 950.301), the family is able and willing to meet all obligations of an MHO Agreement, including the obligations to perform or provide the

required maintenance, to provide the required MH Contribution and its own utilities, and to pay the administration charge.

(c) *MH waiting list.* (1) Families who wish to be considered for selection for MH housing shall apply specifically for such housing. A family on any other IHA waiting list, or a tenant in a rental project of the IHA, must also submit an application for selection in order to be considered for an MH project; and

(2) The IHA shall maintain a waiting list, separate from any other IHA waiting list, of families that have applied for MH housing and that have been determined to meet the admission requirements. The IHA shall maintain an MH waiting list in accordance with requirements prescribed by HUD and shall make selections in the order in which they appear on the list.

(d) *Making the selections.* Within 30 days after HUD approval of the application for a project, the IHA must proceed with preliminary selection of as many Homebuyers as there are homes in the project. Preliminary selection of homebuyers must be made from the MH waiting list in accordance with the date of application, qualification for a Federal preference in accordance with § 950.305, other pertinent factors under the IHA's admissions policies established in accordance with § 950.301, and all admissions are subject to 24 CFR part 750. Final selection of a homebuyer will be made only after the site for that homebuyer has received final site approval, and the form of MH contribution to be made by that homebuyer (or donated for that homebuyer) has been determined.

(e) *Principal residence.* A condition for selection as a homebuyer is that the family agrees to use the home as their principal residence during the term of the MHO Agreement. Ownership or use of a decent, safe and sanitary residence other than the MH home at the time of occupancy or acquisition during occupancy would disqualify a family from the MH program. However, there are two situations that are deemed not to violate the principal residence requirement. First, ownership or use of a secondary home that is necessary for the family's livelihood or for cultural preservation, as described in the IHA's admission and occupancy policy, is acceptable. Second, a family's temporary absence from its MH home, and related subleasing of it is acceptable if it is done for reasons and time periods prescribed in the IHA's admission and occupancy policy.

(f) *Notification of applicants.* The IHA shall give families prompt written notice of whether or not they have been selected. If a family is not selected, the notice must state the basis for the determination and that the family is entitled to an informal hearing by the IHA on the determination, if a request for a hearing is made within a reasonable time (as specified in the notice). Such a hearing should be held within a reasonable time. (Informal review provisions applicable to denial of an application for a Federal preference under § 950.305 are contained in paragraph (k) of that section.)

(g) *Change in income.* (1) If a family's income changes after selection but before execution of the MHO agreement in such a way as to make it ineligible (either too high or too low), the IHA may reject the family for this program. However, even a family with an income above the low-income limits may be admitted to this program, provided that the number of such families admitted does not exceed the limit stated in paragraph (a)(2) of this section.

(2) If a family's income changes after the MHO agreement is executed but before the unit is occupied so that it no longer qualifies for the program, the IHA may reject the family for this program. If it becomes evident that a family's income is inadequate to meet its obligations, the IHA may counsel the family about other housing options, such as its rental program. Inability of the family to meet its obligations under the homebuyer agreement is grounds for termination of the agreement.

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§ 950.419 MH contribution.

(a) *Amount and form of contribution.* As a condition of occupancy, the MH homebuyer will be required to provide an MH contribution. Contributions other than labor may be made by an Indian Tribe on behalf of a family.

(1) The value of the contribution must be $1500.

(2) The MH contribution may consist of land, labor, cash, materials, equipment, or any combination thereof. Land contributed to satisfy this requirement must be owned in fee simple by the homebuyer or must be assigned or allotted to the homebuyer for his or her use before application for an MH unit. Contributions of land donated by another person on behalf of the homebuyer will satisfy the requirement for an MH contribution. A homebuyer may provide cash to satisfy the MH contribution requirement where the cash is used for the purchase of land, labor, or materials or equipment for the homebuyer's home.

(3) The amount of credit for an MH contribution in the case of land, labor, or materials or equipment shall be based upon the market value at the time of the contribution, but in no case will the credit exceed $1500. In the case of labor, materials or equipment, market value shall be determined by the contractor and the IHA. In the case of land, market value shall be determined by the IHA, but in no case will the credit exceed $1,500 per homesite. The use of labor, materials or equipment as MH contributions must be reflected by a reduction in the Total Contract Price stated in the Construction Contract.

(b) *Execution of agreements.* For projects other than Self-Help development projects, MHO Agreements must be signed for all units before execution of the construction contract for the project, unless the IHA obtains approval by the HUD Field Office of an exception. Land leases for trust land must be signed and approved by BIA before construction start. The MHO Agreement must include the homebuyer's agreement to satisfy the MH contribution requirement before occupancy of the unit.

(c) *Total contribution to be furnished before occupancy.* The homebuyer cannot occupy the unit until the entire MH contribution is provided to the IHA. If the homebuyer is unable or unwilling to provide the MH contribution before occupancy of the project, the MHO Agreement for the homebuyer shall be terminated, any MH contribution paid by the homebuyer shall be refunded in accordance with § 950.446, and the IHA shall select a substitute homebuyer from its waiting list.

(d) *MH contribution in event of substitution of homebuyer.* If an MHO Agreement is terminated and a substitute homebuyer is selected, the amount of MH contribution to be provided by the substitute homebuyer shall be in accordance with paragraph (a) of this section. The substitute homebuyer may not occupy the unit until the complete MH contribution has been made.

(e) *Disposition of contribution.* If an MHO Agreement is terminated by the IHA or the homebuyer before the date of occupancy, the homebuyer may receive reimbursement of the value of the MH contribution made plus other amounts contributed by the homebuyer, in accordance with § 950.446.

§ 950.422 Commencement of occupancy.

(a) *Notice.* (1) Upon acceptance by the IHA from the contractor of the home as ready for occupancy, the IHA shall determine whether the homebuyer has met all requirements for occupancy,

including satisfaction in full of the MH contribution, and fulfillment of mandatory homebuyer counseling requirements. (See § 950.453.) The IHA shall notify the homebuyer in writing that the home is available for occupancy as of a date specified in the notice, which is called the date of occupancy.

(2) If the IHA determines that the homebuyer has not fully provided the MH contribution or met any of the other conditions for occupancy by the date of occupancy, the homebuyer shall be sent a notice in writing. This notice must specify the date by which all requirements must be satisfied and shall advise the homebuyer that the MHO Agreement will be terminated and a substitute homebuyer selected for the unit if the requirements are not satisfied. (See §§ 950.446 and 950.419(d).)

(b) *Credits to MH accounts and reserves.* Promptly after the date of occupancy, the IHA shall credit the amount of the MH contribution to the homebuyer's accounts and reserves in accordance with § 950.437 and shall give the homebuyer a statement of the amounts so credited.

§ 950.425 Inspections, responsibility for items covered by warranty.

(a) *Inspection before move-in and identification of warranties.*

(1) To establish a record of the condition of the home on the date of occupancy, the homebuyer (including a subsequent homebuyer) and the IHA shall make an inspection of the home as close as possible to, but not later than, the date the homebuyer takes occupancy. This inspection may be the final inspection required by § 950.270 or may be a separate inspection with the homebuyer and IHA. After the inspection, the IHA representative shall give the homebuyer a signed statement of the condition of the home and equipment and a full written description of all homebuyer responsibilities. The homebuyer shall sign a copy of the statement, acknowledging concurrence or stating objections; and any differences shall be resolved by the IHA and a copy of the signed inspection report shall be kept at the IHA. This written statement of the condition of the home shall not limit the homebuyer's right to claim latent defects in construction that may be covered by warranties referenced in paragraph (a)(2) of this section.

(2) Within 30 days of commencement of occupancy of each home, the IHA shall furnish the homebuyer with a list of applicable contractors', manufacturers' and suppliers' warranties, indicating the items covered and the periods of the warranties, and stating the homebuyer's responsibility for notifying the IHA of any deficiencies that would be covered under the warranties.

(b) *Inspections during contractors' warranty periods, responsibility for items covered by contractors', manufacturers' or suppliers' warranties.* In addition to the inspection required under paragraph (a) of this section, the IHA will inspect the home regularly in accordance with paragraph (c) of this section. However, it is the responsibility of the homebuyer during the period of the applicable warranties, to promptly inform the IHA in writing of any deficiencies arising during the warranty period (including manufacturers' and suppliers' warranties) so that the IHA may enforce any rights under the applicable warranties. If a homebuyer fails to furnish such a written report in time, and the IHA is subsequently unable to obtain redress under the warranty, correction of the deficiency shall be the responsibility of the homebuyer.

(c) *Inspection upon termination of agreement.* If the MHO Agreement is terminated for any reason after commencement of occupancy, the IHA shall inspect the home after notifying the homebuyer of the time for inspection and shall give the homebuyer a written statement of the cost of any maintenance work required to put the home in satisfactory condition for the next occupant (see § 950.446).

(d) *Homebuyer permission for inspections; participation in inspections.* The homebuyer shall permit the IHA to inspect the home at reasonable hours and intervals during the period of the MHO Agreement in accordance with rules established by the IHA. The homebuyer shall be notified of the opportunity to participate in the inspection made in accordance with this section.

§ 950.426 Homebuyer payments—pre-1976 projects.

The amount of the required monthly payment for a homebuyer in an MH project placed under ACC before March 9, 1976 is determined in accordance with the MH Agreement and provisions of §§ 950.315 and 950.102 concerning income. Utility reimbursements are not applicable to the Mutual Help program.

§ 950.427 Homebuyer payments—post-1976 projects.

(a) *Applicability.* The amount of the required monthly payment for a homebuyer in an MH project placed under ACC on or after March 9, 1976, and a homebuyer admitted to occupancy in an existing project on or after the conversion of the project in accordance with § 950.455 is determined in accordance with this section.

(b) *Establishment of payment.* (1) Each homebuyer shall be required to make a monthly payment ("required monthly payment") as determined by the IHA. The minimum required monthly payment must equal the administration charge.

(2) Subject to the requirement for payment of at least the administration charge, each homebuyer shall pay an amount of required monthly payment computed by:

(i) Multiplying adjusted income (determined in accordance with § 950.315) by a specified percentage; and

(ii) Subtracting from that amount the utility allowance determined for the unit. The specific percentage shall be no less than 15 percent and no more than 30 percent, as determined by the IHA.

(3) The IHA shall provide that the required monthly payment may not be more than a maximum amount. The maximum shall not be less than the sum of:

(i) The administration charge; and

(ii) The monthly debt service amount shown on the homebuyer's purchase price schedule.

(4) If the "required monthly payment" exceeds the administration charge, the amount of the excess shall be credited to the homebuyer's monthly equity payments account (see § 950.437(b)).

(c) *Administration charge.* The administration charge should reflect differences in expenses attributable to different sizes or types of units. It is the amount budgeted by the IHA for monthly operating expenses covering the following categories (and any other operating expense categories included in the IHA's HUD-approved operating budget for a fiscal year or other period, excluding any operating cost for which operating subsidy is provided):

(1) Administrative salaries, payroll taxes, etc.; travel, postage, telephone and telegraph, office supplies; office space, maintenance and utilities for office space; general liability insurance or risk protection costs; accounting services; legal expenses; and operating reserve requirements (§ 950.431); and

(2) General expenses, such as premiums for fire and related insurance, payments in lieu of taxes, if any, and other similar expenses.

(d) *Adjustments in the amount of the required monthly payment.* (1) After the initial determination of a homebuyer's required monthly payment, the IHA shall increase or decrease the amount of

such payment in accordance with HUD regulations to reflect changes in adjusted income (pursuant to a reexamination by the IHA in accordance with § 950.315), adjustment's in the administration charge, or in any of the other factors affecting computation of the homebuyer's required monthly payment.

(2) In order to accommodate wide fluctuations in required monthly payments due to seasonal conditions, an IHA may agree with the homebuyer for payments to be made in accordance with a seasonally adjusted schedule which assures full payment of the required amount for each year.

(e) *Homebuyer payment collection policy.* Each IHA shall establish and adopt written policies, and use its best efforts to obtain compliance to assure the prompt payment and collection of required homebuyer payments. A copy of the policies shall be posted prominently in the IHA office, and shall be provided to a homebuyer upon request. Unless HUD has issued a corrective action order with respect to this function, in accordance with § 950.135, HUD approval is not required.

§ 950.428 Maintenance, utilities, and use of home.

(a) *General.* Each IHA shall establish and adopt, and use its best efforts to obtain compliance with, written policies to assure full performance of the respective maintenance responsibilities of the IHA and homebuyers. A copy of such written policies shall be posted prominently in the IHA office, and shall be provided to an applicant or homebuyer upon entry into the program and upon request.

(b) *Provisions for MH projects.* For MH Projects, the written maintenance policies shall contain provisions on at least the following subjects:

(1) The responsibilities of homebuyers for maintenance and care of their dwelling units and common property;

(2) Procedures for providing advice and technical assistance to homebuyers to enable them to meet their maintenance responsibilities;

(3) Procedures for IHA inspections of homes and common property;

(4) Procedures for IHA performance of homebuyer maintenance responsibilities (where homebuyers fail to satisfy such responsibilities), including procedures for charging the homebuyer's proper account for the cost thereof;

(5) Special arrangements, if any, for obtaining maintenance services from outside workers or contractors; and

(6) Procedures for charging homebuyers for damage for which they are responsible.

(c) *IHA responsibility in MH projects.* The IHA shall enforce those provisions of a Homebuyer's Agreement under which the homebuyer is responsible for maintenance of the home. The IHA has overall responsibility to HUD for assuring that the housing is being kept in decent, safe, and sanitary condition, and that the home and grounds are maintained in a manner that will preserve their condition, normal wear and tear excepted. Failure of a homebuyer to meet the obligations for maintenance shall not relieve the IHA of responsibility in this respect. Accordingly, except as may be otherwise provided in this section, the IHA shall conduct a complete interior and exterior examination of each home at least once a year, and shall furnish a copy of the inspection report to the homebuyer. The IHA shall take appropriate action, as needed, to remedy conditions shown by the inspection, including steps to assure performance of the homebuyer's obligations under the homebuyer's agreement. The IHA may inspect the home once every three years, in lieu of an annual inspection where the homebuyer is in full compliance with the original terms of the homebuyer's agreement, including payments, *and* the home is maintained in decent, safe, and sanitary condition, as reflected by the last inspection by the IHA. However, if at any time the IHA determines that the homebuyer is not in compliance with the homebuyer's agreement, it must reinstate annual inspections.

(d) *Homebuyer responsibility in MH program.* (1) The homebuyer shall be responsible for routine and nonroutine maintenance of the home, including all repairs and replacements (including those resulting from damage from any cause). The IHA shall not be obligated to pay for or provide any maintenance of the home other than the correction of warranty items reported during the applicable warranty period.

(2) *Homebuyer's failure to perform maintenance.* (i) Failure of the homebuyer to perform maintenance obligations constitutes a breach of the MHO Agreement and grounds for its termination. Upon a determination by the IHA that the homebuyer has failed to perform its maintenance obligations, the IHA shall require the homebuyer to agree to a specific plan of action to cure the breach and to assure future compliance. The plan shall provide for maintenance work to be done within a reasonable time by the homebuyer, with such use of the homebuyer's account as may be necessary, or to be done by the IHA and charged to the homebuyer's account, in accordance with § 950.437 If the homebuyer fails to carry out the agreed-to plan, the MHO agreement shall be terminated in accordance with § 950.446.

(ii) If the IHA determines that the condition of the property creates a hazard to the life, health, or safety of the occupants, or if there is a risk of damage to the property if the condition is not corrected, the corrective work shall be done promptly by the IHA with such use of the homebuyer's accounts as the IHA may determine to be necessary, or by the homebuyer with a charge of the cost to the homebuyer's accounts in accordance with § 950.437.

(iii) Any maintenance work performed by the IHA shall be accounted for through a work order stating the nature of and charge for the work. The IHA shall give the homebuyer copies of all work orders for the home.

(e) *Homebuyer's responsibility for utilities.* The homebuyer is responsible for the cost of furnishing utilities for the home. The IHA shall have no obligation for the utilities. However, if the IHA determines that the homebuyer is unable to pay for the utilities for the home, and that this inability creates conditions that are hazardous to life, health, or safety of the occupants or threatens damage to the property, the IHA may pay for the utilities on behalf of the homebuyer and charge the homebuyer's accounts for the costs, in accordance with § 950.437. When the homebuyer's account has been exhausted, the IHA shall pursue termination of the homebuyer agreement and may offer the homebuyer a transfer into the rental program if a unit is available.

(f) *Obligations with respect to home and other persons and property.*

(1) The homebuyer shall agree to abide by all provisions of the MHO Agreement concerning homebuyer responsibilities, occupancy and use of the home.

(2) The homebuyer may request IHA permission to operate a small business in the unit. An IHA shall grant this authority where the homebuyer provides the following assurances and may rescind this authority upon violation of any of the following assurances:

(i) The unit will remain the homebuyer's principal residence;

(ii) The business activity will not disrupt the basic residential nature of the housing site; and

(iii) The business will not require permanent structural changes to the unit that could adversely affect a future

homebuyer's use of the unit. The IHA may rescind such authority whenever any of the above assurances are violated.

(g) *Structural changes.* (1) A homebuyer shall not make any structural changes in or additions to the home unless the IHA has determined that such change would not:

(i) Impair the value of the home, the surrounding homes, or the project as a whole; or

(ii) Affect the use of the home for residential purposes.

(2) (i) Additions to the home include, but are not limited to, energy-conservation items such as solar panels, wood-burning stoves, flues and insulation. Any changes made in accordance with this section shall be at the homebuyer's expense, and in the event of termination of the MHO Agreement the homebuyer shall not be entitled to any compensation for such changes or additions.

(ii) If the homebuyer is in compliance with the terms of the MHO agreement, the IHA may agree to allow the homebuyer to use the funds in the MEPA for betterments and additions to the MH home. In such event, the IHA shall determine whether the homebuyer will be required to replenish the MEPA or if the funds are to be loaned to the homebuyer at an interest rate determined by the IHA. The homebuyer cannot use MEPA funds for luxury items, as determined by the IHA.

(Information collection requirement contained in paragraph (c) has been approved by the Office of Management and Budget under control number 2577–0114.)

§ 950.431 Operating reserve.

(a) The IHA shall maintain an operating reserve for the project in an amount sufficient for working capital purposes, for estimated future nonroutine maintenance requirements for IHA-owned administrative facilities and common property, for the payment of advance premiums for insurance, for unanticipated project requirements and for other eligible uses as determined by the IHA. A contribution to this reserve shall be determined by the IHA and included in the administration charge. The amount of this contribution shall be increased or decreased annually to reflect the needs of the IHA for working capital and for reserves for anticipated future expenditures and shall be included in the operating budget submitted to the HUD Field Office for approval. If the IHA fails to maintain an adequate operating reserve level, HUD may issue a corrective action order prescribing specific actions that the IHA must take to improve its financial condition. (See § 950.135).

(b) At the end of each fiscal year or other budget period, the project operating reserve shall be:

(1) Credited with the amount by which operating receipts exceed operating expenses of the project for the budget period; or

(2) Charged with the amount by which operating expenses exceed operating receipts of the project for the budget period.

§ 950.432 Operating budget submission and approval.

In addition to other budget documentation required by HUD, each operating budget or operating budget revision shall include a certified copy of a resolution of the board of commissioners stating that the board has reviewed and approved the operating budget or operating budget revision.

§ 950.434 Operating subsidy.

(a) *Scope.* This section authorizes the use of operating subsidy for Mutual Help projects; establishes eligible costs; and provides for determination of operating subsidy on a uniform basis for all MH projects.

(b) *Eligible costs.* The reasonable cost of an annual independent audit is an eligible cost for operating subsidy. Operating subsidy may also be paid to cover proposed expenditures approved by the HUD Field Office for the following purposes:

(1) Administration charges for vacant units where the IHA submits evidence to the HUD Field Office's satisfaction that it is making every reasonable effort to fill the vacancies;

(2) Collection losses due to payment delinquencies on the part of homebuyer families whose MHO Agreements have been terminated and who have vacated the home, and the actual cost of any maintenance (including repairs and replacements) necessary to put the vacant home in a suitable condition for a subsequent homebuyer family. Operating subsidy may be made available for these purposes only after the IHA has previously used all available homebuyer credits. Every reasonable effort shall be made to collect charges from a vacated homebuyer, including court judgments, professional collection services, etc., as appropriate;

(3) A formula amount for the cost of a HUD-approved counseling program;

(4) A formula amount for training and related travel of IHA staff and Commissioners;

(5) The costs of a HUD-approved professional management contract; and

(6) Operating costs resulting from other unusual circumstances justifying payment of operating subsidy, if approved by HUD.

(7) Subject to appropriations, and in accordance with the provisions of subpart O of this part and procedures determined by HUD, each IHA with a duly elected resident organization shall receive $25 per unit per year for resident participation activities. Of this amount, $15 per unit per year shall fund resident participation activities of the RO. Ten dollars per unit per year shall fund IHA costs incurred in carrying out resident participation activities.

(c) *Ineligible costs.* No operating subsidy shall be paid for utilities, maintenance, or other items for which the homebuyer is responsible except, as necessary, to put a vacant home in condition for a subsequent family as provided in paragraph (b)(2) of this section.

§ 950.437 Homebuyer reserves and accounts.

(a) *Refundable and nonrefundable MH reserves.* The IHA shall establish separate refundable and nonrefundable reserves for each homebuyer effective on the date of occupancy.

(1) The refundable MH reserve represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's cash MH contribution or the value of the labor, materials or equipment MH contribution.

(2) The nonrefundable MH reserve also represents a homebuyer's interest in funds that may be used to purchase the home at the option of the homebuyer. The IHA shall credit this account with the amount of the homebuyer's share of any credits for land contributed to the project and the homebuyer's share of any credit for non-land contributions by a terminated homebuyer.

(b) *Equity accounts.* (1) *Monthly equity payments account ("MEPA").* The IHA shall maintain a separate MEPA for each homebuyer. The IHA shall credit this account with the amount by which each required monthly payment exceeds the administration charge. Should the homebuyer fail to pay the required monthly payment, the IHA may elect to reduce the MEPA by the amount owed each month towards the administration charge, until the MEPA has been fully expended. The MEPA balance must be comprised of an amount backed by cash actually received in order for any such reduction to be made.

(2) *Investment of equity funds.* (i) Funds held by the IHA in the equity

accounts of all the homebuyers in the project shall be invested in HUD-approved investments. Income earned on the investments of such funds shall periodically, but at least annually, be prorated and credited to each homebuyer's equity accounts in proportion to the amount in each such account on the date of proration. If HUD determines that accounts are not properly managed and has issued a corrective action order pursuant to § 950.135, it may ultimately remove responsibility of the IHA for managing such accounts to a HUD-approved escrow agent.

(ii) Notwithstanding other provisions of this subpart and subject to HUD Field Office approval, an IHA may use a portion of the homebuyers' equity accounts for low-income housing purposes provided that a reserve of homebuyers' MEPA is maintained. The reserve must be at a percentage established by the IHA and approved by the HUD Field Office. (Interest must continue to be credited to the homebuyer's account based on the MEPA balance and the rate of interest that would have been earned if the funds were invested.)

(c) *Charges for maintenance.* (1) If the IHA has maintenance work done in accordance with § 950.428(a), the cost thereof shall be charged to the homebuyer's MEPA.

(2) At the end of each fiscal year, the debit balance, if any in the MEPA shall be charged, first to the refundable MH reserve; and second, to the nonrefundable MH reserve, to the extent of the credit balances in that account and those reserves.

(3) In lieu of charging the debit balance in the MEPA to the homebuyer's refundable MH reserve and/or nonrefundable MH reserve, the IHA may allow the debit balance to remain in the MEPA pending replenishment from subsequent credits to the homebuyer's MEPA.

(4) The IHA shall at no time permit the accumulation of a debit balance in the MEPA in excess of the sum of the credit balances in the homebuyer's refundable and nonrefundable MH reserves, unless the expenditure is required to alleviate a hazard to the life, health or safety of the occupants, or to alleviate risk of damage to the property.

(d) *Disposition of reserves and accounts.* When the homebuyer purchases the home, the balances in the homebuyer's reserves and accounts shall be disposed of in accordance with § 950.440. If the MHO agreement is terminated by the homebuyer or the IHA, the balances in the homebuyer's reserves and accounts shall be disposed of in accordance with § 950.446.

(e) *Use of reserves and accounts; nonassignability.* The homebuyer shall have no right to receive or use the funds in any reserve or account except as provided in the MHO agreement, and the homebuyer shall not, without approval of the IHA and HUD, assign, mortgage or pledge any rights in the MHO agreement or to any reserve or account.

§ 950.440 Purchase of home.

(a) *General.* The IHA provides the family an opportunity to purchase the dwelling under the Mutual Help and Occupancy Agreement (a lease with an option to purchase), under which the purchase price is amortized over the period of occupancy, in accordance with a purchase price schedule. For acquisition under the MHO agreement, see paragraph (e) of this section. If a homebuyer wants to acquire ownership in a shorter period than that shown on the purchase price schedule, the homebuyer may exercise his or her option to purchase the home on or after the date of occupancy, but only if the homebuyer has met all obligations under the MHO agreement. The homebuyer may obtain financing, from the IHA or an outside source, at any time, to cover the remaining purchase price. The financing may be provided using such methods as a mortgage or a loan agreement. If the homebuyer is able to obtain financing from an outside source, the IHA will release the homebuyer from the MHO agreement and terminate the homebuyer's participation in this program. For acquisition under methods other than under the MHO agreement, see § 950.443.

(b) *Purchase price and purchase price schedule.* (1) *Initial purchase price.* The initial purchase price of a home for a homebuyer shall be determined by the IHA.

(2) *Purchase price schedule.* Promptly after execution of the construction contract, the IHA shall furnish to the homebuyer a statement of the initial purchase price of the home, and a purchase price schedule that will apply, based on amortizing the balance (purchase price less the MH contribution) over a period, not less than 15 years or more than 25 as determined by the IHA, at an interest rate determined by the IHA. The IHA may choose to forego charging interest and calculate the payment with an interest rate of zero.

(c) *Purchase price schedule for subsequent homebuyer.* (1) *Initial purchase price.* When a subsequent homebuyer executes the Mutual Help and Occupancy Agreement, the purchase price for the subsequent homebuyer shall be determined by the IHA.

(2) *Purchase price schedule.* Each subsequent homebuyer shall be provided with a purchase price schedule, showing the monthly declining purchase price over a period, not less than 15 years or more than 25 years as determined by the IHA, at an interest rate determined by the IHA.

(d) [Reserved].

(e) *Conveyance of home.* (1) *Purchase procedure.* In accordance with the MHO agreement, the IHA shall convey title to the homebuyer when the balance of the purchase price can be covered from the amount in the equity account. The homebuyer may supplement the amount in the equity account with reserves or any other funds of the homebuyer. Notwithstanding the requirement for prompt conveyance, an IHA may delay conveyance long enough to modernization a paid off unit in accordance with its Comprehensive Plan or CIAP application.

(2) *Amounts to be paid.* The purchase price shall be the amount shown on the purchase price schedule for the month in which the settlement date falls.

(3) *Settlement costs.* Settlement costs shall be paid by the homebuyer who may use equity accounts or reserves available for the purchase in accordance with paragraph (e)(4) of this section.

(4) *Disposition of homebuyer accounts and reserves.* When the homebuyer purchases the home, the net credit balances in the homebuyer's equity account as described in § 950.437), supplemented by the nonrefundable MH reserve and then the refundable MH reserve, shall be applied in the following order:

(i) For the initial payment for fire and extended coverage insurance on the home after conveyance if the IHA finances purchase of the home in accordance with § 950.443;

(ii) For settlement costs, if the homebuyer so directs;

(iii) For the purchase price; and

(iv) The balance, if any, for refund to the homebuyer.

(5) *Settlement.* A home shall not be conveyed until the homebuyer has met all the obligations under the MHO Agreement, except as provided in § 950.440(e)(8). The settlement date shall be mutually agreed upon by the parties. On the settlement date, the homebuyer shall receive the documents necessary to convey to the homebuyer the IHA's right, title, and interest in the home, subject to any applicable restrictions or covenants as expressed in

such documents. The required documents shall be approved by the attorneys representing the IHA, and by the homebuyer or the homebuyer's attorney.

(6) *IHA investment and use of purchase price payments.* After conveyance, all homebuyer funds held or received by the IHA from the sale of a unit in a project financed with grants shall be held separate from other project funds, and shall be used for purposes related to low-income housing use, as approved by HUD. Homebuyer funds held or received by the IHA from the sale to a homebuyer of a unit in a project financed by loans are subject to loan forgiveness. Homebuyer funds include the amount applied to payment of the purchase price from the equity account), any cash paid by the homebuyer for application to the purchase price and, if the IHA finances purchase of the home in accordance with § 950.446, any portion of the mortgage payments by the homeowner attributable to payment of the debt service (principal and interest) on the mortgage.

(7) *Removal of home from MH program.* When a home has been conveyed to the homebuyer, whether or not with IHA financing, the unit is removed from the IHA's MH project under its ACC with HUD.

(8) *Homebuyers with delinquencies.* (i) If a homebuyer has a delinquency at the end of the amortization period, the unit is no longer available for assistance from HUD or the IHA, even though the unit has not been conveyed. The IHA must take action to terminate the MHOA or to develop a repayment schedule for the remaining balance to be completed in a reasonable period, but not longer than three years. The payment should be equal to a monthly pro-rated share of the remaining balance owed by the homebuyer, plus an administrative fee consisting of the cost of insurance and the IHA's processing cost. If the homebuyer fails to meet the requirements of the repayment schedule, the IHA should proceed immediately with eviction.

(ii) Notwithstanding the requirements in paragraphs (e)(1) through (8), an IHA may complete emergency and statutorily or regulatorily required modernization work on a unit which is paid off but not conveyed, during the term of the repayment schedule.

(iii) Upon repayment of the total delinquency, the IHA may, in accordance with § 950.602(b)(2), complete non-emergency modernization work on a unit prior to conveyance.

§ 950.443 IHA homeownership financing.

(a) *Eligibility.* The IHA may offer a form of homeownership financing, similar to a purchase money mortgage. The IHA shall set standards for determining eligibility, developing promissory notes, mortgages and other financial instruments necessary to carry out the transaction. Further guidance is provided in HUD Handbooks.

(b) *HUD review and approval.* Unless HUD has issued a corrective action order with respect to this function, in accordance with § 950.135, the IHA may proceed with providing IHA financing without prior HUD approval. IHAs without prior experience in IHA financing should consult with the HUD Field Office.

§ 950.446 Termination of MHO agreement.

(a) *Termination upon breach.* (1) In the event the homebuyer fails to comply with any of the obligations under the MHO agreement, the IHA may terminate the MHO agreement by written notice to the homebuyer, enforced by eviction procedures applicable to landlord-tenant relationships. Foreclosure is an inappropriate method for enforcing termination of the homeownership agreement, which constitutes a lease (with an option to purchase). The homebuyer is a lessee during the term of the agreement and acquires no equitable interest in the home until the option to purchase is exercised.

(2) Misrepresentation or withholding of material information in applying for admission or in connection with any subsequent reexamination of income and family composition constitutes a breach of the homebuyer's obligations under the MHO agreement. "Termination", as used in the MHO agreement, does not include acquisition of ownership by the homebuyer.

(b) *Notice of termination of MHO agreement by the IHA, right of homebuyer to respond.* Termination of the MHO agreement by the IHA for any reason shall be by written notice of termination. Such notice shall be in compliance with the terms of the MHO agreement and, in all cases, shall afford a fair and reasonable opportunity to have the homebuyer's response heard and considered by the IHA. Such procedures shall comply with the Indian Civil Rights Act, if applicable, and shall incorporate all the steps and provisions needed to comply with State, local, or Tribal law, with the least possible delay. (See § 950.340.)

(c) *Termination of MHO agreement by homebuyer.* The homebuyer may terminate the MHO Agreement by giving the IHA written notice in accordance with the agreement. If the homebuyer vacates the home without notice to the IHA, the homebuyer shall remain subject to the obligations of the MHO agreement, including the obligation to make monthly payments, until the IHA terminates the MHO agreement in writing. Notice of the termination shall be communicated by the IHA to the homebuyer to the extent feasible and the termination shall be effective on the date stated in the notice.

(d) *Disposition of funds upon termination of the MHO agreement.* If the MHO agreement is terminated, the balances in the homebuyer's accounts and reserves shall be disposed of as follows:

(1) The MEPA shall be charged with:

(i) Any maintenance and replacement cost incurred by the IHA to prepare the home for the next occupant;

(ii) Any amounts the homebuyer owes the IHA, including required monthly payments;

(iii) The required monthly payment for the period the home is vacant, not to exceed 60 days from the date of receipt of the notice of termination, or if the homebuyer vacates the home without notice to the IHA, for the period ending with the effective date of termination by the IHA; and

(iv) The cost of securing a vacant unit, the cost of notification and associated termination tasks, and the cost of storage and/or disposition of personal property.

(2) If, after making the charges in accordance with paragraph (d)(1) of this section, there is a debit balance in the MEPA, the IHA shall charge that debit balance, first to the refundable MH reserve; and second, to the nonrefundable MH reserve, to the extent of the credit balances in these reserves and account. If the debit balance in the MEPA exceeds the sum of the credit balances in these reserves and account, the homebuyer shall be required to pay to the IHA the amount of the excess.

(3) If, after making the charges in accordance with paragraph (d)(1) of this section, there is a credit balance in the MEPA, this amount shall be refunded.

(4) Any credit balance remaining in the refundable MH reserve after making the charges described in paragraph (d)(2) of this section shall be refunded to the homebuyer.

(5) Any credit balance remaining in the nonrefundable MH reserve after making the charges described in paragraph (d)(2) of this section shall be retained by the IHA for use by the subsequent homebuyer.

(e) *Settlement upon termination.* (1) *Time for settlement.* Settlement with the homebuyer following a termination shall be made as promptly as possible

after all charges provided in paragraph (d) of this section have been determined and the IHA has given the homebuyer a statement of such charges. The homebuyer may obtain settlement before determination of the actual cost of any maintenance required to put the home in satisfactory condition for the next occupant, if the homebuyer is willing to accept the IHA's estimate of the amount of such cost. In such cases, the amounts to be charged for maintenance shall be based on the IHA's estimate of the cost thereof.

(f) *Responsibility of IHA to terminate.* (1) The IHA is responsible for taking appropriate action with respect to any noncompliance with the MHO agreement by the homebuyer. In cases of noncompliance that are not corrected as provided further in this paragraph, it is the responsibility of the IHA to terminate the MHO agreement in accordance with the provisions of this section and to institute eviction proceedings against the occupant.

(2) As promptly as possible after a noncompliance comes to the attention of the IHA, the IHA shall discuss the matter with the homebuyer and give the homebuyer an opportunity to identify any extenuating circumstances or complaints which may exist. A plan of action shall be agreed upon that will specify how the homebuyer will come into compliance, as well as any actions by the IHA that may be appropriate. This plan shall be in writing and signed by both parties.

(3) Compliance with the plan shall be checked by the IHA not later than 30 days from the date thereof. In the event of refusal by the homebuyer to agree to such a plan or failure by the homebuyer to comply with the plan, the IHA shall issue a notice of termination of the MHO agreement and evict the homebuyer in accordance with the provisions of this section on the basis of the noncompliance with the MHO agreement.

(4) A record of meetings with the homebuyer, written plans of action agreed upon and all other related steps taken in accordance with paragraph (f) of this section shall be maintained by the IHA for inspection by HUD.

(g) *Subsequent use of unit.* After termination of a homebuyer's interest in the unit, it remains as part of the MH project under the ACC. The IHA must follow its policies for selection of a subsequent homebuyer for the unit under the MH program. (See §950.449(g) for use of unit if no qualified subsequent homebuyer is available.)

§950.449 Succession.

(a) *Definition of "event."* "Event" means the death, mental incapacity, or other conditions as determined by the IHA, of all of the persons who have executed the MHO agreement as homebuyers.

(b) *Designation of successor by homebuyer.* A homebuyer may designate a successor who, at the time of the "event", would assume the status of homebuyer, provided that at the time of the event, the successor meets the conditions established by the IHA which shall include satisfying program eligibility requirements. The designation may be made at the time of execution of the MHO agreement, and the homebuyer may change the designation at any later time by written notice to the IHA.

(c) *Succession by persons designated by homebuyer.* Upon occurrence of an "event", the person designated as the successor shall succeed to the former homebuyer's rights and responsibilities under the MHO agreement if the designated successor meets the criteria established by the IHA which shall include program eligibility requirements.

(d) *Designation of successor by IHA.* If at the time of the event there is no successor designated by the homebuyer, the IHA may designate, in accordance with its occupancy policy, any person who qualifies under paragraph (c) of this section.

(e) *Occupancy by appointed guardian.* If at the time of the event there is no qualified successor designated by the homebuyer or by the IHA in accordance with paragraphs (a) through (d) of this section, and a minor child or children of the homebuyer are living in the home, the IHA may, in order to protect their continued occupancy and opportunity for acquiring ownership of the home, approve as occupant of the home an appropriate adult who has been appointed legal guardian of the children with a duty to perform the obligations of the MHO agreement in their interest and behalf.

(f) *Succession and occupancy on trust land.* In the case of a home on trust land subject to restrictions on alienation under federal law (including federal trust or restricted land and land subject to trust or restriction under State law), or under State or Tribal law where such laws do not violate federal statutes, a person who is prohibited by law from succeeding to the IHA's interest on such land may, nevertheless, continue in occupancy with all the rights, obligations and benefits of the MHO agreement, modified to conform to these restrictions on succession to the land.

(g) *Termination in absence of qualified successor.* If there is no qualified successor in accordance with the IHA's approved Admissions and Occupancy policy, the IHA shall terminate the MHO agreement and select a subsequent homebuyer from the top of the waiting list to occupy the unit under a new MHO agreement. If a new homebuyer is unavailable or if the home cannot continue to be used for low-income housing in accordance with the Mutual Help program, the IHA may submit an application to HUD to convert the unit to the Rental program in accordance with §950.458 or to approve a disposition of the home, in accordance with subpart M of this part.

§950.452 Miscellaneous.

(a) *Annual statement to homebuyer.* The IHA shall provide an annual statement to the homebuyer that sets forth the credits and debits to the homebuyer equity accounts and reserves during the year and the balance in each account at the end of each IHA fiscal year. The statement shall also set forth the remaining balance of the purchase price.

(b) *Insurance before transfer of ownership, repair or rebuilding.*

(1) *Insurance.* The IHA shall carry all insurance prescribed by HUD, including fire and extended coverage insurance upon the home.

(2) *Repair or rebuilding.* In the event the home is damaged or destroyed by fire or other casualty, the IHA shall consult with the homebuyers as to whether the home shall be repaired or rebuilt. The IHA shall use the insurance proceeds to have the home repaired or rebuilt unless there is good reason for not doing so. In the event the IHA determines that there is good reason why the home should not be repaired or rebuilt and the homebuyer disagrees, the matter shall be submitted to the HUD Field Office for final determination. If the final determination is that the home should not be repaired or rebuilt, the IHA shall terminate the MHO agreement, and the homebuyer's obligation to make required monthly payments shall be deemed to have terminated as of the date of the damage or destruction.

(3) *Suspension of payments.* In the event of termination of a MHO Agreement because of damage or destruction of the home, or if the home must be vacated during the repair period, the IHA will use its best efforts to assist in relocating the homebuyer. If the home must be vacated during the repair period, required monthly payments shall be suspended during the vacancy period.

(c) *Notices.* Any notices by the IHA to the homebuyer required under the MHO Agreement or by law shall be delivered in writing to the homebuyer personally or to any adult member of the homebuyer's family residing in the home, or shall be sent by certified mail, return receipt requested, properly addressed, postage prepaid. Notice to the IHA shall be in writing and either delivered to an IHA employee at the office of the IHA, or sent to the IHA by certified mail, return receipt requested, properly addressed, postage prepaid.

§ 950.453 Counseling of homebuyers.

(a) *General.* (1) The IHA shall provide counseling to Homebuyers in accordance with this section. The purpose of the counseling program shall be to develop:

(i) A full understanding by homebuyers of their responsibilities as participants in the MH Project;

(ii) Ability on their part to carry out these responsibilities; and

(iii) A cooperative relationship with the other Homebuyers.

(2) All homebuyers shall be required to participate in and cooperate fully in all official pre-occupancy and post-occupancy counseling activities. Failure without good cause to participate in the program shall constitute a breach of the MHO Agreement.

(b) The IHA shall submit to the local HUD Office a copy of its counseling program with its request for funding for approval.

(c) *Progress reports.* Unless otherwise required in a corrective action order, IHAs shall submit an annual progress report with the annual budget submission to the HUD Field Office.

(d) *Termination of counseling program.* If HUD determines that an IHA's counseling program is not being properly implemented, the program may be terminated after notice to the IHA stating the deficiencies in program implementation, and giving the IHA 90 days from the date of notification to take corrective action, and in the event of termination the amount included in the Development Cost Budget for the program shall be reduced so as not to exceed expenses already incurred at the time of termination.

§ 950.455 Conversion of rental projects.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the local HUD Office for approval to convert any or all of the units in an existing rental project to the MH program. Any conversion of existing units shall not affect in any way the IHA's status for funding for new development.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the units must be single family detached homes, or apartment/row houses for conversion to condominium/cooperative ownership. In addition, the units must have individually metered utilities and be in decent, safe and sanitary condition. The project(s) which possess the proposed conversion units must have received an approved actual development cost certificate.

(2) Tenants or other applicants to be homebuyers of the proposed conversion units must qualify for the program under § 950.416(b). The entire MH contribution required of the homebuyer must be made before the rental unit occupied by a tenant can be converted to the MH program.

(3) In the case of conversion of apartments or rowhouses to condominium or cooperative ownership, all units in a structure must be converted, with all occupants at the time of the application qualified, in accordance with paragraph (b)(2) of this section. Any occupants who do not qualify or desire to convert must be satisfactorily relocated and replaced with qualified occupants before application for conversion of the structure.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The local HUD Office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; evidence units are habitable, safe and sanitary; family qualifications as discussed in paragraph (b)(2) of this section; and financial feasibility. Where not all units in a project are proposed for conversion, the IHA's ability to operate the remaining rental units must not be adversely affected.

§ 950.458 Conversion of Mutual Help projects to Rental Program.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the local HUD Office for approval to convert any or all Mutual Help project units to the rental program, wherever or whenever a homebuyer or homebuyers have lost the potential for ownership because of the inability to meet the cost of their homebuyer responsibilities.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the project must have received an approved ADCC.

(2) The remaining balances in any reserve accounts shall be accounted for individually for each unit converted in a manner consistent with project intent and in a manner prescribed by HUD

(3) The balance remaining in the MEPA, if any, is applied first to outstanding tenant accounts receivable, then to repair of homebuyer maintenance items, and finally returned to the homebuyer.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The local HUD Office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; and financial feasibility. Where not all units in a project are proposed for conversion, the IHA's ability to operate the remaining units must not be adversely affected.

Subpart F—Self-Help Development in the Mutual Help Homeownership Program

§ 950.470 Purpose and applicability.

(a) *Purpose.* The purpose of the Self-Help program is to provide an alternate method of developing dwelling units that will be less costly than other methods of development, will engender community pride and cooperation, and will provide training in construction skills that will have lasting value to participants. If an IHA is interested in pursuing Self-Help development, it organizes a small group of families (six to ten) to build a substantial portion of the homes for all the families in the group, with technical assistance and supervision and materials provided by the IHA, augmented by skilled labor obtained under contract. The participants are individuals and/or families who qualify for participation in the Mutual Help Homeownership Opportunity program who have the ability to furnish their share of the required labor and who agree to participate in the cooperative effort to build homes for all members of the group.

(b) *Applicability.* Any IHA eligible for development funds may submit an application for a Self-Help Mutual Help Homeownership Opportunity project.

§ 950.475 Basic requirements.

(a) *Contracts.* A Self-Help Mutual Help Homeownership Opportunity project also involves three basic contracts in a form approved by HUD: an ACC for a Mutual Help project executed by HUD and the IHA after approval of the SH project application and after HUD approval of the development program, a Self-Help agreement executed by the participating families and the IHA before

construction begins, and a Mutual Help and Occupancy agreement executed by the participating families and the IHA after construction completion. In addition, there may be organizational documents for the organization created by the participating families.

(b) *Family participation.* The project is to be organized so that a small number of families (six to ten) build a substantial portion of their homes and contract for other skilled labor and supplies. Each family must show the desire to work with other families in building their own homes and must have the time to contribute the labor necessary to perform a substantial number of the tasks required in the construction of the homes. Each family must sign a Self-Help agreement with the IHA.

(c) *IHA capacity.* The IHA must have the capacity to provide for the financial, legal, administrative, and technical responsibilities of the program. The IHA is required to provide assurance that the project will be completed, in the form of a letter of credit or its equivalent in an amount equal to ten percent of the estimated Total Development Cost Standard. The IHA may manage the project itself if it has staff with the necessary background and proven ability to perform responsibly in the field of mutual self-help and in construction; or it may contract with an organization that has this type of experience and ability for a fee that fits within the Total Development Cost Standard. Once an IHA has experience with this method of development, it is encouraged to have several groups of families participating in its Self-Help program for more cost-effective use of the construction supervisors, although each family will work only on the homes of its group.

(d) *Funding.* The funding for technical training and supervision of participating families will be provided through development funds, and the cost will be included in the Total Development Cost of the project. The cost of construction supervision and technical assistance shall generally be no more than 15 percent, but may not exceed 20 percent of the TDC of these self-help homes.

(e) *Applicability of Indian preference.* In the selection of contractors to perform construction supervision, skilled labor, or other work under this program, the provisions concerning preference for Indians (§ 950.165) apply. In the selection of participating families, the provisions of § 950.416 apply.

(f) *Building code.* The building code used by the IHA in accordance with § 950.255 will apply to the homes constructed under this program.

§ 950.480 Self-Help agreement.

(a) *Timing.* The obligations under the Self-Help agreement, executed by the IHA and the families in a group selected by the IHA to participate in a Self-Help program, will be contingent upon approval of the development program by HUD. Each family will be obligated to be available to commence work at a time that fits the IHA's schedule for completion of prior tasks by skilled labor, but generally within 120 days of approval of the IHA's Self-Help project development program by HUD and to complete the work within a period not to exceed two years.

(b) *Pre-construction period.* The Self-Help agreement will provide that, before construction begins, the participating families will be required to organize themselves, with the assistance of the IHA, and to participate in construction skills training.

(c) *Labor contribution.* (1) The Self-Help agreement will specify the construction tasks to be performed by the participating families as their labor contribution and the construction tasks to be performed under contract by skilled laborers. The number of tasks to be performed by the participating families must constitute the vast majority of the tasks. Generally, the construction will be done in stages, with each stage of construction finished with respect to all the homes in the project before moving to the next stage.

(2) The labor performed is not subject to the labor standards specified in section 12 of the United States Housing Act of 1937 (42 U.S.C. 1437j).

(3) The Self-Help agreement will specify the circumstances under which it may be terminated.

(d) *Insurance requirements.* The families are working for themselves, and not the IHA, during the performance of their labor contribution. The Self-Help agreement will provide that the families waive any liability claim against the IHA for any injury that might occur during the development of the project. It is in the best interests of participating families to have their own insurance coverage to cover the possibility of injury. If the IHA is able to obtain insurance coverage at reasonable cost with reimbursement from the families, at their request, to cover this risk, it is encouraged to do so.

(e) *Standard provisions.* The Self-Help agreement will include provisions prohibiting kickbacks and conflict of interest.

(f) *Completion.* The Self-Help agreement will provide that upon successful completion of the family's obligations under it, the family and the IHA will execute a Mutual Help and Occupancy agreement.

§ 950.485 Application.

(a) *General.* The application for a Self-Help development method of Mutual Help project must comply with the general requirements of § 950.225.

(b) *Need for Self-Help housing.* Evidence of the need for Self-Help housing must be submitted, including the following:

(1) The names, addresses, number of persons in the household, and annual incomes of the families selected to participate;

(2) The Self-Help agreement;

(3) Certification by the IHA that the participating families are believed to have the time and ability to fulfill their obligations under the Self-Help agreement; and

(4) Such information as the incomes and sizes of other interested families who appear to be eligible.

(c) *Ability of IHA to administer Self-Help housing.* The IHA must demonstrate its ability to administer the program by identifying the staff members who will supervise construction and provide technical assistance, and describe their experience. If the IHA plans to contract with an outside entity to perform these functions, it must follow the requirements concerning Indian preference. Regardless of the identity of the firm selected to perform this function, the IHA should identify the firm and briefly describe its experience. The IHA also must demonstrate its capacity to administer the program, in accordance with § 950.475.

§ 950.490 Development program.

(a) In addition to complying with the requirements of § 950.260, the IHA's development program for a Self-Help project submitted to HUD must include the following:

(1) *IHA coordination plan.* The plan for organizing and implementing the development, including elements comparable to those covered in the standard Mutual Help construction contract, and the method of coordinating work of participating families and skilled contractors.

(2) *Difference in cost.* A description of how the development cost differs from the cost for a project constructed under a construction contract. This difference should reflect the labor contribution, after considering the construction supervision cost.

(3) *Special provisions for acquisition with rehabilitation projects.* A description of the repair or rehabilitation work needed on each

home to be acquired. The work needed on all the homes should be reasonably comparable in the amount of labor exchange that is required. The estimated number of hours of labor and a description of the work to be done must be provided.

(4) *Certification of participation.* Certification by the IHA that the participating families have signed the Self-Help agreement and remain able to fulfill their obligations under the Self-Help agreement.

(5) *Changes since application stage.* Statement of any changes in the data submitted in the application.

(b) HUD will review the development program submitted by an IHA for a Self-Help project with particular attention to the elements listed in paragraph (a) of this section.

§ 950.495 Default of self-help agreement.

(a) *Default in a Self-Help project.* (1) If the IHA determines that a participating family is failing to provide its labor contribution, as required in accordance with its Self-Help agreement, it shall counsel the family about its obligations and encourage fulfillment of its responsibilities. If the failure of the family is jeopardizing the progress of the project, the IHA shall declare the family in default and terminate its participation in the project. Upon termination of the participation of one family, the IHA shall move expeditiously to select an alternate family to take over the responsibilities of the terminated family. If another qualified family cannot be found to assume the responsibilities of the terminated family, the unit may be converted to some other development method (e.g., force account, conventional bid, etc.) under the Mutual Help Homeownership Opportunity program.

(2) If the IHA determines that an entire group is unable to continue its work to completion of construction, the IHA shall first counsel the group about its obligations and encourage fulfillment of its responsibilities. If counseling is unsuccessful in bringing about satisfactory progress toward completion, the IHA shall declare the families in default and convert the project to a regular Mutual Help Homeownership Opportunity project. The IHA's plan for completing the project must be submitted to HUD for review and consul prior to terminating the self-help project. Availability of additional HUD funding for this purpose is not assured.

(b) [Reserved]

Subpart G—Turnkey III Program

§ 950.501 Introduction.

(a) *Purpose.* This subpart sets forth the essential elements of the HUD Homeownership Opportunities Program for low income families, which is administered by HUD as part of the Indian Housing Program under the United States Housing Act of 1937. In its present form, this part covers only those matters pertinent to the management, operation, conversion and sale of existing Turnkey III homes that remain in Indian housing authority (IHA) ownership. IHAs are encouraged to consider the conversion of Turnkey III units to some other form of operation where compliance with the requirements of the Turnkey III Program has become infeasible.

(b) *Applicability.* (1) This part is applicable to the operation of all Turnkey III developments operated by IHAs.

(2) *Program framework.* All Turnkey III projects shall be operated in accordance with an executed Annual Contributions Contract (ACC), which includes the "Special Provisions for Turnkey III Homeownership Opportunity Project" and Homebuyer Ownership Opportunity Agreements (Homebuyer Agreement) between the IHA and the Homebuyer.

(3) A Turnkey III development may only include units that are to be operated for the purpose of providing homeownership opportunities for eligible low-income families pursuant to this part and the special Turnkey III provisions of the ACC including units occupied temporarily by former homebuyers who, as a result of losing homeownership potential, have been transferred to rental status in place, pending the availability of a suitable rental unit. If for any reason it is determined that certain units should be converted to operation as conventional rental units, Mutual Help units, or some other form of operation, such units must be made a part of a conventional rental project, Mutual Help project, or such other project. However, when a homebuyer is converted to rental status while remaining in the same unit, pending availability of a satisfactory rental unit or approval of a request to convert the unit in accordance with § 950.503, the unit remains under the Turnkey III project.

(4) An IHA may, at its discretion and without HUD approval, establish for its Turnkey III developments any policies, procedures and requirements that are not contrary to the ACC, this part, other applicable Federal, State, and local statutes and regulations, and the rights of homebuyers under existing homebuyer agreements.

(5) *Program overview.* The Turnkey III Program allows IHAs to provide homeownership opportunities for eligible low-income families who meet the specified standard for homeownership potential, through purchase of homes in those Indian housing developments that were established by certain IHAs under the Turnkey III Program. The program uses a lease-purchase arrangement, whereby the homebuyer family initially takes occupancy on a rental basis, under a homebuyer agreement that constitutes a lease with an option to purchase the home as soon as the family reaches the point where they can afford to buy and assume the responsibilities of homeownership. The purchase price is set at the time of initial occupancy, and then, for a subsequent homebuyer who takes occupancy after turnover. The purchase price for a subsequent homebuyer is determined by the IHA. During the period of rental tenancy, the homebuyer makes monthly rental payments based on an affordable percentage of family income and is responsible for routine maintenance. A portion of the homebuyer monthly payment is used to establish an Earned Home Payments Account (EHPA) and a Nonroutine Maintenance Reserve (NRMR). To the extent that these funds are not used by the IHA to perform maintenance relating to the home, the funds will be available to apply to the purchase price at the time the homebuyer is in a position to exercise the option to purchase. At closing, the homebuyer pays the IHA the balance of the purchase price due (or may be permitted by the IHA to finance all or a portion of that amount through a purchase-money mortgage) and the IHA deeds the home over to the homebuyer. The home becomes the privately-owned property of the homebuyer (now a homeowner), no longer Indian housing, and subject only to a restriction on the amount of resale profit that the homeowner is permitted to keep if the property is resold in five years.

(c) [Reserved].

(d) *Contracts, agreements, other documents.* All contracts, agreements and other documents referred to in this subpart must be in a form approved by HUD and changes must be made with the approval of the ONAP Field Office. Contracts, agreements and other documents include but are not limited to:

(1) The Annual Contributions Contract (ACC), including the Special Provisions for Turnkey III Projects;

(2) The Homebuyer Ownership Opportunity Agreement (Homebuyer Agreement);

(3) Certification of Homebuyer Status;

(4) Promissory Note for Payment Upon Resale by Homebuyer at Profit;

(5) Articles of Incorporation and By-Laws of the Homebuyer Association (HBA), if any; and

(6) Recognition Agreement Between Indian Housing Authority and the Homebuyer Association, if any.

§ 950.503 Conversion of Turnkey III developments.

(a) *Applicability.* Notwithstanding other provisions of this part, an IHA may apply to the HUD Field Office for approval to convert any or all of the units in an existing Turnkey III development to the rental or MH program. Any conversion of existing units shall not affect in any way the IHA's status for funding for new development.

(b) *Minimum requirements.* (1) In order to be eligible for conversion, the units must be single family detached homes, or apartment/row houses for conversion to condominium/cooperative ownership. In addition, the units must have individually metered utilities and be decent, safe and sanitary condition. If the units are not decent, safe and sanitary, the IHA shall submit a plan to correct unit deficiencies. The developments which possess the proposed conversion units must have received and approved actual development cost certificate.

(2) For conversion to MH, applicants must qualify for the program under § 950.416(b). The entire MH contribution required of the homebuyer must be made before the Turnkey III unit occupied by a tenant can be converted to the MH program. In determining the purchase price, the homebuyer may receive credit for the period of time they have been residing in a Turnkey III homeownership unit.

(c) *Application process.* The IHA's application must be in the form required by HUD, including all necessary documentation. The HUD Field Office shall review the application for legal sufficiency; Tribal acceptance; demonstration of family interest; evidence units are habitable, safe and sanitary; family qualifications as discussed in paragraph (b)(2) of this section; and financial feasibility. Where not all units in a development are proposed for conversion, the IHA's ability to operate the remaining Turnkey III units must not be adversely affected.

§ 950.505 Eligibility and selection of Turnkey III homebuyers.

(a) *Applications.* The availability of housing under Turnkey III shall be announced to the community at large, unless there is already a sufficient number of eligible applicants on the IHA's Turnkey III waiting list. Families who wish to be considered for Turnkey III, including, but not limited to existing occupants of the IHA's rental housing units and those on the waiting list for IHA rental housing must apply specifically for that program and a separate list of eligible applicants for Turnkey III shall be maintained. Applications shall be dated as received. The submission of an application for Turnkey III by a family which is also an applicant for conventional rental public housing or is an occupant of such housing shall in no way affect its status with regard to such rental housing. A family shall not lose its place on the waiting list until it is selected for Turnkey III and shall not receive any different treatment or consideration with respect to other rental housing programs because of its having applied for Turnkey III. In order to be considered for selection, a family must be determined to meet at least all of the following standards of potential for homeownership:

(1) Sufficient income to cover the EHPA, NRMR, and the estimated cost of utilities with its required monthly payment (see § 950.315);

(2) Ability to meet all obligations under the Homebuyer Agreement; and

(3) At least one member who is gainfully employed, or who has an established source of continuing income.

(b) *Selection and notification of homebuyers.* Homebuyers shall be selected from those families determined to have potential for homeownership. Such selection shall be made in sequence from the waiting list.

§ 950.507 Homebuyer Ownership Opportunity Agreements (HOOA).

(a) *General.* The HOOA must be executed between the IHA and the homebuyer as a condition for occupancy of a Turnkey III unit. The HOOA is a lease agreement which also provides the homebuyer with an option to purchase the home, subject to the homebuyer's compliance with certain conditions. The homebuyer acquires no equity in the home before purchase.

(b) *Pre-Existing Agreements.* (1) Turnkey III Projects in operation on the effective date of this subpart shall be governed by this subpart, except to the extent that the terms of any pre-existing Homebuyer Agreements shall govern the relationship of an IHA and occupant until the termination or cancellation of such agreement(s). If the agreement establishes a maximum or a minimum monthly payment, the terms of the agreement shall govern. However, in no event will the monthly payment charged exceed the Total Tenant Payment determined in accordance with subpart D of this part.

(2) Pre-existing Homebuyer Agreements that determined the required monthly payment in accordance with a "Schedule" developed by the IHA and approved by HUD should continue to determine the monthly payment in accordance with the schedule. This schedule is determined as follows:

(i) The operating budget for the project is based on estimated expenses for a given period of time. The amount needed to operate a particular project is called the breakeven amount. This is comprised of the Operating Expenses, the total amount needed for EHPA, and the total needed for NRMR.

(ii) The aggregate of all homebuyers' incomes is determined. (If no definition of income is stated in the homebuyer's contract, the definition in subpart A of this part is used.)

(iii) The percentage of aggregated income needed to cover 110 percent of the breakeven amount is determined. This percentage is the one that appears in the schedule.

§ 950.509 Responsibilities of homebuyer.

(a) *Repair, maintenance and use of home.* The homebuyer shall be responsible for the routine maintenance of the home to the satisfaction of the HBA and the IHA. This routine maintenance includes the work (labor and materials) of keeping the dwelling structure, grounds, and equipment in good repair, condition, and appearance. In addition, the home must conform with the requirements of local housing codes and applicable regulations and guidelines of HUD. It includes repairs (labor and materials) to the dwelling structure, plumbing fixtures, dwelling equipment (such as range and refrigerator), shades and screens, water heater, heating equipment, and other component parts of the dwelling. It also includes all interior painting and the maintenance of grounds (lot) on which the dwelling is located. It does not include maintenance and replacements provided for by the NRMR.

(b) *Repair of damage.* In addition to the obligation for routine maintenance, the homebuyer shall be responsible for repair of any damage caused by the homebuyer, other occupants, or visitors.

(c) *Care of home.* A homebuyer shall keep the home in a sanitary condition; cooperate with the IHA and the HBA in keeping and maintaining the common areas and property, including fixtures and equipment, in good condition and appearance; and follow all rules of the IHA and of the HBA concerning the use and care of the dwellings and the common areas and property.

(d) *Inspections.* A homebuyer shall agree to permit officials, employees, or agents of the IHA and of the HBA to inspect the home at reasonable hours and intervals in accordance with rules established by the IHA and the HBA.

(e) *Use of home.* (1) A homebuyer shall not:

(i) Sublet the home without the prior written approval of the IHA;

(ii) Use or occupy the home for any unlawful purpose nor for any purpose deemed hazardous by insurance companies on account of fire or other risks; or

(iii) Provide accommodations (unless approved by the HBA and the IHA) to boarders or lodgers.

(2) The homebuyer shall agree to use the home primarily as a place to live for the family (as identified in the initial application or by subsequent amendment with the approval of the IHA), for children thereafter born to or adopted by members of such family, and for aged or widowed parents of the homebuyer or spouse who may join the household.

(f) *Obligations with respect to other persons and property.* Neither the homebuyer nor any other member of the family shall interfere with rights of other occupants of the development, or damage the common property or the property of others, or create physical hazards.

(g) *Structural changes.* A homebuyer shall not make any structural changes in or additions to the home unless the IHA has first determined in writing that such change would not:

(1) Impair the value of the unit, the surrounding units, or the development as a whole; or

(2) Affect the use of the home for residential purposes; or

(3) Violate HUD requirements as to construction and design.

(h) *Statements of condition and repair.* When each homebuyer moves in, the IHA shall inspect the home and shall give the homebuyer a written statement, to be signed by the IHA and the homebuyer, of the condition of the home and the equipment in it. Should the homebuyer vacate the home, the IHA shall inspect it and give the homebuyer a written statement of the repairs and other work, if any, required to put the home in good condition for the next occupant. The homebuyer or the homebuyer's representative and a representative of the HBA may join in any inspections by the IHA.

(i) *Maintenance of common property.* The homebuyer may participate in nonroutine maintenance of the home and in maintenance of common property.

(j) *Assignment and survivorship.* Until such time as the homebuyer obtains title to the home, the following conditions apply:

(1) A homebuyer shall not assign any right or interest in the home or any interest under the Homebuyer Ownership Opportunity Agreement without the prior written approval of the IHA;

(2) In the event of death or mental incapacity, the person designated as the successor in the Homebuyer Ownership Opportunity Agreement shall succeed to the rights and responsibilities under the agreement if that person is a family member and is determined by the IHA to meet all of the standards of potential for homeownership, including the requirement to make the home the person's principal residence. Such person shall be designated by the homebuyer at the time the Homebuyer Ownership Opportunity Agreement is executed. This designation may be changed by the homebuyer at any time. If there is no such designation, or the designee is not a family member or does not meet the standards of potential for homeownership, the IHA may consider as the homebuyer any family member who meets the standards of potential for homeownership;

(3) If there is no qualified successor in accordance with paragraph (j)(2) of this section, and no minor child of the homebuyer's family is in occupancy, the IHA shall terminate the agreement and another family shall be selected. Where a minor child or children of the homebuyer's family is in occupancy, and an appropriate adult(s) who has been appointed legal guardian of the children is able and willing to perform the obligations of the Homebuyer Ownership Opportunity Agreement in their interest and on their behalf, then in order to protect continued occupancy and opportunity for acquisition of ownership of the home, the IHA may approve the guardian(s) as occupants of the unit with a duty to fulfill the homebuyer obligations under the agreement.

(Approved by the Office of Management and Budget under control number 2577–0114)

§ 950.511 Homebuyers' association (HBA).

(a) *General.* (1) The homebuyers' association (HBA) is an incorporated organization composed of all homebuyers and homeowners. Except where the homes are on scattered sites (noncontiguous lots throughout a multi-block area with no common property), or where the number of homes in the development may be too few to support an HBA, each Turnkey III development shall have an HBA. For such cases, a modified form of homebuyers association may be called for or a less formal organization may be desirable. This decision shall be made jointly by the IHA and the homebuyers, acting on the recommendation of HUD.

(2) The functions of the HBA shall be set forth in its articles of incorporation and by-laws. The IHA shall assist the HBA in its organization and operation to the extent possible.

(b) *Funding.* The IHA may provide non-cash contributions to the HBA, such as office space, as well as cash contributions, which shall be provided for in the annual operating budgets of the IHA. The cash contributions shall be in an amount provided for in the IHA budget and approved by HUD and shall be subject to any HUD restrictions on funding.

§ 950.512 Homeowner's association (HOA).

A homeowners' association means an association comprised of homeowners, to which the IHA conveys ownership of common property, and which thereafter has responsibilities with respect to the common property. Only residents who have acquired title to their homes are members of the HOA.

§ 950.513 Breakeven amount and application of monthly payments.

(a) *Definition.* The term "break-even amount" as used herein means the minimum average monthly amount required to provide funds for the amounts budgeted for operating expenses, the EHPA, and the NRMR. A separate breakeven amount is established for each size and type of dwelling unit, as well as for the project as a whole. The breakeven amount for EHPA and NRMR will vary by size and type of dwelling unit. Similar variations may occur for operating expenses. The breakeven amount does not include the monthly allowance for utilities for which the homebuyer pays directly.

(b) *Application of monthly payments.* The IHA shall apply the homebuyer's monthly payment as follows:

(1) To the credit of the homebuyer's EHPA;

(2) To the credit of the homebuyer's NRMR; and

(3) For payment of monthly operating expense, including contributions to the operating reserve.

(c) *Excess over breakeven.* When the homebuyer's required monthly payment exceeds the applicable breakeven amount, the excess shall constitute additional project income and shall be deposited and used in the same manner as other project income.

(d) *Deficit in monthly payment.* When the homebuyer's required monthly payment is less than the applicable breakeven amount, the deficit shall be applied as a reduction of that portion of the monthly payment designated for operating expense (*i.e.,* as a reduction of project income). In all cases, the homebuyer payment must be sufficient to cover the EHPA and the NRMR, which shall be credited with the amount included in the breakeven amount for these accounts.

§ 950.515 Monthly operating expense.

(a) *Definition and categories of monthly operating expense.* The term "monthly operating expense" means the monthly amount needed for the following purposes:

(1) *Administration.* Administrative salaries, travel, legal expenses, office supplies, etc.;

(2) *Homebuyer services.* IHA expenses in the achievement of social goals, including costs such as salaries, publications, payments to the HBA to assist its operation, contract and other costs;

(3) *Utilities.* Those utilities (such as water), if any, to be furnished by the IHA as part of operating expense;

(4) *Routine maintenance—common property.* For community building, grounds and other common areas, if any. The amount required for routine maintenance of common property depends upon the type of common property included in the development and the extent of the IHA's responsibility for maintenance;

(5) *Protective services.* The cost of supplemental protective services paid by the IHA for the protection of persons and property;

(6) *General expense.* Premiums for fire and other insurance, payments in lieu of taxes to the local taxing body, collection losses, payroll taxes, etc.;

(7) *Nonroutine maintenance—common property (contribution to operating reserve).* Extraordinary maintenance of equipment applicable to the community building and grounds, and unanticipated items for non-dwelling structures.

(b) *Monthly operating expense rate.* (1) The monthly operating expense rate to be included in the breakeven amount for each fiscal year shall be established on the basis of the IHA's HUD-approved operating budget for that fiscal year. The operating budget may be revised during the course of the fiscal year in accordance with HUD regulations, contracts, and handbooks.

(2) If it is subsequently determined that the actual operating expense for a fiscal year was more or less than the amount provided by the monthly operating expense established for that fiscal year, the rate of monthly operating expenses to be established for the next fiscal year may be adjusted to account for the differences.

(c) *Posting of monthly operating expense statement.* A statement showing the budgeted monthly amount allocated in the current operating expense category shall be provided to the HBA and copies shall be provided to homebuyers upon request.

§ 950.517 Earned Home Payments Account (EHPA).

(a) *Credits to the account.* The IHA shall establish and maintain a separate EHPA for each homebuyer. Since the homebuyer is responsible for maintaining the home, a portion of the required monthly payment equal to the IHA's estimate, of the monthly cost for such routine maintenance, taking into consideration the relative type and size of the homeowner's home, shall be set aside in the EHPA. In addition, this account shall be credited with:

(1) Any voluntary payments made pursuant to paragraph (f) of this section; and

(2) Any amount earned through the performance of maintenance as provided in paragraph (c) of this section.

(b) *Charges to the account.* (1) If for any reason the homebuyer is unable or fails to perform any item of required maintenance, the IHA shall arrange to have the work done in accordance with the procedures established by the IHA and the HBA, and the cost thereof shall be charged to the homebuyer's EHPA. Inspections of the home shall be made jointly by the IHA and HBA.

(2) To the extent NRMR expense is attributable to the negligence of the homebuyer as determined by the HBA and approved by the IHA (see § 950.519), the cost thereof shall be charged to the EHPA.

(c) *Additional equity through maintenance of common property.* Homebuyers may earn addition EHPA credits by providing in whole or in part any of the maintenance necessary to the common property of the development. When such maintenance is to be provided by the homebuyer, this may be done and credit earned therefore only pursuant to a prior written agreement between the homebuyer and the IHA (or the homeowners' association, depending on who has responsibility for maintenance of the property involved), covering the nature and scope of the work and the amount of credit the homebuyer is to receive. In such cases, the agreed amount shall be charged to the appropriate maintenance account and credited to the homebuyer's EHPA upon completion of the work.

(d) *Investment of excess.* (1) When the aggregate amount of all EHPA balances exceeds the estimated reserve requirements for 90 days, the IHA shall notify the HBA and shall invest the excess in federally insured savings accounts, federally insured credit unions, and/or securities approved by HUD and in accordance with any recommendations made by the HBA. If the HBA wishes to participate in the investment program, it should submit periodically to the IHA a list of HUD-approved securities, bonds, or obligations which the association recommends for investment by the IHA of the funds in the EHPAs. Interest earned on the investment of such funds shall be prorated and credited to each homebuyer's EHPA in proportion to the amount in each such reserve account.

(2)(i) Periodically, but not less often than annually, the IHA shall prepare a statement showing:

(A) The aggregate amount of all EHPA balances;

(B) The aggregate amount of investments (savings accounts and/or securities) held for the account of all the homebuyers' EHPAs; and

(C) The aggregate uninvested balance of all the homebuyers' EHPAs.

(ii) This statement shall be made available to any authorized representative of the HBA.

(e) *Voluntary payments.* To enable the homebuyer to acquire title to the home within a shorter period than anticipated under the original schedule, the homebuyer may, either periodically or in a lump sum, voluntarily make payments over and above the required monthly payments. Such voluntary payments shall be credited to the homebuyer's EHPA.

(f) *Delinquent monthly payments.* Under exceptional circumstances as determined by the HBA and the IHA, a homebuyer's EHPA may be used to pay the delinquent required monthly payments, provided the amount used for this purpose does not seriously deplete the account and provided that the

homebuyer agrees to cooperate in such counseling as may be made available by the IHA or the HBA.

(g) *Annual statement to homebuyer.* The IHA shall provide an annual statement to each homebuyer specifying at least the amounts in the EHPA, and the NRMR. Any maintenance or repair done on the dwelling by the IHA which is chargeable to the EHPA or to the NRMR shall be accounted for through a work order, a copy of which shall be sent to the homebuyer.

(h) *Withdrawal and assignment.* The homebuyer shall have no right to assign, withdraw, or in any way dispose of the funds in its EHPA except as provided in this section or in § 950.525.

(i) *Application of EHPA upon vacating of dwelling.* (1) In the event a homebuyer agreement is terminated the IHA shall charge against the homebuyer's EHPA the amounts required to pay:

(i) The amount due the IHA, including the monthly payments the homebuyer is obligated to pay up to the date the homebuyer vacates;

(ii) The monthly payment for the period the home is vacant, not to exceed 60 days from the date of notice of intention to vacate, or, if the homebuyer fails to give notice of intention to vacate, 60 days from the date the home is put in good condition for the next occupant; and

(iii) The cost of any routine maintenance, and of any nonroutine maintenance attributable to the negligence of the homebuyer, required to put the home in good condition for the next occupant.

(2) If the EHPA balance is not sufficient to cover all of these charges, the IHA shall require the homebuyer to pay the additional amount due. If the amount in the account exceeds these charges, the excess shall be paid to the homebuyer.

(3) Settlement with the homebuyer shall be made promptly after the actual cost of repairs to the dwelling has been determined provided that the IHA shall make every effort to make such settlement within 30 days from the date the homebuyer vacates.

§ 950.519 Nonroutine Maintenance Reserve (NRMR).

(a) *Purpose of reserve.* The IHA shall establish and maintain a separate NRMR for each home, using a portion of the homebuyer's monthly payment. The purpose of the NRMR is to provide funds for the nonroutine maintenance of the home, which consists of the infrequent and costly items of maintenance and replacement shown on the Nonroutine Maintenance Schedule for the home. Such maintenance may include the replacement of dwelling equipment (such as range and refrigerator), replacement of roof, exterior painting, major repairs to heating and plumbing systems, etc. The NRMR shall not be used for nonroutine maintenance of common property, or for nonroutine maintenance relating to the home to the extent such maintenance is attributable to the Homebuyer's negligence or to defective materials or workmanship.

(b) *Amount of reserve.* The amount of the monthly payments to be set aside for NRMR shall be determined by the IHA, on the basis of the Nonroutine Maintenance Schedule showing the amount likely to be needed for nonroutine maintenance of the home during the term of the Homebuyer Ownership Opportunity Agreement, taking into consideration the type of construction and dwelling equipment. This schedule shall be prepared by the IHA and reexamined annually.

(c) *Charges to NRMR.* (1) The IHA shall provide the nonroutine maintenance necessary for the home and the cost thereof shall be funded as provided in paragraph (c)(2) of this section. Such maintenance may be provided by the homebuyer but only pursuant to a prior written agreement with the IHA covering the nature and scope of the work and the amount of credit the homebuyer is to receive. The amount of any credit shall, upon completion of the work, be credited to the homebuyer's EHPA and charged as provided in paragraph (c)(2) of this section.

(2) The cost of nonroutine maintenance shall be charged to the NRMR for the home except that:

(i) To the extent such maintenance is attributable to the fault or negligence of the homebuyer, the cost shall be charged to the homebuyer's EHPA after consultation with the HBA if the homebuyer disagrees, and

(ii) To the extent such maintenance is attributable to defective materials or workmanship not covered by the warranty, or even though covered by the warranty if not paid for thereunder through no fault or negligence of the homebuyer, the cost shall be charged to the appropriate operating expense account of the Project.

(3) In the event the amount charged against the NRMR exceeds the balance therein, the difference (deficit) shall be made up from continuing monthly credits to the NRMR based upon the homebuyer's monthly payments. If there is still a deficit when the homebuyer acquires title, the homebuyer shall pay such deficit at settlement (see paragraph (d)(2) of this section).

(d) *Transfer of NRMR.* (1) In the event the homebuyer agreement is terminated, the homebuyer shall not receive any balance or be required to pay any deficit in the NRMR. When a subsequent homebuyer moves in, a credit balance in the NRMR shall continue to be applicable to the home in the same amount as if the preceding homebuyer had continued in occupancy.

(2) In the event the homebuyer purchases the home, and there remains a balance in the NRMR, the IHA shall pay such balance to the homeowner at settlement. In the event the homebuyer purchases and there is a deficit in the NRMR, the homebuyer shall pay such deficit to the IHA at settlement.

(e) *Investment of excess.* (1) When the aggregate amount of the NRMR balances for all the homes exceeds the estimated reserve requirements for 90 days the IHA shall invest the excess in federally insured savings accounts, federally insured credit unions, and/or securities approved by HUD. Income earned on the investment of such funds shall be prorated and credited to each homebuyer's NRMR in proportion to the amount in each reserve account.

(2)(i) Periodically, but not less often than annually, the IHA shall prepare a statement showing:

(A) The aggregate amount of all NRMR balances;

(B) The aggregate amount of investments (savings accounts and/or securities) held for the account of the NRMRs; and

(C) The aggregate uninvested balance of the NRMRs.

(ii) A copy of this statement shall be made available to any authorized representative of the HBA.

§ 950.521 Operating reserve.

(a) *Purpose of the reserve.* To the extent that total operating receipts (including subsidies for operations) exceed total operating expenditures of the project, the IHA shall establish an operating reserve in connection with its approval of the annual operating budgets for the project. The purpose of this reserve is to provide funds for:

(1) The infrequent but costly items of nonroutine maintenance and replacements of common property, taking into consideration the types of items which constitute common property, such as nondwelling structures and equipment, and in certain cases, common elements of dwelling structures;

(2) Nonroutine maintenance for the homes to the extent such maintenance

is attributable to defective materials or workmanship not covered by warranty;

(3) Working capital, including funds to cover a deficit in a homebuyer's NRMR until such deficit is offset by future monthly payments by the homeowner or a settlement in the event the homebuyer should purchase; and

(4) A deficit in the operation of the project for a fiscal year, including any deficit resulting from monthly payments totaling less than the breakeven amount for the project; and

(5) Funds needed for nonroutine maintenance of vacated homes with insufficient NRMR balances to put them in suitable condition for reoccupancy by subsequent homeowners.

(b) *Nonroutine maintenance—common property (contribution to operating reserve.* The amount under this heading to be included in operating expense (and in the breakeven amount) established for the fiscal year shall be determined by the IHA, on the basis of estimates of the monthly amount needed to accumulate an adequate reserve for the items described in paragraph (a)(1) of this section. This amount shall be subject to revision in the light of experience. This contribution to the operating reserve shall be made only during the period the IHA is responsible for the maintenance of any common property; and during such period, the amount shall be determined on the basis of the requirements of all common property in the development.

(c) *Transfer to homeowners' association.* Where a Turnkey III development includes common property, the IHA shall be responsible for and shall retain custody of the operating reserve until the homeowners acquire voting control of the homeowners' association. When the homeowners acquire voting control, the homeowners' association shall then assume full responsibility for management and maintenance of common property under a plan, agreed upon by the IHA and the homeowners association and there shall be transferred to the homeowners' association a portion of the operating reserve then held by the IHA. This provision shall not apply where there is no common property or where there is no duly organized and functioning homeowners association.

(d) *Disposition of reserve.* If, at the end of a fiscal year, there is an excess over the maximum operating reserve, this excess shall be applied to the operating deficit of the project, if any, and any remainder shall be used for such purposes as approved by HUD under an ACC. Following the end of the fiscal year in which the last home has been conveyed by the IHA, the balance of the operating reserve held by the IHA shall be paid to HUD, or retained by the IHA in a replacement reserve if an ACC amendment has been executed implementing loan forgiveness, provided that the aggregate amount of payments by the IHA under this paragraph shall not exceed the aggregate amount of annual contributions paid by HUD with respect to the development.

§ 950.523 Operating subsidy.

Operating subsidy may be paid by HUD, subject to the availability of funds for this purpose and at HUD's sole discretion, to cover an operating deficit as approved by HUD in an operating budget submitted by an IHA for a Turnkey III project. However, operating subsidy or project funds may not be used to establish or maintain the homebuyer reserve accounts. Project funds may be used on a temporary basis to pay the cost of utilities for an individual unit by way of a utility reimbursement when a homebuyer has insufficient tenant income to cover even the utilities. In such a case, the inability of the homebuyer to pay utilities constitutes a loss of homeownership potential and continuing eligibility for the Turnkey III program.

§ 950.525 Purchase price and methods of purchase.

(a) *Purchase price.* The purchase price for the initial and subsequent homebuyer shall be determined by the IHA.

(b) *Purchase price schedule.* On the date when the homebuyer agreement is signed, the IHA shall provide the homebuyer with a Purchase Price Schedule, showing the monthly declining purchase price over the term of the HOOA agreement (a period not less than 15 years or more than 25 as determined by the IHA, at an interest rate determined by the IHA.) The IHA may choose to forego charging interest and calculate the payment with an interest rate of zero.

(c) *Methods of purchase.* (1) The homebuyer may achieve ownership when the amount in the EHPA, plus such portion of the NRMR as the homebuyer wishes to use for the purchase, is equal to the unamortized balance purchase price as shown at that time on the homebuyer's purchase price schedule plus all incidental costs (the costs incidental to acquiring ownership, including, but not limited to, the costs for a credit report, field survey, title examination, title insurance, and inspections, the fees for attorneys other than the IHA's attorney, mortgage application, closing and recording, and the transfer taxes and loan discount payment, if any). If for any reason title to the home is not conveyed to the homebuyer during the month in which the combined total in the EHPA and designated portion of the NRMR equals the purchase price, the balance of the purchase price shall be fixed as the amount specified for that month and the homebuyer shall be refunded:

(i) The net additions, if any, credited to the EHPA after that month, and

(ii) Such part of the monthly payments made by the homebuyer after the balance of the purchase price has been fixed which exceeds the breakeven amount attributable to the unit.

(2) Where the sum of the unamortized balance of the purchase price and incidental costs is greater than the amounts in the homebuyer's EHPA and NRMR, the homebuyer may achieve ownership by obtaining financing for or otherwise paying the excess amount. The unamortized balance of the purchase price shall be the amount shown on the homebuyer's purchase price schedule for the month in which the settlement date for the purchase occurred.

(3) *Period required to achieve ownership.* The maximum period for achieving ownership shall be 30 years, but depending upon increases in the homebuyer's income and the amount of credit which the homebuyer can accumulate in the EHPA and NRMR the period may be shortened accordingly.

(4) *Residual receipts.* After payment in full of the IHA's debt, if there are any subsequent homebuyers who have not acquired ownership of their homes, the IHA shall retain all residual receipts from the operation of the development in a replacement reserve.

(5) *IHA financing.* The IHA may, at its discretion, provide financing for purchases by homebuyers, or assist with financing, by such methods and on such terms and conditions as be agreeable to the IHA and the homebuyer, without any requirement for prior HUD approval. The financing may be provided using such methods as a mortgage or a loan agreement.

(6) *Transfer of title to homebuyer.* When the homebuyer is to obtain ownership, a closing date shall be mutually agreed upon by the parties. On the closing date the homebuyer shall pay the required amount of money to the IHA, sign the promissory note in accordance with § 950.527, and receive a deed for the home.

§ 950.527 Payment upon resale at profit.

(a) *Promissory note.* (1) When a homebuyer achieves ownership, the

homebuyer shall sign a note obligating him or her to make payment to the IHA, subject to the provisions of paragraph (a)(2) of this section, in the event the homebuyer resells the home at a profit within five years of actual residence in the home after becoming a homeowner. If, however, the homeowner should purchase and occupy another home within one year (18 months in the case of a newly constructed home) of the resale of the Turnkey III home, the IHA shall refund to the homeowner the amount previously paid under the note, less the amount, if any, by which the resale price of the Turnkey III home exceeds the acquisition price of the new home, provided that application for such refund shall be made no later than 30 days after the date of acquisition of the new home.

(2)(i) The note to be signed by the homebuyer pursuant to paragraph (a)(1) of this section shall be a noninterest-bearing promissory note to the IHA. The note shall be executed at the time the homebuyer becomes a homeowner and shall be secured by a second mortgage. The initial amount of the note shall be computed by taking the appraised value of the home at the time the homebuyer becomes a homeowner and subtracting:

(A) The homebuyer's purchase price plus incidental costs (as described in § 950.525(c);) *and*

(B) The increase in value of the home as determined by appraisal, caused by improvements paid for by the homebuyer with funds from sources other than the EHPA or NRMR.

(ii) The note shall provide that this initial amount shall be automatically reduced by 20 percent thereof at the end of each year of residency as a homeowner, with the note terminating at the end of the five-year period of residency, as determined by the IHA. To protect the homeowner, the note shall provide that the amount payable under it shall in no event be more than the net profit on the resale, that is, the amount by which the resale price exceeds the sum of:

(A) The homebuyer's purchase price plus incidental costs,

(B) The costs of the resale, including commissions and mortgage prepayment penalties, if any, and

(C) The increase in value of the home, determined by appraisal, due to improvements paid for as a homebuyer (with funds from sources other than the EHPA or NRMR) or as a homeowner.

(3) Amounts collected by the IHA under such notes shall be retained by the IHA for use in making refunds pursuant to paragraph (a)(1) of this section. After expiration of the period for the filing of claims for such refunds, any remaining amounts shall be used for such purposes as may be authorized or approved by HUD under such Annual Contributions Contract as the IHA may then have with HUD.

(b) *Residency requirements.* The five-year note period does not end if the homeowner rents or otherwise does not use the home as the homeowner's principal place of residence for any period within the first five years after achieving ownership. Only the actual amount of time the homeowner is in residence is counted, and the note shall be in effect until a total of five years time of residence has elapsed, at which time the homeowner may request that the IHA release him or her from the note, and the mortgage securing the note. The IHA shall release the homeowner upon such a request.

(c) *Death of homeowner.* In the event of the death of the homeowner, or last surviving co-owner, prior to the end of the five-year period of the promissory note, the IHA may, at its sole discretion, cancel the note and release the encumbrance of the mortgage, in whole or in part.

§ 950.529 Termination of Homebuyer Ownership Opportunity Agreement.

(a) *Termination by IHA.* (1) In the event the homebuyer should breach the Homebuyer Ownership Opportunity Agreement by failure to make the required monthly payment within ten days after its due date, by misrepresentation or withholding of information in applying for admission or in connection with any subsequent reexamination of income and family composition, by failure to comply with any of the other homebuyer obligations under the agreement, by loss of homeownership potential (beyond a temporary, unforeseen change in circumstances) (see § 950.503(c)(3)), an income that requires outright purchase (see § 950.525(b)), the IHA may terminate the agreement 30 days after giving the homebuyer notice of its intention to do so in accordance with paragraph (a)(2) of this section.

(2) Notice of termination by the IHA shall be in writing. Such notice shall state:

(i) The reason for termination;

(ii) That the homebuyer may respond to the IHA, in writing or in person, within a specified reasonable period of time regarding the reason for termination;

(iii) That in such response the homebuyer may be represented by the HBA;

(iv) That the IHA will consult the HBA concerning this termination;

(v) That unless the IHA rescinds or modifies the notices, the termination shall be effective at the end of the 30-day notice period; and

(vi) That, in the case of termination as a result of loss of homeownership potential when the homebuyer is otherwise in compliance with the agreement, the family will be offered a transfer to a rental unit (whether or not in concert with a conversion of that unit to the rental program). If a rental unit of appropriate size is available, the family will be notified of a transfer to that unit. If no other unit is then available and the homebuyer's current unit is not to be converted to rental, the family will be notified that it may remain in place until an appropriate rental unit becomes available (in which case the unit remains under the Turnkey III project). Otherwise, the notice shall state that the transfer shall occur as soon as a suitable rental unit is available for occupancy, but no earlier than 30 days from the date of the notice. The notice shall also state that if the homebuyer should refuse to move under such circumstances, the family may be required to vacate the homebuyer unit, without further notice.

(b) *Termination by the homebuyer.* The homebuyer may terminate the Homebuyer Ownership Opportunity Agreement by giving the IHA 30 days notice in writing of this intention to terminate and vacate the home. In the event that the homebuyer vacates the home without notice to the IHA, the agreement shall be terminated automatically and the IHA may dispose of, in any manner deemed suitable by it, any items of personal property left by the homebuyer in the home.

(c) *Transfer to the rental program.* In the event of termination of the Homebuyer Ownership Opportunity Agreement by the IHA or by the homebuyer with adequate notice, the homebuyer may be transferred to a suitable unit in the rental program, in accordance with § 950.503(c)(3)(ii) or terminated from occupancy. If the homebuyer is transferred to the rental program, the amount in the homeowner's EHPA shall be paid in accordance with § 950.517(i).

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Subpart I—Modernization Program

General Provisions

§ 950.600 Purpose and applicability.

(a) *Purpose.* The purpose of this section is to set forth the policies and procedures for the Modernization program, authorizing HUD to provide financial assistance to Indian Housing Authorities (IHAs) to:

(1) Improve the physical condition and upgrade the management and operation of existing Indian housing developments;

(2) Assure that such developments continue to be available to serve low-income families;

(3) Assess the risks of lead-based paint poisoning through the use of professional risk assessments that include dust and soil sampling and laboratory analysis in all developments constructed before 1980 that are, or will be occupied by families; and

(4) Take effective interim measures to reduce and contain the risks of lead-based paint poisoning recommended in such professional risk assessments.

(b) *Applicability.* (1) The undesignated heading entitled, General Provisions, applies to all modernization under this subpart. The undesignated heading entitled, Comprehensive Improvement Assistance Program (CIAP), sets forth the requirements and procedures for the CIAP for IHAs that own or operate fewer than 250 Indian housing units. An IHA that qualifies for participation in the CGP is not eligible to participate in the CIAP. The undesignated heading entitled, Comprehensive Grant program (CGP), sets forth the requirements and procedures for the CGP for IHAs that own or operate 250 or more Indian housing units. For purposes of the 250 or more unit threshold for participation in the CGP, and for the formula allocation under § 950.601, an existing rental, Mutual Help or section 23 bond-financed unit under the ACC shall count as one unit; and a unit under the Turnkey III program shall count as one-fourth of a unit. An IHA that has already qualified to participate in the CGP because it owns or operates 250 or more units, may elect to continue to participate in the CGP so long as it owns or operates at least 200 units.

(2) This subpart applies to IHA-owned low-income Indian housing developments (including developments managed by a Resident Management Corporation pursuant to a contract with the IHA), and to section 23 Leased Housing Bond-Financed developments, for which IHAs request assistance under the CIAP or CGP. This subpart also applies to the implementation of modernization programs which were approved before FFY 1992. Rental developments that are planned for conversion to homeownership under sections 5(h), 21, or 301 of the Act, but which have not yet been sold by an IHA, continue to qualify for assistance under this part. This subpart does not apply to developments under the section 23 Leased Housing Non-Bond Financed program, the section 10(c) Leased program, or the section 23 or section 8 Housing Assistance Payments programs.

(c) *Transition.* Any amount that HUD has obligated to an IHA under CIAP must be used for the purposes for which the funding was provided, or for purposes consistent with an approved action plan submitted by the IHA under the CGP, as the IHA determines to be appropriate.

(d) *Other.* See subpart A of this part for applicable requirements, other than the Act, that apply to modernization under this subpart.

§ 950.601 Allocation of funds under section 14.

(a) *General.* This section describes the process for allocating modernization funds to the aggregate of IHAs and PHAs participating in the CIAP (i.e., agencies that own or operate fewer than 250 units), and to individual IHAs and PHAs participating in the CGP (i.e., agencies that own or operate 250 or more units). The program requirements governing PHA participation in the CIAP and CGP are contained in 24 CFR part 968.

(b) *Set-aside for emergencies and disasters.* For each FFY, HUD shall reserve from amounts approved in the appropriation act for grants under this part and 24 CFR part 968, $75 million (which shall include unused reserve amounts carried over from previous FFYs), which shall be made available to IHAs and PHAs for modernization needs resulting from natural and other disasters, and from emergencies. HUD shall replenish this reserve at the beginning of each FFY so that it always begins with a $75 million balance. Any unused funds from previous years will remain in the reserve until allocated. The requirements governing the reserve for disasters and emergencies and the procedures by which an IHA may request such funds, are set forth in § 950.667.

(c) *Set-aside for credits for mod troubled PHAs under 24 CFR part 968, subpart C.* (1) *General.* After deducting amounts for the reserve for natural and other disasters and for emergencies under paragraph (b) of this section, HUD shall set aside no more than five percent of the remaining amount for the purpose of providing credits to PHAs under 24 CFR part 968 (subpart C) that were formerly designated as mod troubled agencies under the Public Housing Management Assessment program ("PHMAP") at 24 CFR part 901. The purpose of this set-aside is to compensate such PHAs for amounts previously withheld by HUD because of their prior designation as a mod troubled agency.

(2) *Nonapplicability to IHAs.* Since the PHMAP performance indicators under 24 CFR part 901 do not apply to IHAs, these agencies cannot be deemed "mod troubled" for purposes of the CGP. Hence, IHAs are not subject to any reduction in funding under section 14(k)(5)(a) of the Act, nor do they participate in the set-aside of credits established under paragraph (c)(1) of this section.

(d) *Formula allocation based on relative needs.* After determining the amounts to be reserved under paragraphs (b) and (c) of this section, HUD shall allocate the amount remaining pursuant to the formula set forth in paragraphs (e) and (f) of this section, which is designed to measure the relative backlog and accrual needs of IHAs and PHAs.

(e) *Allocation for backlog needs.* HUD shall allocate half of the formula amount under paragraph (d) of this section based on the relative backlog needs of IHAs and PHAs, as follows:

(1) *Determination of backlog need.* (i) *Statistically reliable data.* Where HUD determines that the data concerning the categories of backlog need identified under paragraph (e)(4) of this section are statistically reliable for individual IHAs and PHAs with 250 or more units, or the aggregate of IHAs and PHAs with fewer than 250 units not participating in the formula funding portion of the modernization program, it will base its allocation on direct estimates of the statutory categories of backlog need, based on the most recently available, statistically reliable data.

(ii) *Statistically reliable data are unavailable.* Where HUD determines that statistically reliable data concerning the categories of backlog need identified under paragraph (e)(4) of this section are not available for individual IHAs and PHAs with 250 or more units, it will base its allocation of funds under this section on estimates of the categories of backlog need using:

(A) The most recently available data on the categories of backlog need under paragraph (e)(4) of this section;

(B) Objectively measurable data concerning the following IHA or PHA, community and development characteristics:

(*1*) The average number of bedrooms in the units in a development. (Weighted at 2858.7);

(*2*) The proportion of units in a development available for occupancy by very large families. (Weighted at 7295.7);

(3) The extent to which units for families are in high-rise elevator developments. (Weighted at 5555.8);

(4) The age of the developments, as determined by the DOFA date (date of full availability). In the case of acquired developments, HUD will use the DOFA date unless the IHA provides HUD with the actual date of construction, in which case HUD will use the age of the development (or, for scattered sites, the average age of all the buildings), subject to a 50 year cap. (Weighted at 206.5);

(5) In the case of a large agency, the number of units with 2 or more bedrooms. (Weighted at .433);

(6) The cost of rehabilitating property in the area. (Weighted at 27544.3);

(7) For family developments, the extent of population decline in the unit of general local government determined on the basis of the 1970 and 1980 censuses. (Weighted at 759.5); and

(C) An equation constant of 1412.9.

(2) *Calibration of backlog need for developments constructed prior to 1985.* The estimated backlog need, as determined under either paragraphs (e)(1)(i) or (e)(1)(ii) of this section, shall be adjusted upward for developments constructed prior to 1985 by a constant ratio of 1.5 to more accurately reflect the costs of modernizing the categories of backlog need under paragraph (e)(4) of this section, for the Indian housing stock as of 1991.

(3) *Deduction for prior modernization.* HUD shall deduct from the estimated backlog need, as determined under either paragraphs (e)(1)(i) or (e)(1)(ii) of this section, amounts previously provided to an IHA or PHA for modernization, using one of the following methods:

(i) *Standard deduction for prior CIAP and MROP.* HUD shall deduct 60 percent of the CIAP funds made available on an IHA-wide or PHA-wide basis from FFY 1984 to 1991, and 40 percent of the funds made available on a development-specific basis for the Major Reconstruction of Obsolete Projects (MROP) (not to exceed the estimated formula need for the development), subject to a maximum fifty percent deduction of an IHA's or PHA's total need for backlog funding;

(ii) *Newly constructed units.* Units with a DOFA date of October 1, 1991 or thereafter will be considered to have a zero backlog; or

(iii) *Acquired developments.* Developments acquired by an IHA with major rehabilitation, with a DOFA date of October 1, 1991 or thereafter will be considered to have a zero backlog.

(4) *Categories of backlog need.* The most recently available data to be used under either paragraphs (e)(1)(i) or (e)(1)(ii) of this section must pertain to the following categories of backlog need:

(i) Backlog of needed repairs and replacements of existing physical systems in Indian housing developments;

(ii) Items that must be added to developments to meet HUD's modernization standards under § 950.603, and State, local and Tribal codes; and

(iii) Items that are necessary or highly desirable for the long-term viability of a development, in accordance with HUD's modernization standards.

(f) *Allocation for accrual needs.* HUD shall allocate the other half remaining under the formula allocation under paragraph (d) of this section based upon the relative accrual needs of IHAs and PHAs, determined as follows:

(1) *Statistically reliable data.* Where HUD determines that statistically reliable data are available concerning the categories of need identified under paragraph (f)(3) of this section for individual IHAs and PHAs with 250 or more units and for the aggregate of IHAs and PHAs with fewer than 250 units it shall base its allocation of assistance under this section on the needs that are estimated to have accrued since the date of the last objective measurement of backlog needs under paragraph (e)(1)(i) of this section; or

(2) *Statistically reliable data are unavailable.* Where HUD determines that statistically reliable data concerning the categories of need identified under paragraph (f)(3) of this section are not available for individual IHAs and PHAs with 250 or more units, it shall base its allocation of assistance under this section on estimates of accrued need using:

(i) The most recently available data on the categories of backlog need under paragraph (f)(3) of this section;

(ii) Objectively measurable data concerning the following IHA or PHA, community, and development characteristics:

(A) The average number of bedrooms in the units in a development. (Weighted at 100.1);

(B) The proportion of units in a development available for occupancy by very large families. (Weighted at 356.7);

(C) The age of the developments. (Weighted at 10.4);

(D) The extent to which the buildings in developments of an agency average fewer than 5 units. (Weighted at 87.1.);

(E) The cost of rehabilitating property in the area. (Weighted at 679.1);

(F) The total number of units of each IHA or PHA that owns or operates 250 or more units. (Weighted at .0144); and

(iii) An equation constant of 602.1.

(3) *Categories of need.* The data to be provided under either paragraph (f)(1) or (f)(2) of this section must pertain to the following categories of need:

(i) Backlog of needed repairs and replacements of existing physical systems in Indian housing developments; and

(ii) Items that must be added to developments to meet HUD's modernization standards under § 950.603, and State, local and Tribal codes.

(g) *Allocation for CIAP.* The formula amount determined under paragraphs (e) and (f) of this section for IHAs and PHAs with fewer than 250 units shall be allocated to IHAs in accordance with the requirements of the undesignated heading under this subpart entitled, "Comprehensive Improvement Assistance Program," (CIAP) and to PHAs in accordance with the requirements of 24 CFR part 968 (subpart B).

(h) *Allocation for CGP.* The formula amount determined under paragraphs (e) and (f) of this section for IHAs with 250 or more units shall be allocated in accordance with the requirements of the undesignated heading under this subpart entitled, "Comprehensive Grant Program," and for PHAs in accordance with the requirements of 24 CFR part 968 (subpart C). An IHA that is eligible to receive a grant under the CGP may appeal the amount of its formula allocation under this section in accordance with the requirements set forth in § 950.669(b). An IHA which is eligible to receive modernization funds under the CGP because it owns or operates 250 or more units, is disqualified from receiving assistance under the CIAP under this part.

(i) *Use of formula allocation.* Any amounts allocated to an IHA under paragraphs (e) and (f) of this section may be used for any eligible activity under this subpart, notwithstanding that the allocation amount is determined by allocating half based on the relative backlog needs and half based on the relative accrual needs of IHAs and PHAs.

(j) *Calculation of number of units.* For purposes of determining under this section the number of units owned or operated by an IHA or PHA, and the relative modernization needs of IHAs and PHAs, HUD shall count as one unit each existing rental, Mutual Help and section 23 Bond-Financed unit under the ACC, except that it shall count as one-fourth of a unit each existing unit under the Turnkey III program. New development units that are added to an IHA's or PHA's inventory will be added to the overall unit count so long as they

are under ACC amendment and have reached DOFA by the first day in the FFY in which the formula is being run. Any increase in units (reaching DOFA and under ACC amendment) as of the beginning of the FFY shall result in an adjustment upwards in the number of units under the formula. New units reaching DOFA after this date will be counted for formula purposes as of the following FFY.

(k) *Demolition, disposition and conversion of units.* (1) *General.* Where an existing unit under an ACC is demolished, disposed of, or converted into a larger or smaller unit, HUD shall not adjust the amount the IHA or PHA receives under the formula, unless more than one percent of the units are affected on a cumulative basis. Where more than one percent of the existing units are demolished, disposed of, or converted, HUD shall reduce the formula amount for the IHA or PHA over a 3-year period to reflect removal of the units from the ACC.

(2) *Determination of one percent cap.* In determining whether more than one percent of the units are affected on a cumulative basis, HUD will compare the units eligible for funding in the initial year under formula funding with the number of units eligible for funding for formula funding purposes for the current year, and shall base its calculations on the following:

(i) Increases in the number of units resulting from the conversion of existing units will be added to the overall unit count so long as they are under ACC amendment by the first day of the FFY in which the formula is being run;

(ii) Units which are lost as a result of demolition, disposition or conversion shall not be offset against units subsequently added to an IHA's or PHA's inventory;

(iii) For purposes of calculating the number of converted units, HUD shall regard the converted size of the unit as the appropriate unit count (e.g., a unit that originally was counted as one unit under paragraph (j) of this section, but which later was converted into two units, shall be counted as two units under the ACC).

(3) *Phased-in reduction of units.* (i) *Reduction less than one percent.* If HUD determines that the reduction in units under paragraph (k)(2) of this section is less than one percent, the IHA or PHA will be funded as though no change had occurred.

(ii) *Reduction greater than one percent.* If HUD determines that the reduction in units under paragraph (k)(2) of this section is greater than one percent, the number of units on which formula funding is based will be the number of units reported as eligible for funding for the current program, plus two thirds of the difference between the initial year and the current year in the first year, plus one third of the difference in the second year, and at the level of the current year in the third year.

(iii) *Exception.* A unit that is conveyed under the Mutual Help or Turnkey III programs will result in an automatic (rather than a phased-in) reduction in the unit count.

(4) *Subsequent reductions in unit count.* (i) Once an IHA's or PHA's unit count has been fully reduced under paragraph (k)(3)(ii) of this section to reflect the new number of units under the ACC, this new number of units will serve as the base for purposes of calculating whether there has been a one-percent reduction in units on a cumulative basis.

(ii) A reduction in formula funding, based upon additional reductions to the number of an IHA's or PHA's units, will also be phased in over a three-year period, as described in paragraph (k)(2) of this section.

§ 950.602 Special requirements for Turnkey III and Mutual Help developments.

(a) *Modernization costs.* Modernization work on a Mutual Help or Turnkey III unit shall not increase the purchase price or amortization period of the home.

(b) *Paid off units.* (1) *Turnkey III units.* Modernization work on any Turnkey III units that have been paid off, even though not conveyed, by the time the CIAP application or CGP annual statement is submitted is ineligible. However, modernization work on any Turnkey III units that have not been paid off at the time the CIAP application or CGP annual statement is submitted and that is included in the CIAP application or annual statement is eligible even where the units are subsequently paid off before the work is completed. Notwithstanding this requirement, work which is necessary to meet statutory and regulatory requirements (e.g., handicapped accessibility, lead-based paint testing, interim containment, professional risk assessment, and abatement) may be performed on paid off Turnkey III units so long as the work is completed prior to conveyance.

(2) *Mutual Help units.* An IHA may use CIAP or CGP funds under this subpart for the purposes of modernizing a Mutual Help unit which is paid off though not conveyed, and may do so only with a unit which the IHA has identified in its CIAP application or Comprehensive Plan (including its action plan and work statement). In accordance with the provisions of § 950.440(e)(8)(iii), an IHA may perform non-emergency work on a paid off Mutual Help unit only after all delinquencies are repaid.

(c) *Other.* The homebuyer family must be in compliance with its financial obligations under its homebuyer agreement in order to be eligible for non-emergency physical improvements, with the exception of work necessary to meet statutory and regulatory requirements, (e.g., handicapped accessibility, lead-based paint testing, interim containment, professional risk assessment, and abatement) and the correction of development deficiencies. Notwithstanding the above requirement, an IHA may, with prior HUD Field Office approval, complete non-emergency physical improvements on any homeownership unit where the IHA demonstrates that, due to economies of scale or geographic constraints, substantial cost savings may be realized by completing all necessary work in a development at one time.

§ 950.603 Modernization and energy conservation standards.

(a) All improvements funded under this subpart, which may include alterations, betterments, additions, replacements or non-routine maintenance, shall meet the HUD modernization standards, described in paragraph (b) of this section, comply with lead-based paint testing and abatement requirements in subpart H of this part, and provide decent, safe, and sanitary living conditions in IHA-owned and IHA-operated housing. All improvements funded under this part shall meet the HUD-energy conservation standards for cost-effective energy conservation measures in such developments, described in paragraphs (c) and (d) of this section.

(b) The modernization standards are comprised of both mandatory and development-specific standards. The mandatory standards are intended to provide decent, safe, and sanitary living conditions in Indian housing, including corrections of violations of basic health and safety codes, and to address all deficiencies, including those related to deferred maintenance. The development-specific standards permit an IHA to undertake improvements that are necessary or highly desirable for the long-term physical and social viability of a development, which includes site and building security. The modernization standards are contained in HUD Handbook 7485.2, as revised, Public and Indian Housing

Modernization Standards, and in other documents cited in the Handbook.

(c) The energy conservation standards are standards for the installation of cost-effective energy conserving improvements, including solar energy systems. The energy conservation standards provide for the conducting or updating of energy audits, including cost-benefit analyses of energy saving opportunities, in order to determine which measures will be cost effective in conserving energy. The energy conservation standards are contained in the HUD Workbook, Energy conservation for Housing, and in other documents cited in the Workbook.

(d) Life-cycle cost-effective energy performance standards established by HUD to reduce the operating costs of Indian housing developments over the estimated life of the buildings shall apply to developments modernized under this subpart. These standards are contained in HUD Handbook 7418.1, as revised, Life-Cycle Cost Analysis for Utility Combinations.

(Approved by the Office of Management and Budget under control number 2577–0024.)

Comprehensive Improvement Assistance Program (For IHAs that Own or Operate Fewer than 250 Indian Housing Units)

§ 950.609 Purpose.

The purpose of the undesignated heading entitled, Comprehensive Improvement Assistance Program (CIAP), is to set forth the policies and procedures for the CIAP under which IHAs that own or operate fewer than 250 units of Indian housing may receive financial assistance for the modernization of Indian housing developments, including Emergency and Other Modernization. Funding for this program is provided under section 5(c) of the Act (42 U.S.C. 1437c(c)), pursuant to section 14(k) of the Act (42 U.S.C. 1437l(k)) (see § 950.601 for the formula allocation process for the aggregate of CIAP agencies under this subpart).

§ 950.615 Eligible costs.

(a) *Demonstration of viability.* Except in the case of emergency work, an IHA shall only expend funds on a development for which the IHA has determined, and HUD agrees, that the completion of the improvements and replacements will reasonably ensure the long-term physical and social viability of the development at a reasonable cost, as defined in § 950.102.

(b) *Physical improvement costs for rental and Mutual Help developments.* Eligible costs include alterations, betterments, non-dwelling additions, replacements, and non-routine maintenance that are necessary to meet the modernization and energy conservation standards prescribed in § 950.603. The modernization standards include mandatory and development specific work. The mandatory standards may be exceeded only when the IHA and HUD determine that it is necessary or highly desirable for the long-term physical and social viability of the individual development. If demolition or disposition is proposed, the IHA shall comply with subpart M of this part.

(c) *Turnkey III developments.* (1) *General.* Eligible physical improvement costs for existing Turnkey III developments are limited to work items under Emergency Modernization or Other Modernization which are not the responsibility of the homebuyer families, and which are related to health and safety, correction of development deficiencies, physical accessibility, energy audits and cost-effective energy conservation measures, or lead-based paint testing, interim containment, professional risk assessment and abatement. In addition, eligible costs include management improvements under the modernization type of Other Modernization.

(2) *Ineligible costs.* Nonroutine maintenance or replacements, dwelling additions, and items that are the responsibility of the homebuyer families are ineligible costs.

(3) *Exception for vacant or non-homebuyer-occupied Turnkey III units.*

(i) Notwithstanding the requirements of paragraph (c)(1) of this section, an IHA may carry out Other Modernization in a Turnkey III development, whenever a Turnkey III unit becomes vacant or is occupied by a non-homebuyer family. An IHA that intends to use funds under this paragraph must identify in its CIAP application, the estimated number of units proposed for Other Modernization and subsequent sale. In addition, an IHA must certify that the IHA has homebuyers who are both eligible for homeownership, in accordance with the requirements of this part, and who have demonstrated their intent to be placed into each of the Turnkey III units proposed for Other Modernization.

(ii) Before an IHA may be approved for Other Modernization of a unit under this paragraph, it must first deplete any Earned Home Payments Account (EHPA), or Non-Routine Maintenance Reserve (NRMR) pertaining to the unit, and request the maximum operating subsidy. Any increase in the value of a unit caused by its Other Modernization under this paragraph shall be reflected solely by its subsequent appraised value, and not by an automatic increase in its purchase price.

(d) *Demolition and conversion costs.* Eligible costs include:

(1) Demolition of dwelling units or non-dwelling facilities, where the demolition is approved by HUD under subpart M of this part, and related costs, such as clearing and grading the site after demolition and subsequent site improvement to benefit the remaining portion of the existing development; and

(2) Conversion of existing dwelling units to different bedroom sizes or to non-dwelling use.

(e) *Management improvement costs.* (1) *General.* Management improvements that are development-specific or IHA-wide in nature are eligible costs where needed to upgrade the operation of the IHA's developments, sustain physical improvements at those developments or correct management deficiencies. Management improvements and planning costs may be funded as a single modernization project.

(2) *Ineligible costs.* An IHA's ongoing operating expenses, including direct provision of social services through either contract or force account labor, are ineligible management improvement costs. In addition, where an approved modernization program includes management improvements which involve ongoing costs, HUD is not obligated to provide continued funding or additional operating subsidy after the end of the implementation period of the management improvements. An IHA is responsible for finding other funding sources, reducing its ongoing management costs, or terminating the management activities.

(3) *Eligible costs.* Eligible costs include:

(i) *General management costs.* Eligible general management costs include, but are not limited to: Management, financial, and accounting control systems of the IHA, rent collection and maintenance.

(ii) *Economic development costs.* Economic development activities, such as job training and resident employment, for the purpose of carrying out activities related to the eligible management and physical improvements are eligible costs, as approved by HUD. HUD encourages IHAs, to the greatest extent feasible, to hire residents as trainees, apprentices, or employees to carry out the modernization program under this subpart.

(iii) *Resident management costs.* Technical assistance to a resident council or resident management corporation (RMC), as defined in

subpart O of this part, in order to determine the feasibility of the resident management entity or assist in its formation is an eligible cost.

(iv) *Resident homeownership costs.* The study of the feasibility of converting rental to homeownership units, as well as the preparation of an application for conversion to homeownership, is an eligible cost.

(f) *Drug elimination costs.* Drug elimination activities involving management or physical improvements are eligible costs, as specified by HUD.

(g) *Administrative costs.* Administrative costs necessary for the planning (planning costs can be funded as a single modernization project), design, implementation and monitoring of the physical and management improvements are eligible costs, and include the following:

(1) The salaries of nontechnical and technical IHA personnel assigned full-time or part-time to modernization are eligible costs only where the scope and volume of the work are beyond that which could reasonably be expected to be accomplished by such personnel in the performance of their non-modernization duties. An IHA shall properly apportion to the appropriate program budget any direct charges for the salaries of assigned full- or part-time staff (e.g., to the CIAP or operating budget);

(2) IHA contributions to employee benefit plans on behalf of nontechnical and technical IHA personnel are eligible costs in direct proportion to the amount of salary charged to the CIAP; and

(3) Other administrative costs, such as telephone and facsimile, as specified by HUD.

(h) *Architectural/engineering and consultant fees.* Fees for planning, preparation of needs assessments and other required documents, detailed design work, assistance in the preparation of construction and bid documents, lead-based paint professional risk assessments and testing are eligible costs.

(i) *Relocation and moving costs.* Relocation and other relocation assistance for permanent and temporary relocation are eligible costs, where this assistance is required by § 950.117.

(j) *Cost limitations.* (1) *Management improvements.* Management improvement costs shall not exceed 10 percent of the CIAP funds available to an Indian Field Office in a particular FFY.

(2) *Planning costs.* Planning costs are costs incurred before HUD approval of the CIAP application and which are related to developing the CIAP application or carrying out eligible modernization planning, such as detailed design work, preparation of solicitations, and lead-based paint professional risk assessment and testing. Planning costs may be funded as a single modernization project. If an IHA incurs planning costs without prior HUD approval, an IHA does so with the full understanding that the costs may not be reimbursed upon approval of the CIAP application. Planning costs shall not exceed 5 percent of the CIAP funds available to an Indian Field Office in a particular FFY.

(3) *Program benefit.* Where the physical or management improvement will benefit programs other than Indian Housing, such as Section 8, local renewal, eligible costs are limited to the amount directly attributable to the Indian Housing Program.

(k) *Ineligible costs.* An IHA shall not make luxury improvements, or carry out any other ineligible activities, as specified by HUD.

§ 950.618 Procedures for obtaining approval of a modernization program.

(a) *HUD notification.* After modernization funds for a particular FFY become available, HUD shall publish in the **Federal Register** a notice of funding availability (NOFA) and the time frame for submission of applications.

(b) *IHA consultation with local officials and residents/homebuyers.* An IHA shall develop the application in consultation with local officials and resident and homebuyers, as set forth in § 950.624.

(c) *IHA application.* An IHA shall submit to HUD an application, in a form prescribed by HUD, which shall include:

(1) A general description of IHA development(s) (including the current physical condition, for each development for which the IHA is requesting funds, or for all the IHA's developments) and physical and management improvement needs (to meet the Secretary's standards in § 950.603), general description of major work categories (e.g., kitchens, bathrooms) required to correct identified deficiencies and estimated costs, including a statement concerning consultation with local officials and residents and viability of the development(s). The application will also identify a cost estimate for the equipment systems or structural elements which would normally be replaced over the remaining period of the annual contributions contract or during the 30-year period beginning on the date of submission of the application.

(2) For management improvements, the application must identify the management improvement need, including a general description of the work required for correction and an estimated cost. Management areas for which needs should be identified include, but are not limited to, the following:

(i) The management, financial, and accounting control systems of the IHA;

(ii) The adequacy and qualifications of personnel employed by such IHA (in the management and operation of such developments) for each category of employment; and

(iii) The adequacy and efficacy of resident programs and services in such developments, the security of each such development and its residents, policies and procedures of the IHA for the selection and eviction of residents in such developments, and other policies and procedures of such IHA relating to such developments, as specified by the Secretary; and

(3) Any other documents, as may be required by HUD.

(d) *Completeness review.* To be eligible for selection, an application must be received by the Field Office within the time period specified in the NOFA and must be complete. In order to determine whether an application is complete, responsive to the NOFA and acceptable for technical processing, the Field Office shall perform an initial completeness review upon receipt of the application. To make the above determination, the Field Office shall use the following criteria:

(1) The application was received by HUD at the appropriate address by the date and time specified in the NOFA and was complete and responsive (excluding exhibits which are certifications); or

(2) If an application is determined to be incomplete or to have missing certifications, the IHA shall be advised in writing of any deficiencies or any inconsistencies. The missing information is to be submitted within a specified period of time from the date of HUD's written notification. This is not additional time to substantially revise the application. Deficiencies which may be corrected at this time are inadvertently omitted documents or clarifications of previously submitted material and other changes which are not of such a nature as to improve the competitive position of the application. The IHA must acceptably correct deficiencies (including furnishing missing certifications) within the time specified in the NOFA.

(e) *Eligibility review.* (1) *Eligibility for processing.* To be eligible for processing,

based on the general description of its developments' condition and general statement of physical and management improvement needs, and the Field Office's knowledge of the development's conditions, the work items, particularly emergency work items, must appear to be eligible and needed.

(2) *Eligibility review on reduced scope.* When the following conditions exist, the IHA will be reviewed on a reduced scope:

(i) Where the IHA owes funds to HUD as a result of excess development, modernization or operating funds previously provided and the IHA has not repaid the funds, or has not entered into a repayment agreement, or is not meeting its obligations under a repayment agreement, the IHA is eligible for processing for Emergency Modernization only.

(ii) Where the IHA has not complied with Fair Housing and Equal Opportunity (FHEO) requirements as set forth in § 950.115, as evidenced by an action, finding or determination as described in paragraphs (e)(2)(ii)(A) through (E) of this section, unless the IHA is implementing a voluntary compliance agreement or settlement agreement designed to correct the area(s) of noncompliance, the IHA is eligible for processing only for Emergency Modernization or for work needed to remedy civil rights deficiencies.

(A) A pending proceeding against the IHA based upon a charge of discrimination issued under the Fair Housing Act. A charge of discrimination is a charge under section 810(g)(2) of the Fair Housing Act (42 U.S.C. 3610(g)(2)), issued by the HUD's General Counsel or legally authorized designee;

(B) A pending civil rights suit against the IHA, referred by the HUD's General Counsel and instituted by the Department of Justice;

(C) Outstanding HUD findings of IHA noncompliance with civil rights statutes and executive orders under § 950.115, or implementing regulations, as a result of formal administrative proceedings, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance;

(D) A deferral of the processing of applications from the IHA imposed by HUD under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and § 950.115, the Attorney General's Guidelines (28 CFR 50.3) and HUD's title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1), or under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and HUD's implementing regulations (24 CFR 8.57); or

(E) An adjudication of a violation under any of the authorities under § 950.115 in a civil action filed against the IHA by a private individual, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance.

(3) *FHEO Division review.* The processing office shall request the appropriate FHEO Division of the Field or Regional Office to identify any IHAs with equal opportunity-related problems. After consulting with Regional FHEO, as appropriate, and reviewing its own files, the FHEO Division shall identify each IHA by the following categories and provide any other relevant information within the requested time frame:

(i) There are no known equal opportunity-related problems;

(ii) There are known equal opportunity-related problems, as identified; or

(iii) There are circumstances as set forth in paragraph (e)(2) of this section.

(f) *Technical processing.* When an application is determined to be complete and responsive to the NOFA and eligible for processing, technical processing, consisting of the following, shall be accomplished:

(1) The Field Office shall categorize the eligible IHAs and their developments into two processing groups: Group 1 for Emergency Modernization; and Group 2 for Other Modernization. IHA developments may be included in both groups and the same development may be in each group. The IHA only needs to submit one application which includes needs which the Field Office will process under Group 1 or Group 2. However, the IHA can submit Emergency Modernization applications whenever needed. Group 2 developments are subject to the long-term viability and reasonable cost analysis. Preference will be given to IHAs which request assistance for developments having conditions which threaten the health or safety of the residents or having a significant number of vacant, substandard units; and which have demonstrated a capability of carrying out the activities proposed. Within Group 2, the Secretary may give priority to compliance with statutory, regulatory, and court-ordered deadlines.

(2) The Field Office will evaluate the Group 2 IHAs and developments to determine eligibility and acceptability based on the technical review factors in paragraph (g) of this section. Based on these factors, the Field Office shall determine the applications which, in its judgment, are approvable. Selections then shall be made in accordance with paragraph (h) of this section.

(g) *Technical review factors.* The technical review factors for assistance include:

(1) Extent and urgency of need, including need to comply with statutory, regulatory, or court-ordered deadlines;

(2) Extent of vacancies;

(3) IHA's modernization capability;

(4) IHA's management capability;

(5) Degree of resident involvement in IHA operations;

(6) Degree of IHA activity in resident initiatives, including resident management, economic development, and drug elimination efforts;

(7) Degree of resident employment;

(8) Local government support for proposed modernization; and

(9) Such additional factors as the Secretary determines necessary and appropriate.

(h) *Rating and ranking.* The Field Office shall rate and rank each application in Group 2 on the basis of its assessment of the application using the technical review factors set forth in paragraph (g) of this section and in the NOFA. The Field Office shall identify for joint review selection the highest IHA ranking applications in Group 2 in descending order and other Group 2 HAs with lower ranking applications but with high priority needs, which most reasonably approximate the amount of modernization which can be funded. High priority needs are non-emergency needs, but related to: health or safety; vacant, substandard units; structural or system integrity; or compliance with statutory, regulatory or court-ordered deadlines. All Group 1 applications would be automatically selected for joint review.

(i) *Joint review.* HUD shall notify each IHA whose application has been selected for further processing as to whether the joint review will be conducted on-site or off-site (*e.g.*, by telephone or in-office meeting). The purpose of the joint review is to discuss the proposed modernization program, as set forth in the application, and determine the size of the grant, if any, to be awarded. Where the IHA has not included all its developments in the CIAP application, HUD may not, as a result of joint review consider funding any non-emergency work at excluded developments or subsequently approve use of leftover funds at excluded developments. An IHA shall prepare for the joint review by preparing a draft CIAP budget, and reviewing the other

items to be covered during the joint review, as prescribed by HUD. If conducted on-site, the joint review may include an inspection of the proposed physical work. IHAs not selected for joint review will be advised in writing of the reasons for nonselection.

(j) *HUD awards.* Upon completion of the joint review, HUD shall adjust the amounts to be awarded, as necessary, based on information obtained at Joint Review, including the information received as a result of the FHEO review and completion of the environmental review, and announce the IHAs selected for CIAP grants (subject to their submission of an approvable CIAP budget and any other required documents). HUD would request the funded IHA to submit a CIAP budget, including an implementation schedule, a resolution by the IHA Board of Commissioners (approving the CIAP budget and containing certifications required by HUD), and any other necessary documents.

(k) *ACC amendment.* After HUD approval of the CIAP budget, HUD and the IHA shall enter into an ACC amendment in order for the IHA to requisition modernization funds. The ACC amendment shall require low-income use of the housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC). HUD has the authority to condition an ACC amendment (e.g., to require an IHA to hire a modernization coordinator or contract administrator to a administer its modernization program).

(l) *Declaration of trust.* An IHA shall execute and file for record a Declaration of Trust as provided under the ACC to protect the rights and interests of HUD throughout the 20-year period during which the IHA is obligated to operate its developments in accordance with the ACC, the Act, and HUD regulations and requirements. A Declaration of Trust is not required for Mutual Help units.

§ 950.624 Resident and homebuyer participation.

(a) *Resident participation.* For a rental development only, the IHA shall establish a Partnership Process, as defined in § 950.102, to develop, implement and monitor the CIAP. Before submission of the application, an IHA shall consult with the residents, the resident organization or the RMC (see subpart O of this part) of the development being proposed for modernization regarding its intent to submit an application for CIAP funds. An IHA shall give residents a reasonable opportunity to present their views on the proposed modernization program and alternatives to it, and give full and serious consideration to resident recommendations. An IHA shall respond in writing to the residents, the resident organization or the RMC, indicating its acceptance or rejection of resident recommendations, consistent with HUD requirements and the IHA's own determination of efficiency, economy, and need. After HUD approval of the modernization program, an IHA shall inform the residents, the resident organization or the RMC of the approved work items and its progress during implementation. Where HUD does not approve the modernization program, an IHA shall so inform the residents, the resident organization or the RMC.

(b) *Homebuyer participation: Turnkey III and Mutual Help.* For a homeownership development only, before submission of the application, an IHA shall consult with the homebuyer families of the development proposed for modernization regarding its intent to submit an application for CIAP funds. An IHA shall give the homebuyer families a reasonable opportunity to present their views on the proposed modernization program and alternatives to it, and give full and serious consideration to their recommendations. An IHA shall respond in writing to the homebuyer families, indicating its acceptance or rejection of their recommendations, consistent with HUD requirements and the IHA's own determination of efficiency, economy, and need. After HUD approval of the modernization program, an IHA shall inform the homebuyer families of the approved work items and its progress during implementation. Where HUD does not approve the modernization program, an IHA shall so inform the homebuyer families.

§ 950.635 Initiation of modernization activities.

After HUD has approved the modernization program and entered into an ACC amendment with the IHA, an IHA shall undertake the modernization activities and expenditures set forth in its approved CIAP budget in a timely, efficient and economical manner, subject to the following requirement. An IHA shall ensure that there is no duplication between the activities carried out with CIAP funds and the activities carried out with other funds.

§ 950.639 Fund requisitions.

An IHA shall requisition modernization funds against the approved CIAP budget in accordance with procedures prescribed by HUD.

§ 950.642 Contracting requirements.

An IHA shall comply with the prevailing wage rate requirements in §§ 950.120 and 950.172, as well as the Indian Preference requirements in § 950.175. In addition, an IHA shall comply with State, Tribal and local laws and Federal requirements, as set forth in 24 CFR part 85, except as follows:

(a) *Architect/engineer and other professional services contracts.* Notwithstanding 24 CFR 85.36(g), an IHA shall comply with HUD requirements to either:

(1) Where the proposed contract amount exceeds the HUD-established threshold, submit the contract for prior HUD approval before execution or issuance; or

(2) Where the proposed contract amount does not exceed the HUD-established threshold, certify that the scope of work is consistent with any agreements reached with HUD, and that the amount is appropriate and does not exceed the HUD-approved CIAP budget amount.

(b) *Assurance of completion.* For each construction contract over $25,000, the contractor shall furnish a performance and payment bond for 100 percent of the contract price or, notwithstanding 24 CFR 85.36(h), a twenty percent cash escrow, or a twenty-five percent letter of credit or, as may be required by law, separate performance and payment bonds, each for fifty percent or more of the contract price.

(c) *Construction solicitations.* Notwithstanding 24 CFR 85.36(g), an IHA shall comply with HUD requirements to either:

(1) Where the estimated contract amount exceeds the HUD-established threshold, submit a complete construction solicitation for prior HUD approval before issuance; or

(2) Where the estimated contract amount does not exceed the HUD-established threshold, certify receipt of the required architect's/engineer's certification that the construction documents accurately reflect HUD-approved work and meet the modernization and energy conservation standards and that the construction solicitation is complete and includes all mandatory items.

(d) *Contract awards.* An IHA shall obtain HUD approval of the proposed award of a contract if the award exceeds the HUD-approved CIAP budget amount or if the procurement meets the criteria set forth in 24 CFR 85.36(g)(2) (i) through (iv). In all other instances, an IHA shall make the award without HUD approval after the IHA has certified that:

(1) The solicitation and award procedures were conducted in

compliance with State, Tribal and local laws and Federal requirements;

(2) The award does not exceed the approved CIAP budget amount and does not meet the criteria in 24 CFR 85.36(g)(2) (i) through (iv) for prior HUD approval;

(3) The contractor is not on the Lists of Parties Excluded from the Federal Procurement or Nonprocurement Programs; and

(e) *Contract modifications.* Notwithstanding 24 CFR 85.36(g), except in an emergency endangering life or property, an IHA shall comply with HUD requirements to either:

(1) Where the proposed contract modification exceeds the HUD-established threshold, submit the proposed modification for prior HUD approval before issuance; or

(2) Where the proposed contract modification does not exceed the HUD-established threshold, certify that the proposed modification is within the scope of the contract and that any additional costs are within the latest HUD-approved CIAP budget or otherwise approved by HUD.

(f) *Construction requirements.* An IHA may be required to submit to HUD periodic progress reports and construction completion documents for prior HUD approval above a HUD-specified amount.

(g) *Previous participation.* An IHA shall ensure that the contractor is not on the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

§ 950.645 On-site inspections.

It is the responsibility of the IHA, not HUD, to provide, by contract or otherwise, adequate and competent supervisory and inspection personnel during modernization, whether work is performed by contract or force account labor and with or without the services of an architect/engineer, to assure work quality and progress.

§ 950.648 Budget revisions.

An IHA shall not incur any modernization cost in excess of the total HUD-approved CIAP budget. An IHA shall submit a budget revision, in a form prescribed by HUD, if the IHA plans (within the total approved CIAP budget) to incur modernization costs in excess of the approved CIAP budget amount for any development. An IHA also shall comply with HUD requirements to either:

(a) Submit the proposed CIAP budget revision for prior HUD approval if the IHA plans to delete or substantially revise approved work items, add new work items, or incur modernization costs in excess of the HUD-established threshold; or

(b) Certify that the revisions are necessary to carry out the approved work and do not result in the approved CIAP budget amount for any development being exceeded.

§ 950.651 Progress reports.

For each six-month period, beginning October 1, until completion of the modernization program or expenditure of all funds, an IHA shall submit a report, in a form prescribed by HUD, to the HUD Field Office. Where HUD determines that an IHA is having implementation problems, HUD may require more frequent reporting. The report shall include:

(a) Modernization fund obligations and expenditures and progress against the approved implementation schedule(s); and

(b) Management improvement progress, where applicable.

§ 950.654 HUD review of IHA performance.

HUD shall periodically review IHA performance in carrying out its approved modernization program to determine compliance with HUD requirements, the quality of an IHA's inspections as evidenced by the quality of work, and the timeliness of the work. Where deficiencies are noted, an IHA shall take corrective action, as directed by HUD.

§ 950.657 Fiscal closeout.

Upon completion or termination of a modernization program, the IHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to HUD for review, audit verification, and approval. An IHA shall immediately remit any excess funds provided by HUD. The audit shall follow the guidelines prescribed in 24 CFR part 44, Non-Federal Government Audit Requirements. If the audited modernization cost certificate indicates that there are still excess funds, an IHA shall immediately remit the excess funds as directed by HUD. If the audited modernization cost certificate discloses unauthorized or ineligible expenditures, an IHA shall take such corrective actions as HUD may direct.

Comprehensive Grant Program (For IHAs That Own or Operate 250 or More Indian Housing Units)

§ 950.660 Purpose.

(a) The purpose of the Comprehensive Grant Program (CGP) under this subpart is:

(1) To provide modernization assistance to IHAs that own or operate a total of 250 or more units of Indian Housing on a reliable and more predictable basis, to enable them to operate, upgrade, modernize, and rehabilitate Indian housing developments, to ensure their continued availability for low income families as decent, safe, and sanitary housing;

(2) To provide considerable discretion to IHAs to decide the specific improvements, the manner of their execution, and the timing of the expenditure of funds;

(3) To simplify significantly the program of Federal assistance for capital improvements in Indian Housing developments;

(4) To provide increased opportunities and incentives for more efficient management of Indian housing developments; and

(5) To give IHAs greater control in planning and expending funds for modernization, rehabilitation, maintenance, and improvement of Indian housing developments to benefit low income families.

(b) The purpose of the sections under the undesignated heading entitled, Comprehensive Grant Program (CGP), is to set forth the policies and procedures for the CGP under which IHAs that own and operate a total of 250 or more units of Indian housing receive financial assistance on a formula grant basis in accordance with § 950.601(e) and (f) for the modernization of Indian housing developments.

§ 950.666 Eligible costs.

(a) *General.* An IHA may use financial assistance received under the CGP for the following eligible costs:

(1) Undertaking activities described in its approved action plan under § 950.672(d)(5);

(2) Carrying out emergency work, whether or not the need is indicated in the IHA's approved Comprehensive Plan (including Five-Year Action Plan) or Annual Submission;

(3) Funding a replacement reserve to carry out eligible activities in future years, subject to the restrictions set forth in paragraph (f) of this section;

(4) Preparing the Comprehensive Plan and action plan under § 950.672, including reasonable costs necessary to assist residents to participate in a meaningful way in the planning, implementation and monitoring process; and

(5) Carrying out an audit, in accordance with 24 CFR part 44 and § 950.120.

(b) *Demonstration of viability.* Except in the case of emergency work, an IHA shall only expend funds on a development for which the IHA has demonstrated that completion of the

improvements and replacements identified in the Comprehensive Plan will reasonably ensure the long-term physical and social viability of the development at a reasonable cost.

(c) *Physical improvement costs for rental and Mutual Help developments.* Eligible costs include alterations, betterments, additions, replacements, and non-routine maintenance that are necessary to meet the modernization and energy conservation standards prescribed in § 950.603. These mandatory standards may be exceeded only when the IHA determines that it is necessary or highly desirable for the long-term physical and social viability of the individual development. Such development specific work may include property purchases. If demolition or disposition is proposed, the IHA shall comply with subpart M of this part.

(d) *Costs for Turnkey III developments.* (1) *Eligible costs.* Eligible physical improvement costs for existing Turnkey III developments are limited to work items which are not the responsibility of homebuyer families and which are related to health and safety, correction of development deficiencies, physical accessibility, energy audits and cost-effective energy conservation measures, and lead-based paint testing and abatement. In addition, management improvements are eligible modernization costs for existing homeownership developments.

(2) *Ineligible costs.* Nonroutine maintenance or replacements, additions, and items that are the responsibility of the homebuyer families are ineligible costs.

(3) *Exception for vacant or non-homebuyer-occupied Turnkey III units.* (i) Notwithstanding the requirements of paragraph (d)(2) of this section, an IHA may substantially rehabilitate a Turnkey III development whenever a unit becomes vacant or is occupied by a non-homebuyer family. An IHA that intends to use funds under this paragraph must identify in its needs assessment the estimated number of units that the IHA is proposing for substantial rehabilitation and subsequent sale. In addition, an IHA must demonstrate in its needs assessment that: the IHA has homebuyers who are both eligible for homeownership, in accordance with the requirements of subpart G of this part, and who have demonstrated their intent to be placed into each of the Turnkey III units proposed to be substantially rehabilitated.

(ii) Before an IHA may be approved for the substantial rehabilitation of a unit under this paragraph, it must first deplete any Earned Home Payments Account (EHPA) or Non-Routine Maintenance Reserve (NRMR) pertaining to the unit, and request the maximum amount of operating subsidy. Any increase in the value caused by its substantial rehabilitation under this paragraph shall be reflected solely by its subsequent appraised value, and not by an automatic increase in its selling price.

(e) *Demolition and conversion costs.* Eligible costs include:

(1) Demolition of dwelling units or nondwelling facilities, where the demolition is approved by HUD under subpart M of this part, and related costs, such as clearing and grading the site after demolition and subsequent site improvement to benefit the remaining portion of the existing development; and

(2) Conversion of existing dwelling units to different bedroom sizes.

(f) *Replacement reserve costs.* (1) Funding a replacement reserve to carry out eligible activities in future years is an eligible cost, subject to the following restrictions:

(i) Annual CGP funds are not needed for existing needs, as identified by the IHA in its needs assessments; or

(ii) A physical improvement requires more funds than the IHA would receive under its annual formula allocation; or

(iii) A management improvement requires more funds than the IHA may use under its 20 percent limit for management improvements, and the IHA needs to save a portion of subsequent year(s) grants, to fund the work item;

(2) The IHA shall invest replacement reserve funds so as to generate a return equal to or greater than the average 91-day Treasury bill rate;

(3) Interest earned on funds in the replacement reserve will not be added to the IHAs income in the determination of an IHA's operating subsidy eligibility, but must be used for eligible modernization costs;

(4) To the extent that its annual formula allocation and any unobligated balances of modernization funds are not adequate to meet emergency needs, an IHA must first use its replacement reserve, where funded, to meet emergency needs, before requesting funds from the $75 million reserve. An IHA is not required to use its replacement reserve for natural and other disasters.

(g) *Management improvement costs.* Management improvements that are needed to upgrade the operation of the IHA's developments, sustain physical improvements at those developments or correct management deficiencies identified by the IHA in its Comprehensive Plan are eligible costs. An IHA's ongoing operating expenses, including direct provision of social services through either contract or force account labor, are ineligible management improvement costs.

(1) *Economic development activities costs.* Economic development activities such as job training, resident employment and resident businesses, for the purpose of carrying out activities related to the eligible management and physical improvements are eligible costs, as approved by HUD. HUD encourages IHAs, to the greatest extent feasible, to hire residents as trainees or employees to carry out the modernization program under this subpart, and to contract with resident-owned businesses for modernization work.

(2) *Resident management costs.* Technical assistance to a resident council or resident management corporation (RMC), as defined in § 950.455, in order to determine the feasibility of the resident management entity or assist in its formation is an eligible cost.

(3) *Resident homeownership costs.* The study of the feasibility of converting rental to homeownership units, as well as the preparation of an application for conversion to homeownership, is an eligible cost.

(h) *Drug elimination costs.* Drug elimination activities involving management or physical improvements are eligible costs, as specified by HUD.

(i) *Administrative costs.* Administrative costs necessary for the planning, design, implementation and monitoring of the physical and management improvements are eligible costs and include the following:

(1) The salaries of nontechnical and technical IHA personnel assigned full-time or part-time to modernization are eligible costs only where the scope and volume of the work are beyond that which could be reasonably expected to be accomplished by such personnel in the performance of their nonmodernization duties. The IHA shall properly apportion to the appropriate program budget any direct charges for the salaries of assigned full- or part-time staff (e.g., to the CIAP, CGP or operating budgets);

(2) IHA contributions to employee benefit plans on behalf of nontechnical and technical IHA personnel are eligible costs in direct proportion to the amount of salary charged to the CGP; and

(3) Other administrative costs, such as telephone and facsimile, as specified by HUD.

(j) *Audit costs.*

(k) *Architectural/engineering and consultant fees.* Fees for planning,

preparation of needs assessments and required documents, detailed design work, preparation of construction and bid documents, lead-based paint testing, etc., are eligible costs.

(l) *Relocation costs.* Relocation costs as a direct result of rehabilitation, demolition or acquisition for a CGP-funded activity are eligible costs, as required by § 950.117.

(m) *Cost limitation.* (1) Notwithstanding the full fungibility of work items in § 950.675(c), an IHA shall not use more than a total of 20 percent of its annual grant for management improvement costs in account 1408, unless specifically approved by HUD, or unless the IHA is determined by the Field Office to be high performing and have administrative capacity under § 950.135.

(2) Notwithstanding the full fungibility of work items in § 950.675(c), an IHA shall not use more than a total of 7 percent of its annual grant on administrative costs in account 1410, excluding any costs related to in-house lead-based paint or asbestos testing, in-house architectural/engineering (A/E) work, or other special administrative costs required by state, tribal or local law, unless specifically approved by HUD. In the case of an IHA whose jurisdiction covers an unusually large geographic area, an additional two percent of the annual grant may be spent on costs related to travelling to the IHA's developments for CGP-related business, as specifically approved by HUD. (For purposes of this paragraph (m)(2), "an unusually large geographic area" means an area served by an IHA whose offices are physically separated from the majority of its developments by distances that require overnight travel and/or travel by air or other commercial carriers, *e.g.*, a statewide IHA with developments in multiple localities; a regional IHA with developments in multiple counties or states; or an Alaska IHA with developments in multiple villages.);

(3) Where the physical or management improvement will benefit programs other than Indian Housing, such as Section 8, local renewal, etc., eligible costs are limited to the amount directly attributable to the Indian Housing Program.

(n) *Ineligible costs.* An IHA (or an RMC acting on behalf of an IHA) shall not make luxury improvements, or carry out any other ineligible activities, as specified by HUD.

§ 950.667 Reserve for emergencies and disasters.

(a) *Emergencies.* (1) *Eligibility for assistance.* An IHA (including an IHA that is not considered to be administratively capable under § 950.135) may obtain funds at any time, for any eligible emergency work item as defined in § 950.102 (for IHAs participating in CGP) or for any eligible emergency work item (described as emergency modernization in § 950.102) (for IHAs participating in CIAP), from the reserve established under § 950.601(b). However, emergency reserve funds may not be provided to an IHA participating in CGP that has the necessary funds available from any other source, including its annual formula allocation under § 950.601(e) and (f), other unobligated modernization funds, and its replacement reserves under § 950.666. Emergency reserve funds may not be provided to an IHA participating in CIAP that has the necessary funds available from any other source, including unobligated CIAP (and no CIAP modernization is available for the remainder of the fiscal year) and residual receipts. IHAs participating in CIAP must also have the emergency modernization work under contract within 6 months after receiving HUD's approval of emergency reserve funds. An IHA is not required to have an approved Comprehensive Plan under § 950.672 before it can request emergency assistance from this reserve.

(2) *Procedure.* To obtain emergency funds, an IHA must submit a request, in a form to be prescribed by HUD, which demonstrates that without the requested funds from the set-aside under this section, the IHA does not have adequate funds available to correct the conditions which present an immediate threat to the health or safety of the residents. HUD will immediately process a request for such assistance and, if it determines that the IHA's request meets the requirements of paragraph (a)(1) of this section, it shall approve the request, subject to the availability of funds in the reserve.

(3) *Repayment.* An IHA that receives assistance for its emergency needs from the reserve under § 950.601(b) must repay such assistance from its future allocations of assistance, where available. For HAs participating in the CGP, HUD shall deduct up to 50 percent of an IHA's succeeding year's formula allocation under § 950.601(e) and (f) to repay emergency funds previously provided by HUD to the IHA. The remaining balance, if any, shall be deducted from an IHA's succeeding years' formula allocations.

(b) *Natural and other disasters.* (1) *Eligibility for assistance.* An IHA (including an IHA which has been determined by HUD not to be administratively capable under § 950.135) may request assistance at any time from the reserve under § 950.601(b) for the purpose of permitting the IHA to respond to a natural or other disaster. To qualify for assistance, the disaster must pertain to an extraordinary event affecting only one or a few IHAs, such as an earthquake or hurricane. Any disaster declared by the President (or which HUD determines would qualify for a Presidential declaration if it were on a larger scale) qualifies for assistance under this paragraph. An IHA may receive funds from the reserve regardless of the availability of other modernization funds or reserves, but only to the extent its needs are in excess of its insurance coverage. An IHA is not required to have an approved Comprehensive Plan under § 950.672 before it can request assistance from the reserve under § 950.601(b).

(2) *Procedure.* To obtain funding for natural or other disasters under § 950.601(b), an IHA must submit a request, in a form prescribed by HUD, which demonstrates that it meets the requirements of paragraph (b)(1) of this section. HUD will immediately process a request for such assistance and, if it determines that the request meets the requirements under paragraph (b)(1) of this section, it will approve the request, subject to the availability of funds in the reserve.

(3) *Repayment.* Funds provided to an IHA under paragraph (b)(1) of this section for natural and other disasters shall be in the form of a grant, and are not required to be repaid.

§ 950.669 Allocation of assistance.

(a) *Submission of formula characteristics report.* (1) *Formula characteristics report.* In its first year of participation in the CGP, each IHA shall verify and provide data to HUD, in a form and at a time to be prescribed by HUD, concerning IHA and development characteristics, so that HUD can develop the IHA's annual funding allocation under the CGP in accordance with § 950.601(e) and (f). If an IHA fails to submit to HUD the formula characteristics report by the prescribed deadline, HUD will use the data which it has available concerning IHA and development characteristics for purposes of calculating the IHA's formula share. After its first year of participation in the CGP, an IHA is required to respond to data transmitted by HUD if there have been changes to its inventory from that previously reported, or where requested by HUD. On an annual basis, HUD will transmit to the IHA the formula characteristics report which reflects the data that will be used to determine the IHA's formula

share. The IHA will have 30 days to review and advise HUD of errors in this HUD report. Necessary adjustments will be made to the IHA's data before the formula is run for the current FFY.

(b) *HUD notification of formula amount; appeal rights.* (1) *Formula amounts notification.* After HUD determines an IHA's formula allocation under § 950.601 (e) and (f) based upon the IHA, development, and community characteristics, it shall notify the IHA of its formula amount and provide instruction on annual submission in accordance with §§ 950.672(a) and 950.678.

(2) *Appeal based upon unique circumstances.* An IHA may appeal in writing HUD's determination of its formula amount within 60 calendar days of the date of HUD's determination on the basis of "unique circumstances." The IHA must indicate what is unique, and specify the manner in which it is different from all other IHAs participating in the CGP, and provide any necessary supporting documentation. HUD shall render a written decision on an IHA's appeal under this paragraph within 60 calendar days of the date of its receipt of the IHA's request for an appeal. HUD shall publish in the **Federal Register** a description of the facts supporting any successful appeals based upon "unique circumstances." Any adjustments resulting from successful appeals in a particular FFY under this paragraph shall be made from the subsequent years' allocation of funds under this part.

(3) *Appeal based upon error.* An IHA may appeal in writing HUD's determination of its formula amount within 60 calendar days of the date of HUD's determination on the basis of an error. The IHA may appeal on the basis of error the correctness of data in the formula characteristics report. The IHA must describe the nature of the error, and provide any necessary supporting documentation. HUD shall respond to the IHA's request within 60 calendar days of the date of its receipt of the IHA's request for an appeal. Any adjustment resulting from successful appeals in a particular FFY under this paragraph shall be made from subsequent years' allocation of funds under this part.

(c) *IHAs determined to be high risk.* If an IHA is determined to have serious deficiencies in accordance with § 950.135, or if the IHA fails to meet, or to make reasonable progress toward meeting, the goals previously established in its management improvement plan under § 950.135, HUD may designate the IHA high risk. If the IHA is designated high risk with respect to modernization, HUD may withhold some or all of the IHA's annual grant; HUD may declare a breach of the grant agreement with respect to all or some of the IHA's functions so that the IHA or a particular function of the IHA may be administered by another entity; or HUD may take other sanctions authorized by law or regulation.

(d) *Obligation of formula funding.* All formula funding should be obligated within two years of allocation or such longer period approved by HUD. If the IHA fails to obligate funds within this period, they may be subject to an alternative management strategy which may involve third-party oversight or administration of the modernization function. HUD would only require such action after a corrective action order had been issued under § 950.687 and the IHA failed to comply with the order. HUD could then issue an alternative management strategy in a correction action order. An IHA may appeal in writing the corrective action order imposing an alternative management strategy within 60 days of that order. HUD Headquarters shall render a written decision on an IHA's appeal within 60 calendar days of the date of its receipt of the IHA's appeal.

§ 950.672 Comprehensive Plan (including Five-Year Action Plan).

(a) *Submission.* HUD shall notify IHAs of the requested date for submitting or updating a Comprehensive Plan. For planning purposes, IHAs may use the amount they received under CGP in the prior year in developing their Comprehensive Plan or they may wait for the annual HUD notification of formula amount under § 950.669(b)(1).

(b)(1) *Resident participation.* An IHA is required to develop, implement, monitor and annually amend portions of its Comprehensive Plan in consultation with residents of the developments covered by the Comprehensive Plan, and with democratically elected resident groups. In addition, the IHA must also consult with resident management corporations (RMCs) to the extent that an RMC manages a development covered by the Comprehensive Plan. The IHA, in partnership with the residents, must develop and implement a process for resident participation which ensures that residents are involved in a meaningful way in all phases of the CGP. Such involvement shall involve implementing the Partnership Process as a critical element of the CGP.

(2) *Establishment of Partnership Process.* The IHA, in partnership with the residents of the developments covered by the plan, and with democratically elected resident groups, must establish a Partnership Process to develop and implement the goals, needs, strategies and priorities identified in the Comprehensive Plan. After residents have organized to participate in the CGP, they may decide to establish a volunteer advisory group of experts in various professions to assist them in the CGP Partnership Process. The Partnership Process shall be designed to achieve the following:

(i) To assure that residents are fully briefed and involved in developing the content of, and monitoring the implementation of, the Comprehensive Plan including, but not limited to, the physical and management needs assessments, viability analysis, Five-Year Action Plan, and Work Statements for each year. If necessary, the IHA shall develop and implement capacity building strategies to ensure meaningful resident participation in CGP. Such technical assistance efforts for residents are eligible management improvement costs under CGP;

(ii) To enable residents to participate, on an IHA-wide or area-wide basis, in ongoing discussions of the Comprehensive Plan and strategies for its implementation, and in all meetings necessary to ensure meaningful participation.

(3) *Public notice.* Within a reasonable amount of time before the advance meeting for duly elected resident organizations under paragraph (b)(4) of this section, and the public hearing under paragraph (b)(5) of this section, the IHA shall provide public notice of the advance meeting and the public hearing in a manner determined by the IHA and which ensures notice to all duly elected resident organizations. The public notice shall also include a summary of activities of the previous year (uses of past funding) and progress update, estimated funding level (i.e., current year funding or formula amount, whichever the IHA elects); a summary of the CGP requirements; the estimated time frames for completion of the required CGP documents; and the requirement for resident participation in the planning, development and monitoring of modernization activities under the CGP;

(4) *Advance meeting for duly elected resident organizations.* The IHA shall hold, within a reasonable amount of time before the public hearing under paragraph (b)(5) of the section, a meeting for residents and duly elected resident organizations at which the IHA shall explain the components of the Comprehensive Plan. The meeting shall

be open to all residents and duly elected resident organizations;

(5) *Public hearing.* The IHA shall hold at least one public hearing, and any appropriate number of additional hearings, to ensure ample opportunity for residents, duly elected resident organizations, local government officials, and other interested parties, to express their priorities and concerns. The IHA shall give full consideration to the comments and concerns of residents, local government officials, and other interested parties.

(c) *Local government participation.* An IHA shall consult with appropriate local government officials with respect to the development of the Comprehensive Plan. In the case of an IHA with developments in multiple jurisdictions, the IHA may meet this requirement by consulting with an advisory group representative of all the jurisdictions. At a minimum, such consultation must include providing such officials with:

(1) Advance written notice of the public hearing required under paragraph (b)(5) of this section;

(2) A copy of the summary of total preliminary estimated costs to address physical needs by each development and management/operations needs IHA-wide and a specific description of the IHA's process for maximizing the level of participation by residents.

(d) *Contents of Comprehensive Plan.* The Comprehensive Plan shall identify all of the physical and management improvements needed for an IHA and all of its developments, and that represent needs eligible for funding under § 950.666. The plan shall also include preliminary estimates of the total cost of these improvements. The plan shall set forth general strategies for addressing the identified needs, and highlight any special strategies, such as major redesign or partial demolition of a development, that are necessary to ensure the long-term physical and social viability of the development. Each Comprehensive Plan shall contain the following elements:

(1) *Summaries.* An IHA shall include as part of its Comprehensive Plan the following summaries:

(i) A summary of total preliminary estimated costs to address physical needs by each development and management needs IHA-wide; and

(ii) A specific description of the IHA's process for maximizing the level of participation by residents during the development, implementation and monitoring of the Comprehensive Plan, a summary of the general issues raised on the plan by residents and others during the public comment process and the IHA's response to the general issue. IHA records, such as minutes of planning meetings or resident surveys, shall be maintained in the IHA's files and made available to residents, duly elected resident organizations, and other interested parties, upon request.

(2) *Physical needs assessment.* (i) *Requirements.* The physical needs assessment identifies all of the work that an IHA would need to undertake to bring each of its developments up to the modernization and energy conservation standards, as required by section 14(e)(1)(A)(ii) of the Act, to comply with lead-based paint testing and abatement requirements under § 950.120(i), and to comply with other program requirements under § 950.120. The physical needs assessment is completed without regard to the availability of funds, and shall include the following information with respect to each of an IHA's developments:

(A) A brief summary of the physical improvements necessary to bring each development to a level at least equal to the modernization standards contained in HUD Handbook 7485.2 (Public and Indian Housing Modernization Standards), and to the energy conservation and life-cycle cost-effective performance standards, as required in § 950.603, and to comply with the Lead-Based Testing and Abatement requirements under § 950.120(i), and the relative urgency of need also must be indicated. If the IHA has no physical improvement needs at a particular development at the time it completes its Comprehensive Plan, it must so indicate. Similarly, if the IHA intends to demolish, partially demolish, convert, or dispose of a development (or units within a development) it must so indicate in the summary of physical improvements;

(B) The replacement needs of equipment systems and structural elements that will be required to be met (assuming routine and timely maintenance is performed) during the period covered by the action plan;

(C) A preliminary estimate of the cost to complete the physical work;

(D) The projected FFY in which the IHA anticipates that the development will meet the modernization and energy conservation standards;

(E) In addition, the IHA shall provide with respect to vacant or non-homebuyer-occupied Turnkey III units, the estimated number of units that the IHA is proposing for substantial rehabilitation and subsequent sale, in accordance with § 950.666(d)(3).

(ii) *Sources of data.* The IHA shall identify in its needs assessment the sources from which it derived data to develop the physical needs assessment under this paragraph, and shall retain such source documents in its files.

(3) *Management needs assessment.* (i) *Requirements.* The plan shall include a comprehensive assessment of the improvements needed to upgrade the management and operation of the IHA and of each viable development so decent, safe and sanitary living conditions will be provided. The management needs assessment shall include the following, with the relative urgency of need indicated:

(A) An identification of the most current needs related to the following areas (to the extent that any of these needs is addressed in a HUD-approved management improvement plan, the IHA may simply include a cross-reference to these documents);

(*1*) The management, financial, and accounting control systems of the IHA;

(*2*) The adequacy and qualifications of personnel employed by the IHA in the management and operation of its developments, for each significant category of employment;

(*3*) The adequacy and efficacy of:

(*i*) Resident programs and services;

(*ii*) Resident and development security;

(*iii*) Resident selection and eviction;

(*iv*) Occupancy;

(*v*) Maintenance;

(*vi*) Resident management and resident capacity building programs;

(*vii*) Resident opportunities for employment and business development and other self-sufficiency opportunities for residents; and

(*viii*) Homeownership opportunities for residents.

(B) Any additional deficiencies identified through audits and HUD monitoring reviews which are not addressed under paragraph (d)(3)(i)(A) of this section. To the extent that any of these is addressed in a HUD-approved management improvement plan, the IHA may include a cross-reference to these documents;

(C) Any other management and operations needs which the IHA wants to address at the IHA-wide or development level;

(D) An IHA-wide preliminary cost estimate for addressing all the needs identified in the management needs assessment, without regard to the availability of funds; and

(E) The projected FFY in which the IHA anticipates that all identified management deficiencies will be corrected.

(ii) *Sources of data.* The IHA shall identify in its needs assessment the sources from which it derived data to develop the management needs

assessment under this paragraph, and shall retain such source documents in its files.

(4) *Demonstration of long-term physical and social viability.*

(i) *General.* The plan shall include, on a development-by-development basis, an analysis of whether completion of the improvements and replacements identified under paragraphs (d)(2) and (d)(3) of this section will reasonably ensure the long-term physical and social viability of the development at a reasonable cost. The IHA shall keep documentation in its files to support its reasonable cost determinations of each major work item (e.g., kitchen cabinets, exterior doors). HUD will review cost reasonableness as part of its review of the Annual Submission and the Performance and Evaluation Report. Where necessary, HUD will review the IHA's documentation in support of its cost reasonableness;

(ii) *Determination of non-viability.* Where an IHA's analysis of a development, under paragraph (d) of this section, establishes that completion of the identified improvements and replacements will not result in the long-term physical and social viability of the development at a reasonable cost, the IHA shall not expend CGP funds for the development, except for emergencies and essential non-routine maintenance necessary to maintain habitability until residents can be relocated. The IHA shall specify in its Comprehensive Plan the actions it proposes to take with respect to the non-viable development (e.g., demolition or disposition under subpart M of this part).

(5) *Five-Year Action Plan.* (i) *General.* The Comprehensive Plan shall include a rolling Five-Year Action Plan to carry out the improvements and replacements (or a portion thereof) identified under paragraphs (d)(2) and (d)(3) of this section. In developing its Five-Year Action Plan, the IHA shall assume that the current year funding or formula amount will be available for each year of its Five-Year Action Plan, whichever the IHA is using for planning purposes, plus the IHA's estimate of the funds that will be available from other sources, such as State, local and tribal governments. All activities specified in an IHA's Five Year Action Plan are contingent upon the availability of funds, and the work items are fungible, *i.e.*, interchangeable;

(ii) *Requirements.* Under the action plan, an IHA must indicate how it intends to use the funds available to it under the CGP to address the deficiencies, or a portion of the deficiencies, identified under its physical and management needs assessments, as follows:

(A) *Physical condition.* With respect to the physical condition of an IHA's developments, an IHA must indicate in its action plan how it intends to address, over a five-year period, the deficiencies (or a portion of the deficiencies) identified in its physical needs assessment so as to bring each of its developments up to a level at least equal to the modernization and energy conservation standards. This would include specifying the work to be undertaken by the IHA in major work categories (e.g., kitchens, electrical systems, etc.); establishing priorities among the major work categories by development and year based upon the relative urgency of need; and estimating the cost of each of the identified major work categories. In addition, an IHA must estimate the FFY in which it anticipates that the development will meet the modernization and energy conservation standards. In developing its action plan, an IHA shall give priority to the following:

(*1*) Activities required to correct emergency conditions;

(*2*) Activities required to meet statutory (or other legally mandated) requirements;

(*3*) Activities required to meet the needs identified in the Section 504 needs assessment within the regulatory timeframes; and

(*4*) Activities required to complete lead-based paint testing and abatement requirements by December 6, 1994.

(B) *Management and operations.* An IHA must address in its action plan the management and operations deficiencies (or a portion of the deficiencies) identified in its management needs assessment, as follows:

(*1*) With respect to the management and operations needs of the IHA, the IHA must identify how it intends to address with CGP funds, if necessary, the deficiencies (or a portion thereof) identified in its management needs assessment, including work identified through audits, the ACA, HUD monitoring reviews, and self-assessments (this would include establishing priorities based upon the relative urgency of need);

(*2*) A preliminary IHA-wide cost estimate, by major work category.

(iii) *Procedure for maintaining current Five-Year Action Plan.* The IHA shall maintain a current Five-Year Action Plan by annually amending its Five-Year Action Plan, in conjunction with the Annual Submission;

(6) *Local government statement.* The Comprehensive Plan shall include a statement signed by the chief executive officer of the appropriate governing body (or, in the case of an IHA with developments in multiple jurisdictions, from the CEO of each such jurisdiction), certifying as to the following:

(i) The IHA developed the Comprehensive Plan/Five-Year Action Plan or amendments thereto in consultation with officials of the appropriate governing body and with development residents covered by the Comprehensive Plan/Five-Year Action Plan, in accordance with the requirements of § 950.672(b) and (c);

(ii) The Comprehensive Plan/Five-Year Action Plan or amendments thereto are consistent with the appropriate governing body's assessment of its low-income housing needs and that the appropriate governing body will cooperate in providing resident programs and services; and

(iii) The IHA's proposed drug elimination activities are coordinated with, and supportive of, local drug elimination strategies and neighborhood improvement programs, if applicable.

(7) *IHA resolution.* The plan shall include a resolution adopted by the IHA Board of Commissioners, and signed by the Board Chairman of the IHA, approving the Comprehensive Plan or any amendments thereto and certifying that:

(i) The IHA will comply with all policies, procedures, and requirements prescribed by HUD for modernization, including implementation of the modernization in a timely, efficient, and economical manner;

(ii) IHA has established controls to assure that any activity funded by the CGP is not also funded by any other HUD program, thereby preventing duplicate funding of any activity;

(iii) The IHA will not provide to any development more assistance under the CGP than is necessary to provide affordable housing, after taking into account other government assistance provided;

(iv) The proposed physical work will meet the modernization and energy conservation standards under § 950.603;

(v) The proposed activities, obligations and expenditures in the Five-Year Action Plan/Annual Submission are consistent with the proposed or approved Comprehensive Plan of the IHA;

(vi) The IHA will comply with applicable civil rights requirements under § 950.115, and, where applicable, will carry out the Comprehensive Plan in conformity with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), the Fair Housing Act (42 U.S.C. 3601--

3619), and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794);

(vii) The IHA will, to the greatest extent feasible, give preference to the award of modernization contracts to Indian organizations and Indian-owned economic enterprises under § 950.165;

(viii) The IHA has provided to HUD any documentation that HUD has requested to carry out its review under the National Environmental Policy Act (NEPA) and other related authorities in accordance with § 950.120(a) and (b), and will not obligate, in any manner, the expenditure of CGP funds, or otherwise undertake the activities identified in its Comprehensive Plan/Annual Submission, until the IHA receives written notification from HUD indicating that HUD has complied with its responsibilities under NEPA and other related authorities;

(ix) The IHA will comply with the wage rate requirements under § 950.120 (c) and (d);

(x) The IHA will comply with the relocation assistance and real property acquisition requirements under § 950.117;

(xi) The IHA will comply with the requirements for physical accessibility under § 950.120(f);

(xii) The IHA will comply with the requirements for access to records and audits under § 950.120(g);

(xiii) The IHA will comply with the uniform administrative requirements under § 950.120(h);

(xiv) The IHA will comply with lead-based paint testing and abatement requirements under § 950.120(i);

(xv) The IHA has complied with the requirements governing tribal government and resident participation in accordance with §§ 950.672(b), 950.678(d), and 950.684, and has given full consideration to the priorities and concerns of tribal government and residents, including comments which were ultimately not adopted, in preparing the Comprehensive Plan/Five-Year Action Plan and any amendments thereto;

(xvi) The IHA will comply with the special requirements of § 950.666(d) with respect to a homeownership development; and

(xvii) The IHA will comply with the special requirements of § 950.633 with respect to a Section 23 leased housing bond-financed development.

(xviii) The IHA will comply with section 3 of the Housing and Urban Development Act of 1968, as amended (12 U.S.C. 1701u), and make best efforts, consistent with existing Federal, State, and local laws and regulations, to give low- and very low-income persons, training and employment opportunities generated by CGP assistance, and to make best efforts, consistent with existing Federal, State, and local laws and regulations, to award contracts for work to be performed in connection with CGP assistance to business concerns that provide economic opportunities for low- and very low-income persons.

(e) *Amendments to the Comprehensive Plan.* (1) *Extension of time for performance.* An IHA shall have the right to amend its Comprehensive Plan (including the action plan) to extend the time for performance whenever HUD has not provided the amount of assistance set forth in the Comprehensive Plan or has not provided the assistance in a timely manner.

(2) *Amendments to needs assessments.* The IHA must amend its plan by revising its needs assessments whenever it proposes to carry out activities in its Five-Year Action Plan or Annual Submission, that are not reflected in its current needs assessments (except in the case of emergencies). If the bases for the needs assessment have changed substantially, an IHA may propose an amendment to its needs assessments, in connection with the submission of its Annual Submission (see § 950.678(b), or at any other time. These amendments shall be reviewed by HUD in accordance with § 950.675;

(3) *Six-year revision of Comprehensive Plan.* The physical and management needs assessments, and the summaries listed in § 950.672(d)(1) are required to be revised only every sixth year, although the IHA may elect to revise some or all of these more frequently. Every sixth year, an IHA must submit to HUD, as a part of its Annual Submission, a complete revision of its Comprehensive Plan.

(4) *Annual revision of Five-Year Action Plan.* Annually, the IHA shall submit to HUD, with its Annual Submission, an update of its Five-Year Action Plan. Notwithstanding the new fifth year, the IHA shall identify changes in work categories from the previous year Five-Year Action Plan when making this annual submission.

(5) *Required submissions.* Any amendments to the Comprehensive Plan under this section must be submitted with the IHA resolution under § 950.672(d)(7).

(f) *Prerequisite for receiving assistance.* (1) *Prohibition of assistance.* No financial assistance, except for emergency work to be funded under §§ 950.601(b) and 950.666(a)(2), and for modernization needs resulting from disasters under § 950.601(b), may be made available under this subpart unless HUD has approved a Comprehensive Plan submitted by the IHA which meets the requirements of § 950.672. An IHA that has failed to obtain approval of its Comprehensive Plan by the end of the FFY shall have its formula allocation for that year (less any formula amounts provided to the IHA for emergencies) added to the subsequent year's appropriation of funds for grants under this part. HUD shall allocate such funds to IHAs and PHAs participating in the CGP in accordance with the formula under § 950.601(e) and (f) in the subsequent FFY. An IHA which elects in any FFY not to participate in the CGP under this subpart may participate in the CGP in subsequent FFYs. (2) Requests for emergency assistance. An IHA may receive funds from its formula allocation to address emergency modernization needs where HUD has not approved an IHA's Comprehensive Plan. To request such assistance, an IHA shall submit to HUD a request for funds in such form as HUD may prescribe, including any documentation necessary to support its claim that an emergency exists. HUD shall review the request and supporting documentation to determine if it meets the definition of "emergency work," as set forth in § 950.102.

§ 950.675 HUD review and approval of Comprehensive Plan (including action plan).

(a) Submission of Comprehensive Plan. (1) Upon receipt of a Comprehensive Plan from an IHA, HUD shall determine whether:

(i) The plan contains each of the required components specified at § 950.672(d); and

(ii) Where applicable, the IHA has submitted any additional information or assurances required as a result of HUD monitoring, findings of inadequate IHA performance, audit findings, or civil rights compliance findings.

(2) *Acceptance for review.* If the IHA has submitted a Comprehensive Plan (including the action plan) which meets the criteria specified in paragraph (a)(1) of this section, HUD shall accept the Comprehensive Plan for review, within 14 calendar days of its receipt in the Field Office. The IHA shall be notified in writing that the plan has been accepted by HUD, and that the 75-day review period is proceeding.

(3) *Time period for review.* A Comprehensive Plan that is accepted by HUD for review shall be considered to be approved unless HUD notifies the IHA in writing, postmarked within 75 calendar days of the date of HUD's

receipt of the Comprehensive Plan for review, that HUD has disapproved the plan. HUD shall not disapprove a Comprehensive Plan on the basis that it cannot complete its review within the 75-day deadline.

(4) *Rejection of Comprehensive Plan.* If an IHA has submitted a Comprehensive Plan (including the action plan), which does not meet the requirements of paragraph (a)(1) of this section, HUD shall notify the IHA within 14 calendar days of its receipt that HUD has rejected the plan for review. In such case, HUD shall indicate the reasons for rejection, the modifications required to qualify the Comprehensive Plan for HUD review, and the deadline date for receipt of any modifications.

(b) *HUD approval of Comprehensive Plan (including action plan).* (1) A Comprehensive Plan (including the action plan) that is accepted by HUD for review in accordance with paragraph (a) of this section shall be considered to be approved, unless HUD notifies the IHA in writing, postmarked within 75 days of the date of HUD's receipt of the Comprehensive Plan for review, that HUD has disapproved the plan, indicating the reasons for disapproval, and the modifications required to make the Comprehensive Plan approvable. The IHA must re-submit the Comprehensive Plan to HUD, in accordance with the deadline established by HUD, which may allow up to 75 calendar days before the end of the FFY for HUD review. If the revised plan is disapproved by HUD following its resubmission, or the IHA fails to resubmit the plan by the deadline established by HUD, any funds that would have been allocated to the IHA shall be added to the subsequent year's appropriation of funds for grants under this subpart. HUD shall allocate such funds to IHAs and PHAs participating in the CGP in accordance with the formula under 24 CFR 968.103 and § 950.601. HUD shall not disapprove a Comprehensive Plan on the basis that HUD cannot complete its review under this section within the 75-day deadline.

(2) HUD shall approve the Comprehensive Plan except where it makes a determination in accordance with one or more of the following:

(i) The Comprehensive Plan is incomplete in significant matters. HUD determines that the IHA has failed to include all required information or documentation in its Comprehensive Plan, e.g. the physical needs assessment does not provide all of the information required by HUD concerning all of its developments; or the IHA has supplied incomplete data on the current condition and other characteristics of its developments;

(ii) Identified needs are plainly inconsistent with facts and data. On the basis of available significant facts and data pertaining to the physical and operational condition of the IHA's developments or the management and operations of the IHA, HUD determines that the IHA's identification of modernization needs (see § 950.672(d)(2) and (3)) is plainly inconsistent with such facts and data. HUD will take into account facts and data such as those derived from recent HUD monitoring, audits, and resident comments and will disapprove a Comprehensive Plan based on such findings as:

(A) Identified physical improvements and replacement are inadequate. The completion of the identified physical improvements and replacements will not bring all of an IHA's developments to a level at least equal to the modernization and energy conservation and life-cycle cost-effective standards in § 950.603 (except that a development must meet the energy conservation standards under § 950.603 only when they are applicable to the work being performed);

(B) Identified management improvements are inadequate. The identified management and operations improvement needs do not address all of an IHA's areas of deficiency, or the completion of those improvements would not result in each area of deficiency under an IHA's management improvement plan under § 950.135 being brought up to an acceptable level of performance under the ACA and the Field Office Monitoring of IHAs Handbook 7440.3; and

(C) Proposed physical and management improvements fail to address identified needs. The proposed physical and management improvements in the action plan are not related to the identified needs in the needs assessments portion of the Comprehensive Plan, e.g., a heating plant renovation is in the action plan, but it was not included in the needs assessment for that development.

(iii) Action plan is plainly inappropriate to meeting identified needs. On the basis of the Comprehensive Plan, HUD determines that the action plan (see § 950.672(d)(5)) is plainly inappropriate to meet the needs identified in the Comprehensive Plan, e.g., the proposed work item will not correct the need identified in the needs assessment. HUD will take into account the availability of funds. In addition, HUD will take into account whether the action plan fails to address work items that are needed to correct known emergency conditions or which are otherwise needed to meet statutory or other legally mandated requirements, as identified by the IHA in its Comprehensive Plan.

(iv) Inadequate demonstration of long-term viability at reasonable cost. HUD determines that the IHA has failed to demonstrate that completion of improvements and replacements identified in the Comprehensive Plan, as required by § 950.672(d) (2) and (3), will reasonably ensure long-term viability of one or more Indian housing developments to which they relate at a reasonable cost, as required by § 950.672(d)(4).

(v) Contradiction of local government statement or IHA resolution. HUD has evidence which tends to challenge, in a substantial manner, the appropriate governing body's statement or IHA resolution contained in the Comprehensive Plan, as required in § 950.672(d) (6) and (7). Such evidence may include, but is not necessarily limited to:

(A) Evidence that the IHA failed to implement the Partnership Process and to meet the requirements for resident participation, as set forth in § 950.672(b). In such cases, HUD shall review the IHA's resident participation process and any supporting documentation to determine whether the standards for participation under § 950.672(b) were met;

(B) With respect to an IHA established under State law and determined to be subject to the requirements of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and the Fair Housing Act (42 U.S.C. 3601–3619), HUD shall also consider as such evidence the following:

(*1*) A pending proceeding against the IHA based upon a charge of discrimination pursuant to the Fair Housing Act. (For purposes of this provision, "a charge of discrimination" means a charge, pursuant to section 810(g)(2) of the Fair Housing Act (42 U.S.C. 3610(g)(2)), issued by the HUD General Counsel, or his or her legally authorized designee;)

(*2*) A pending civil rights suit against the IHA instituted by the Department of Justice;

(*3*) Outstanding HUD findings, under § 950.120, of IHA noncompliance with civil rights statutes and executive orders or implementing regulations, as a result of formal administrative proceedings, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance;

(4) A deferral of the processing of applications from the IHA imposed by HUD under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), the Attorney General's Guidelines (28 CFR 50.3) and HUD's title VI regulations (24 CFR 1.8) and procedures (HUD Handbook 8040.1), or under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and HUD's section 504 regulations (24 CFR 8.57); or

(5) An adjudication of a violation under any of the authorities under § 950.120(a) in a civil action filed against the IHA by a private individual, unless the IHA is implementing a HUD-approved resident selection and assignment plan or compliance agreement designed to correct the area(s) of noncompliance.

(c) *Effect of HUD approval of Comprehensive Plan.* After HUD approves the Comprehensive Plan (including the Five-Year Action Plan), or any amendments to the plan, it shall be binding upon HUD and the IHA, until such time as the IHA submits, and HUD approves, an amendment to its plan. The IHA shall have full fungibility of work items (may undertake any of the work items) identified in any of the five years of the approved Five-Year Action Plan without further HUD approval. Actual uses of the funds are to be reflected in the IHA annual Performance and Evaluation Report for each grant. See § 950.684. Except for emergencies, the IHA shall consult, to the extent practicable, the residents on significant changes (such as changes in scope of work) whenever it moves work items within the approved Five-Year Action Plan. Documentation of that consultation is to be retained in IHA files. If HUD determines as a result of an audit or monitoring findings that an IHA has provided false or substantially inaccurate data in its Comprehensive Plan/Annual Submission or has circumvented the intent of the program, HUD may condition the receipt of assistance, in accordance with § 950.687. Moreover, in accordance with 18 U.S.C. 1001, any individual or entity who knowingly and willingly makes or uses a document or writing containing any false, fictitious or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of the United States, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

§ 950.678 Annual Submission of activities and expenditures.

(a) *General.* The Annual Submission consists of a Five-Year Action Plan with a Work Statement for each of the five years and an implementation schedule for the current year, local government statement, materials demonstrating the partnership process, and other miscellaneous documents outlined in this section. For planning purposes, an IHA may use either the amount of funding received in the current year or the formula amount provided in HUD's notification under § 950.669(b)(1) in developing the Five-Year Action Plan for presentation at the resident meetings and public hearing. The Work Statement for the first year of the Five-Year Action Plan is intended to provide a statement of the activities and costs that the IHA plans to undertake, in whole or in part, with the assistance to be provided by HUD in that year. The Work Statements for all five years will be at the same level of detail so that the IHA may interchange work items as discussed in § 950.672(d)(5)(i).

(b) *Submission.* After considering the amount of HUD assistance under paragraph (a) of this section, and estimating how much funding will be available from other sources, such as State and tribal governments, and determining its activities and costs based on the current FFY formula amount, the IHA shall submit its Annual Submission in accordance with instructions provided by HUD.

(c) *Acceptance for review.* Upon receipt of an Annual Submission from an IHA, HUD shall determine whether:

(1) It contains each of the required components; and

(2) The IHA has submitted any additional information or assurances required as a result of HUD monitoring findings of inadequate IHA performance, audit findings, and civil rights compliance findings. If the IHA has submitted a complete Annual Submission and all required information and assurances, HUD will accept the submission for review, as of the date of receipt. If the IHA has not submitted all required material, HUD will promptly notify the IHA that it has disapproved the submission, indicating the reasons for disapproval, the modifications required to qualify the Annual Submission for HUD review, and the date by which such modifications must be received by HUD.

(d) *Resident and local government participation.* An IHA is required to develop its Annual Submission, including any proposed amendments to its Comprehensive Plan as provided in § 950.672(e), in consultation with officials of the appropriate governing body (or, in the case of an IHA with developments in multiple jurisdictions, in consultation with the CEO of each such jurisdiction or with an advisory group representative of all jurisdictions) and with residents and especially duly elected resident organizations of the developments covered by the Comprehensive Plan, as follows:

(1) *Public notice.* Within a reasonable amount of time before the advance meeting for residents under paragraph (d)(2) of this section, and the public hearing under paragraph (d)(3) of this section, the IHA shall provide public notice of the advance meeting and the public hearing in a manner determined by the IHA and which ensures notice to all duly elected resident organizations. The public notice shall also include a summary of activities of the previous year (uses of past funding) and progress update, estimated funding level (i.e., current year funding or formula amount, whichever the IHA elects); a summary of the CGP requirements; the estimated time frames for completion of the required CGP documents; and the requirement for resident participation in the planning, development and monitoring of modernization activities under the CGP;

(2) *Advance meeting with residents.* The IHA shall at least annually hold a meeting open to all residents and duly elected resident organizations. The advance meeting shall be held within a reasonable amount of time before the public hearing under paragraph (d)(3) of this section. The IHA will provide residents with information concerning the contents of the IHA's Five-Year Action Plan (and any proposed amendments to the IHA's Comprehensive Plan to be submitted with the Annual Submission) so that residents can comment adequately at the public hearing on the contents of the Five-Year Action Plan and any proposed amendments to the Comprehensive Plan.

(3) *Public hearing.* The IHA shall annually hold at least one public hearing, and any appropriate number of additional hearings, to ensure ample opportunity for residents of the developments covered by the Comprehensive Plan, officials of the appropriate governing body, and other interested parties, to express their priorities and concerns and discuss the current status of prior approved programs. The IHA shall give full consideration to the comments and concerns of residents, local government officials, and other interested parties in developing its Five-Year Action Plan, or any amendments to its Comprehensive Plan.

(4) *Expedited scheduling.* IHAs are encouraged to hold the meeting with residents and duly elected resident organizations under paragraph (d)(2) of

this section, and the public hearing under paragraph (d)(3) of this section between July 1 (i.e., after the end of the program year—June 30) and September 30, using the formula amount for the current FFY. If an IHA elects to use such expedited scheduling, it must explain at the meeting with residents and duly elected resident organizations and at the public hearing that the current FFY amount is not the actual grant amount for the subsequent year, but is rather the amount used for planning purposes and preparing the draft Performance and Evaluation Report. It must also explain that the Five-Year Action Plan will be adjusted when HUD provides notification of the actual formula amount, and explain which items may be added or deleted to adjust for the formula amount and that any added items will come from the Five-Year Action Plan.

(e) *Contents of Work Statement.* The Work Statement for each year must include, for each development or on an IHA-wide basis for management improvements for which work is to be funded out of that year's grant:

(1) A list of development accounts with a general description of work items;

(2) The cost for each work item, as well as a summary of cost by development account;

(3) The IHA-wide or development-specific management improvements to be undertaken during the year;

(4) For each development and for or any management improvements not covered by a HUD-approved management improvement plan, a schedule for the use of current year funds, including target dates for the obligation and expenditure of the funds. In general, HUD expects that an IHA will obligate its current year's allocation of CGP funds (except for its funded replacement reserves) within two years, and expend such funds within three years, of the date of HUD approval, unless longer time-frames are approved by HUD due to local differences;

(5) A summary description of the actions to be taken with non-CGP funds to meet physical and management improvement needs which have been identified by the IHA in its needs assessments;

(6) Any documentation that HUD needs to assist it in carrying out its responsibilities under the National Environmental Policy Act (42 U.S.C. 4321) and other related authorities in accordance with § 950.120 (a) and (b);

(7) Other information, as specified by HUD; and

(8) An IHA resolution approving the Annual Submission or any amendments thereto, as set forth in § 950.672(d)(7).

(f) *Additional submissions with Annual Submission.* An IHA must submit with the Annual Submission:

(1) Any amendments to the Comprehensive Plan, as set forth in § 950.672(e);

(2) A summary of the IHA's resident consultation activities, including a summary of the general issues raised by residents and others during the public comment process and the IHA's response to the general issues; and

(3) Such additional information as may be prescribed by HUD. HUD shall review any proposed amendments to the Comprehensive Plan in accordance with review standards under § 950.675(b).

(g) *HUD review and approval of Annual Submission.* (1) *General.* An Annual Submission accepted in accordance with paragraph (a) of this section shall be considered to be approved, unless HUD notifies the IHA in writing, postmarked within 75 calendar days of the date that HUD receives the Annual Submission for review under paragraph (c) of this section, that HUD has disapproved the Annual Submission, indicating the reasons for disapproval, the modifications required to make the Annual Submission approvable, and the date by which such modifications must be received by HUD. HUD shall not disapprove an Annual Submission on the basis that HUD cannot complete its review under this section within the 75-day deadline;

(2) *Bases for disapproval for Annual Submission.* HUD shall approve the Annual Submission, except where:

(i) *Incomplete insignificant matters.* HUD determines that the IHA has failed to include all required information or documentation in its Annual Submission;

(ii) *Plainly inconsistent with Comprehensive Plan.* HUD determines that the activities and expenditures proposed in the Annual Submission are plainly inconsistent with the IHA's approved Comprehensive Plan;

(iii) *Contradiction of IHA resolution.* HUD has evidence which tends to challenge, in a substantial manner, the certifications contained in the board resolution, as required by § 950.672(d)(7).

(h) *Amendments to Annual Submission.* The IHA shall advise HUD of all changes to the IHA's approved Work Statement for year one in its Performance and Evaluation Report submitted under § 950.684. Any additional work items (changes which add work items), except for emergency work, must be within the IHA's approved Five-Year Action Plan or receive prior HUD approval.

(i) *Extension of time for performance.* An IHA may revise the target dates for fund obligation and expenditure in the approved Annual Submission whenever any valid delay outside the IHA's control occurs, as specified by HUD. Such revision is subject to HUD review under § 950.687(a)(2) as to the IHA's continuing capacity. HUD shall not review as to an IHA's continuing capacity any revisions to an IHA's Comprehensive Plan and related statements where the basis for the revision is that HUD has not provided the amount of assistance set forth in the Annual Submission, or has not provided such assistance in a timely manner.

(j) *ACC Amendment.* After HUD approval of each year's Annual Submission, HUD and the IHA shall enter into an ACC amendment to obtain modernization funds. The ACC amendment shall require low-income use of housing for not less than 20 years from the date of the ACC amendment (subject to sale of homeownership units in accordance with the terms of the ACC).

(k) *Declaration of Trust.* An IHA shall execute and file for record a Declaration of Trust as provided under the ACC to protect the rights and interests of HUD throughout the 20-year period during which the IHA is obligated to operate its developments in accordance with the ACC, the Act, and HUD regulations and requirements. A Declaration of Trust is not required for Mutual Help units.

§ 950.681 Conduct of modernization activities.

(a) *Initiation of activities.* After HUD has approved a Five-Year Action Plan and entered into an ACC amendment or grant agreement with the IHA for year one of the Plan, the IHA shall undertake the modernization activities and expenditures set forth in its approved Work Statement for year one or substitute work items from within the approved Five-Year Action Plan, subject to the following requirements:

(1) The IHA may undertake the activities using force account or contract labor, including contracting with an RMC. If the entirety of modernization activity (including the planning and architectural design of the rehabilitation) is administered by an RMC, the IHA shall not retain for any administrative or other reason, any portion of the CGP funds provided, unless the IHA and the RMC provide otherwise by contract; and

(2) All activities shall be monitored by resident groups within the framework and intent of the Partnership Process.

(b) *Fund requisitions.* To request modernization funds against the approved Work Statement for year one, the IHA shall comply with requirements prescribed by HUD.

(c) *Contracting requirements.* The IHA shall comply with the wage rate requirements in § 950.120. In addition, the IHA shall comply with the requirements set forth in subpart B of this part, except as follows:

(1) *Assurance of completion.* For each construction or equipment contract over $25,000, the contractors shall furnish a performance and payment bond for 100 percent of the contract price or, notwithstanding 24 CFR 85.36(h) and § 950.170, a 20 percent cash escrow, or a 25 percent-letter of credit or, as may be required by law, separate performance and payments bonds, each for 50 percent or more of the contract price.

(2) *Previous participation.* An IHA shall ensure that the contractor is not on the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(d) *Assurance of non-duplication.* The IHA shall ensure that there is no duplication between the activities carried out pursuant to the CGP, and activities carried out with other funds.

(e) *Fiscal closeout of a comprehensive grant.* Upon expenditure by an IHA of all funds, or termination by HUD of the activities funded by each annual grant, the IHA shall submit the actual modernization cost certificate, in a form prescribed by HUD, to HUD for review, audit verification, and approval. The audit shall follow the guidelines prescribed by 24 CFR part 44, Non-Federal Government Audit Requirements. If the audited modernization cost certificate discloses unauthorized expenditures, the IHA shall take such corrective actions as HUD may direct.

§ 950.684 IHA Performance and Evaluation Report.

(a) *Submission.* For any FFY in which an IHA has received assistance under this subpart, the IHA shall submit a Performance and Evaluation Report, in a form and at a time to be prescribed by HUD, describing its use of assistance in accordance with the approved Five-Year Action Plan. The IHA must make reasonable efforts to notify residents and officials of the appropriate governing body of the availability of the draft report, make copies available to residents in the development office, and provide residents with at least 30 calendar days in which to comment on the report.

(b) *Content.* The report shall include the following:

(1) An explanation of how the IHA has used other funds, such as Community Development Block Grant program assistance, State or Tribal assistance, and private funding, for the needs identified in the IHA's Comprehensive Plan and for the purposes of this subpart;

(2) An explanation of how the IHA has used the CGP funds to address the needs identified in its Comprehensive Plan and to carry out the activities identified in its approved Five-Year Action Plan, and shall specifically address:

(i) Any funds used for emergency needs not set forth in its Five-Year Action Plan, and

(ii) Any changes to the Annual Submission under § 950.678(h);

(3) The results of the IHA's process for consulting with residents on the implementation of the plan;

(4) The current status of the IHA's obligations and expenditures and specifying how the IHA is performing with respect to its implementation schedules, and an explanation of any necessary revision to the planned target dates;

(5) A summary of resident, Tribal or local government comments received on the report; and

(6) A resolution by the IHA Board of Commissioners approving the Performance and Evaluation Report and containing a certification the IHA has made reasonable efforts to notify residents in the development(s) and local government officials of the opportunity to review the draft and comment on it before its submission to HUD, and that copies of the report were provided to residents in the development office, to local government officials, or furnished upon their request.

§ 950.687 HUD review of IHA performance.

(a) *HUD determination.* At least annually, HUD shall carry out such reviews of the performance of each IHA as may be necessary or appropriate to make the determinations required by this paragraph, taking into consideration all available evidence.

(1) *Conformity with Comprehensive Plan.* HUD will determine whether the IHA has carried out its activities under this subpart in a timely manner and in accordance with its Comprehensive Plan.

(i) In making this determination, HUD will review the IHA's performance to determine whether the modernization activities undertaken during the period under review conform substantially to the activities specified in the approved Five-Year Action Plan. HUD will also review an IHA's schedules which are provided with its Annual Submission for purposes of determining whether the IHA has carried out its modernization activities in a timely manner;

(ii) HUD will review an IHA's performance to determine whether the activities carried out comply with the requirements of the Act, including the requirement that the work carried out meets the modernization and energy conservation standards in § 950.603, this part, and other applicable laws and regulations.

(2) *Continuing capacity.* HUD will determine whether the IHA has a continuing capacity to carry out its Comprehensive Plan in a timely manner. After the first full operational year of CGP, CIAP experience will not be taken into consideration except where the IHA has not yet had comparable experience under the CGP

(i) The primary factors to be considered in arriving at a determination that a recipient has a continuing capacity are those described in paragraphs (a)(1) and (a)(3) of this section as they relate to carrying out the Comprehensive Plan. HUD generally will consider an IHA to have a continuing capacity if it determines that the IHA has:

(A) Carried out its activities under the CGP program, as well as the CIAP, in a timely manner, taking into account the level of funding available and whether the IHA obligates its modernization funds within two years from the execution of the ACC amendment and expends such modernization funds within three years of ACC amendment execution, or such longer period if agreed to by HUD in an implementation schedule, except in circumstances beyond the IHA's reasonable control.

(B) Adequately inspected the funded modernization to assure that the physical work is being carried out in accordance with the plans and specifications and the modernization and energy conservation standards (or, in the case of an IHA's performance under CIAP, whether the IHA has carried out the physical work in accordance with the HUD-approved budget and in conformance with the modernization and energy conservation standards) and that any HUD monitoring findings relating to the quality of the physical work have been, or are being, resolved);

(C) Established and maintained internal controls for its modernization program in accordance with HUD

requirements for financial management and accounting, as determined by the fiscal audit;

(D) Administered its modernization contracts in accordance with a HUD-approved procurement policy, which meets the requirements of 24 CFR 85.36(a) and § 950.160;

(E) Carried out its activities in accordance with its Comprehensive Plan and HUD requirements; and

(F) Has satisfied, or made reasonable progress toward satisfying, the performance standards prescribed in paragraph (a)(3) of this section as they relate to activities under the CGP program;

(ii) HUD will give particular attention to IHA efforts to accelerate the progress of the program and to prevent the recurrence of past deficiencies or noncompliance with applicable laws and regulations.

(3) *Reasonable progress.* HUD shall determine whether the IHA has satisfied, or has made reasonable progress towards satisfying, the following performance standards:

(i) With respect to the physical condition of each development, whether the work items being carried out by the IHA are in conformity with the modernization and energy conservation standards in § 950.603, and whether the IHA has brought, or is making reasonable progress toward bringing, all of its developments to these standards, in accordance with its physical needs assessment; and

(ii) With respect to the management condition of the IHA, whether the IHA is making reasonable progress in implementing, the work items (specified in its annual submission and Five-Year Action Plan), necessary to eliminate the deficiencies identified in its management needs assessment; and

(iii) In determining whether the IHA has made reasonable progress, HUD will take into account the level of funding available and whether the IHA obligates its modernization funds within two years from the execution of the ACC amendment and expends such modernization funds within three years of ACC amendment execution, or such longer period if agreed to by HUD in an implementation schedule. The IHA must demonstrate to HUD's satisfaction that any lack of timeliness (beyond the time periods specified in this paragraph or date specified in a HUD approved implementation schedule) has resulted from factors beyond the IHA's reasonable control.

(b) *Notice of deficiency.* Based on HUD reviews of IHA performance and findings of any of the deficiencies in paragraph (d) of this section, HUD may issue to the IHA a notice of deficiency stating the specific program requirements which the IHA has violated and requesting the IHA to take any of the actions in paragraph (e) of this section.

(c) *Corrective action order.* (1) Based on HUD reviews of IHA performance and findings of any of the deficiencies paragraph (d) of this section, HUD may issue to the IHA a corrective action order, whether or not a notice of deficiency has previously been issued in regard to the specific deficiency on which the corrective action order is based. HUD may order corrective action at any time by notifying the IHA of the specific program requirements which the IHA has violated, and specifying that any of the corrective actions listed in paragraph (e) of this section must be taken. HUD shall design corrective action to prevent a continuation of the deficiency, mitigate any adverse effects of the deficiency to the extent possible, or prevent a recurrence of the same or similar deficiencies.

(2) Before ordering corrective action, HUD will notify the IHA and give it an opportunity to consult with HUD regarding the proposed action.

(3) Any corrective action ordered by HUD shall become a condition of the grant agreement.

(4) If HUD orders corrective action by an IHA in accordance with this section, the IHA's Board of Commissioners must notify affected residents of HUD's determination, the bases for the determination, the conditioning requirements imposed under this paragraph, and the consequences to the IHA if it fails to comply with HUD's requirements.

(d) *Basis for corrective action.* HUD may order an IHA to take corrective action only if HUD determines:

(1) The IHA has not submitted a performance and evaluation report, in accordance with § 950.684;

(2) The IHA has not carried out its activities under the CGP program in a timely manner and in accordance with its Comprehensive Plan or HUD requirements, as described in paragraph (a)(1) of this section;

(3) The IHA does not have a continuing capacity to carry out its Comprehensive Plan in a timely manner or in accordance with its Comprehensive Plan or HUD requirements, as described in paragraph (a)(2) of this section;

(4) The IHA has not satisfied, or has not made reasonable progress towards satisfying, the performance standards specified in paragraph (a)(3) of this section;

(5) An audit conducted in accordance with 24 CFR part 44 and § 950.120, or pursuant to other HUD reviews (including monitoring findings) reveals deficiencies that HUD reasonably believes require corrective action;

(6) The IHA has failed to repay HUD for amounts awarded under the CGP program that were improperly expended; or

(7) The IHA has been determined to be high risk, in accordance with § 950.135.

(e) *Types of corrective action.* HUD may direct an IHA to take one or more of the following corrective actions:

(1) Submit additional information:

(i) Concerning the IHA's administrative, planning, budgeting, accounting, management, and evaluation functions, to determine the cause for a IHA not meeting the standards in paragraph (a) (1), (2), or (3) of this section;

(ii) Explaining any steps the IHA is taking to correct the deficiencies;

(iii) Documenting that IHA activities were not inconsistent with the IHA's annual statement or other applicable laws, regulations, or program requirements; and

(iv) Demonstrating that the IHA has a continuing capacity to carry out the Comprehensive Plan in a timely manner;

(2) Submit schedules for completing the work identified in its Work Statements and report periodically on its progress on meeting the schedules;

(3) Notwithstanding 24 CFR 85.36(g), submit to HUD the following documents for prior approval, which may include, but are not limited to:

(i) Proposed agreement with the architect/engineer (prior to execution);

(ii) Complete construction and bid documents (prior to soliciting bids);

(iii) Proposed award of contracts, including construction and equipment contracts and management contracts; or

(iv) Proposed contract modifications prior to issuance, including modifications to construction and equipment contracts, and management contracts.

(4) Submit additional material in support of one or more of the statements, resolutions, and certifications submitted as part of the IHA's Comprehensive Plan, annual statement, or performance and evaluation report;

(5) Submit additional material in support of one or more of the statements, resolutions, and certifications submitted as part of the IHA's Comprehensive Plan, Five-Year Action Plan, or Performance and Evaluation Report;

(6) Reimburse, from non-HUD sources, one or more program accounts for any amounts improperly expended;

(7) Take such other corrective actions HUD determines appropriate to correct IHA deficiencies.

(8) Submit to an alternative management strategy which may involve third-party oversight or administration of the modernization function (see § 950.669(d)); and

(9) Take such other corrective actions HUD determines appropriate to correct IHA deficiencies.

(f) *Failure to take corrective action.* In cases where HUD has ordered corrective action and the IHA has failed to take the required actions within a reasonable time, as specified by HUD, HUD may take one or more of the following steps:

(1) Withhold some or all of the IHA's grant;

(2) Declare a breach of the ACC grant amendment with respect to some or all of the IHA's functions; or

(3) Any other sanction authorized by law or regulation.

(g) *Reallocation of funds that have been withheld.* Where HUD has withheld for a prescribed period of time some or all of an IHA's annual grant, HUD may reallocate such amounts to other IHAs/PHAs under the CGP program, subject to approval in appropriations acts. The reallocation shall be made to IHAs which HUD has determined to be administratively capable under § 950.135, and to PHAs under the CGP program which are not designated as either troubled or mod troubled under the PHMAP at 24 CFR part 901, based upon the relative needs of these IHAs and PHAs, as determined under the formula at § 950.601.

(h) *Right to appeal.* Before withholding some or all of the IHA's annual grant, declaring a breach of the ACC grant amendment, or reallocating funds that have been withheld, HUD will notify the IHA and give it an opportunity, within a prescribed period of time, to present to the Assistant Secretary for Public and Indian Housing any arguments or additional facts and data concerning the proposed action.

(i) *Notification of residents.* The IHA's Board of Commissioners must notify affected residents of HUD's final determination to withhold funds, declare a breach of the ACC grant amendment, or reallocate funds, as well as the basis for, and the consequences resulting from, such a determination.

(j) *Recapture.* In addition, HUD may recapture for good cause any grant amounts previously provided to an IHA, based upon a determination that the IHA has failed to comply with the requirements of the CGP program. Before recapturing any grant amounts, HUD will notify the IHA and give it an opportunity to appeal in accordance with § 950.687(h). Any reallocation of recaptured amounts will be in accordance with § 950.687(g). The IHA's board of Commissioners must notify affected residents of HUD's final determination to recapture any funds.

Subpart J—Operating Subsidy

§ 950.701 Purpose and applicability.

(a) *Implementation of section 9(a).* (1) The purpose of this subpart is to establish standards and policies for the distribution of operating subsidy in accordance with section 9(a) of the United States Housing Act of 1937 (42 U.S.C. 1437g(a)). Section 9(a) authorizes the Secretary of Housing and Urban Development (HUD) to make annual contributions for the operation of IHA-owned rental housing (operating subsidy).

(2) This subpart establishes standards for the cost of providing comparable services as determined in accordance with a formula representing the operations of a prototype well-managed project, taking into account the character and location of the project and the characteristics of the families served. These standards, policies and procedures are called the Performance Funding System (PFS), as described in this subpart. The provisions of PFS are intended to recognize and give an incentive for efficient and economical management and to avoid the expenditure of Federal funds to compensate for excessive costs attributable to poor or inefficient management. PFS is intended to provide the incentive and financial discipline for excessively high-cost IHAs to improve their management efficiency.

(b) *Applicability.* This subpart is applicable to all IHA-owned rental units under Annual Contributions Contracts. This subpart is not applicable to the Section 23 Leased Housing Program, the Section 23 Housing Assistance Payments Program, the Section 8 Housing Assistance Payments Program, the Mutual-Help Program, or the Turnkey III Homeownership Opportunity Program. Provisions regarding operating subsidy for the homeownership programs are found in the applicable subpart of this rule (subpart E for Mutual Help of this part, and subpart G for Turnkey III of this part).

§ 950.705 Determination of amount of operating subsidy under PFS.

The amount of operating subsidy for which each IHA is eligible shall be determined as follows: The projected operating income level is subtracted from the total expense level (Allowable Expense Level plus Utilities Expense Level). These amounts are per-unit per-month dollar amounts, and must be multiplied by the Unit Months Available. Transition funding, if applicable, and other costs as specified in paragraphs (b) through (e) of § 950.720 are then added to this total in order to determine the total amount of operating subsidy for the requested budget year, exclusive of consideration of the cost of an independent audit. As an independent operating subsidy eligibility factor, an IHA may receive operating subsidy in an amount, approved by HUD, equal to the actual or estimated cost of the independent audit to be prorated to operations of the IHA-owned rental housing (under § 950.720(a)). (See § 950.730 regarding adjustments.)

§ 950.710 Computation of allowable expense level.

The IHA shall compute its Allowable Expense Level (AEL) using forms prescribed by HUD, as follows:

(a) *Computation of Base Year Expense Level.* The Base Year Expense Level includes payments in lieu of taxes (PILOT) required by a Cooperation Agreement even if PILOT is not included in the approved operating budget for the base year because of a waiver of the requirements by the local taxing jurisdiction(s). The Base Year Expense Level includes all other operating expenditures as reflected in the IHA's operating budget for the base year approved by HUD except the following:

(1) Utilities expense;

(2) Cost of an independent audit;

(3) Adjustments applicable to budget years before the base year;

(4) Expenditures supported by supplemental subsidy payments applicable to budget years before the base year;

(5) All other expenditures that are not normal fiscal year expenditures as to amount or as to the purpose for which expended; and

(6) Expenditures that were funded from a nonrecurring source of income.

(b) *Adjustment.* In compliance with the six exclusions set forth in paragraph (a) of this section, the IHA shall adjust the AEL by excluding any of these items from the Base Year Expense Level if this has not already been accomplished. If such adjustment is made in the second or some later fiscal year of the PFS, the AEL shall be adjusted in the year in which the adjustment is made, but the adjustment shall not be applied

retroactively. If the IHA does not make these adjustments, the HUD Field Office shall compute the adjustments.

(c) *Computation of "Formula Expense Level".* The IHA shall compute its Formula Expense Level in accordance with a HUD- prescribed formula that estimates the cost of operating an average unit in a particular IHA's inventory. The formula takes into account such data as the number of two or more bedroom units, ratio of two or more bedroom units in high-rise family projects, ratio of units with three or more bedrooms, local government wage rates, and number of pre-1940 rental units occupied by poor households. It uses weights, and a local inflation factor assigned each year, to derive a Formula Expense Level for the current year and the requested budget year. The weights of the formula and the formula are subject to updating by HUD.

(d) *Computation of Allowable Expense Level.* The IHA shall compute its Allowable Expense Level as follows:

(1) *Allowable Expense Level for first budget year under PFS where Base Year Expense Level does not exceed the top of the range.* The top of the range is defined as: FEL plus $10.31 for fiscal years starting before April 1, 1992, and FEL multiplied by 1.15 for fiscal years starting on or after April 1, 1992. Every IHA whose Base Year Expense Level is less than the top limit of the range shall compute its AEL for the first budget year under PFS by adding the following to its Base Year Expense Level (before adjustment under § 950.730);

(i) Any increase approved by HUD in accordance with § 950.730(a);

(ii) The increase (decrease) between the Formula Expense Level for the base year and the Formula Expense Level for the first budget year under PFS; and

(iii) The sum of the Base Year Expense Level, and any amounts described in paragraphs (d)(1) (i) and (ii) of this section multiplied by the local inflation factor.

(2) *Allowable Expense Level for first budget year under PFS where Base Year Expense Level exceeds the top of the range.* The top of the range is defined as: FEL plus $10.31 for fiscal years starting before April 1, 1992, and FEL multiplied by 1.15 for fiscal years starting on or after April 1, 1992. Every IHA whose Base Year Expense Level exceeds the top of the range shall compute its AEL for the first budget year under PFS by adding the following to the top of the range (not to its Base Year Expense Level, as in paragraph (d)(1) of this section):

(i) The increase (decrease) between the Formula Expense Level for the base year and the Formula Expense Level or the first budget year under PFS;

(ii) The sum of the figure equal to the top of the range and the increase (decrease) described in paragraph (d)(2)(i) of this section, multiplied by the local inflation factor. (If the Base Year Expense Level is above the allowable expense level, computed as provided in paragraph (d) of this section, the IHA may be eligible for transition funding under § 950.735.)

(3) *Allowable Expense Level for first budget year under PFS for a new project.* A new project of a new IHA or a new project of an existing IHA that the IHA decides to place under a separate ACC, which did not have a sufficient number of units available for occupancy in the base year to have a level of operations representative of a full fiscal year of operation is considered to be a "new project". The AEL for the first budget year under PFS for a "new project" will be based on the AEL for a comparable project, as determined by the HUD Field Office. The IHA may suggest a project or projects it believes to be comparable.

(4) *Allowable Expense Level for budget years after the first budget year under PFS that begins on or after April 1, 1986.* For each budget year after the first budget year under PFS that begin on or after April 1, 1986, the AEL shall be computed as follows:

(i) The allowable expense level shall be increased by any increase to the AEL approved by HUD under § 950.720(c);

(ii) The AEL for the current budget year also shall be increased (or decreased) by either;

(A) If the IHA has not experienced a change in the number of its units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on paragraph (d)(4)(ii)(B) of this section, the AEL shall be increased by one-half of one percent (.5 percent); or

(B) If the IHA has experienced a change in the number of units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on this paragraph (d)(4)(ii)(B) of this section, it shall use the increase (decrease) between the Formula Expense Level for the current budget year and the Formula Expense Level for the requested budget year. The IHA characteristics that shall be used to compute the Formula Expense Level for the current budget year shall be the same as those that were used for the requested budget year when the last adjustment to the AEL was made based on this paragraph (d)(4)(ii)(B) of this section, except that the number of interim years in which the .5 percent adjustment was made under paragraph (d)(4)(ii)(A) of this section shall be added to the average age that was used for the last adjustment; and

(iii) The amount computed in accordance with paragraphs (d)(4) (i) and (ii) of this section shall be multiplied by the local inflation factor.

Example:

FY 1987. Assume that: (1) The IHA has experienced no change in the number of its units, (2) the AEL for the IHA's FY 1986 is $64.00, and (3) the applicable local inflation factor is 6 percent (expressed as 1.06). The AEL for FY 1987 is $68.18, computed as follows:

1. Allowable Expense Level for FY 1986	$64.00
2. Delta: Increase (or Decrease) in Formula Expense Level ($64.00 × .5 percent)	.32
3. Sum (line 1 plus line 2)	64.32
4. Local Inflation Factor	1.06
5. Allowable Expense Level for FY 1987 (line 3 multiplied by line 4)	$68.18

FY 1988. Assume that the IHA has deprogrammed (*e.g.*, demolished or sold) a project that represents seven percent of its units, and that the last time an adjustment to the AEL was made based on paragraph (d)(4)(ii)(B) of this section was in its FY 1985, at which time the IHA had the following characteristics for its requested budget year: average age of 10 years, average project height of 5 stories, and average unit size of 4 bedrooms. The Formula Expense Level for the current budget year is calculated using 12 years (10 years plus two years in which the standard .5 percent adjustment was used), 5 stories and 4 bedrooms.

Also assume that Formula Expense Level calculated based on these characteristics is $70.00 and that the IHA average characteristics for the requested budget year are now an average age of 8 years, average project height of 4 stories and average unit size of 2 bedrooms, resulting in a Formula Expense Level for the requested budget year of $68.00. The Formula Expense Level for the requested budget year, therefore, decreases by $2.00. Assuming that the local inflation factor is 4.5 percent (expressed as 1.045), the AEL for FY 1988 is $69.16, computed as follows:

1. Allowable Expense Level for FY 1987	$68.18
2. Delta (or Decrease) in Formula Expense Level	(2.00)
3. Sum (line 1 plus line 2)	66.18
4. Local Inflation Factor	1.045
5. Allowable Expense Level for FY 1988 (line 3 multiplied by line 4)	$69.16

It should be noted that the Delta in line 2 of the example reflects the application of the formula weights, constant and local inflation factor for the requested budget year applied first to the IHA characteristics for the current

budget year and then to the IHA characteristics for the requested budget year, to determine the respective Formula Expense Levels. The local inflation factor shown on line 4 of the example is the same one used in determining the Formula Expense Levels.

(5) *Allowable Expense Level for budget years after the first budget year under PFS that begins on or after April 1, 1992.* For each budget year after the first budget year under PFS that begins on or after April 1, 1992, the AEL shall be computed as follows:

(i) The Allowable Expense Level shall be increased by any increase to the AEL approved by HUD under § 950.720(c);

(ii) The AEL for the Current Budget Year also shall be adjusted as follows:

(A) Increased by one-half of one percent (.5 percent); and

(B) If the IHA has experienced a change in the number of units in excess of 5 percent or 1,000 units, whichever is less, since the last adjustment to the AEL based on this paragraph (d)(5)(ii)(B) of this section, it shall use the increase (decrease) between the Formula Expense Level for the Current Budget Year and the Formula Expense Level for the Requested Budget Year. The IHA's characteristics that shall be used to compute the Formula Expense Level for the Current Budget Year shall be the same as those that applied to the Requested Budget Year when the last adjustment to the AEL was made based on this paragraph (d)(5)(ii)(B) of this section, except that the number of interim years in which the .5 percent adjustment was made under paragraph (d)(5)(ii)(A) of this section shall be added to the average age that was used for the last adjustment.

(iii) The amount computed in accordance with paragraphs (d)(5) (i) and (ii) of this section shall be multiplied by the Local Inflation Factor.

(6) *Adjustment of Allowable Expense Level for budget years after the first budget year under PFS.* HUD may adjust the AEL of budget years after the first year under PFS under the provisions of §§ 950.710(b) or 950.720(c).

§ 950.715 Computation of utilities expense level.

(a) *General.* In recognition of the rapid rises which occur in utilities costs, the wide diversity among IHAs as to types of utilities services used and the manner in which utilities payments are allocated between IHAs and tenants, and the fact that utilities rates charged by suppliers are beyond the control of the IHA, the PFS treats utilities expenses separately from other IHA expenses. Utilities expenses are, therefore, excluded from the IHA's allowable expense level and the PFS provides for computation of the amount of operating subsidy for utilities costs based upon a calculated utilities expense of each IHA. Accordingly, the IHA's utilities expense level for the requested budget year shall be computed by multiplying the allowable utilities consumption level (AUCL) per-unit per-month for each utility, determined as provided in paragraph (c) of this section, by the projected utility rate determined as provided in paragraph (b) of this section. The AUCL for space heating utilities will be adjusted after the end of the affected fiscal year pursuant to the instructions of paragraph (d) of this section.

(b) *Utilities rates.* (1) The currently applicable rates, with consideration of adjustments and pass-throughs, in effect at the time the operating budget is submitted to HUD will be used as the utilities rates for the requested budget year, except that, when the appropriate utility commission has, before the date of submission of the operating budget to HUD, approved and published rate changes to be applicable during the requested budget year, the future approved rates may be used as the utilities rates for the entire requested budget year.

(2) If an IHA takes action, such as a well-head purchase of natural gas or administrative appeals or legal action beyond normal public participation in rate-making proceedings to reduce the rate it pays for utilities (including water, fuel oil, electricity, and gas), then the IHA will be permitted to retain one-half of the cost savings during the first 12 months attributable to its actions. Upon determination that the action was cost-effective in the first year, the IHA may be permitted to retain one-half the annual cost savings for an additional period not to exceed six years, if the actions continue to be cost-effective. See also paragraph (f) of this section and § 950.730(c).

(c) *Computation of "Allowable Utilities Consumption Level".* The Allowable Utilities Consumption Level (AUCL) used to compute the utilities expense level of an IHA for the requested budget year generally will be based upon the availability of consumption data. For project utilities where consumption data are available for the entire rolling base period, the computation will be in accordance with paragraph (c)(1) of this section. Where data are not available for the entire period, the computation will be in accordance with paragraph (c)(2) of this section, unless the project is a new project, in which case the computation will be in accordance with paragraph (c)(3) of this section. For a project where the IHA has taken special energy conservation measures that qualify for special treatment in accordance with paragraph (g)(1) of this section, the computation of the AUCL may be made in accordance with paragraph (c)(4) of this section. The AUCL for all of an IHA's projects is the sum of the amounts determined using all of the paragraphs in this paragraph (c), as appropriate.

(1) *Rolling Base Period System.* For project utilities with consumption data for the entire rolling base period, the AUCL is the average amount consumed per unit per month during the rolling base period, adjusted in accordance with paragraph (d) of this section. The IHA shall determine the average amount of each of the utilities consumed during the rolling base period (i.e., the 36-month period ending 12 months prior to the first day of the requested budget year).

(i) *IHA fiscal years affected.* The rolling base period shall be used to compute the AUCL submitted with the operating budgets.

(ii) An example of a rolling base is as follows:

IHA fiscal year (affected fiscal year)		Rolling base period	
Beginning	Ending	Begins	Ends
1–1–92	12–31–92 (1st year)	1–1–88	12–31–90
1–1–93	12–31–93 (2nd year)	1–1–89	12–31–91

(2) Alternative method where data is not available for the entire rolling base period:

(i) If the IHA has not maintained or cannot recapture consumption data regarding a particular utility from its records for the whole rolling base period mentioned in paragraph (c)(1) of this section, it shall submit consumption

data for that utility for the last 24 months of its rolling base period to the HUD Field Office for approval. If this is not possible, it shall submit consumption data for the last 12 months of its rolling base period. The IHA also shall submit a written explanation of the reasons that data for the whole rolling base period is unavailable.

(ii) In those cases where an IHA has not maintained or cannot recapture consumption data for a utility for the entire rolling base period, comparable consumption for the greatest of either 36, 24, or 12 months, as needed, shall be used for the utility for which the data is lacking. The comparable consumption shall be estimated based upon the consumption experienced during the rolling base period of comparable project(s) with comparable utility delivery systems and occupancy. The use of actual and comparable consumption by each IHA, other than those IHAs defined as new projects in paragraph (c)(3) of this section, will be determined by the availability of complete data for the entire 36-month rolling base period. Appropriate utility consumption records, satisfactory to HUD, shall be developed and maintained by all IHAs so that a 36-month rolling average utility consumption per unit per month under paragraph (c)(1) of this section can be determined.

(iii) If an IHA cannot develop the consumption data for the rolling base period or for 12 or 24 months of the rolling base period, either from its own project(s) data, or by using comparable consumption data the actual per-unit per-month utility expenses stated in paragraph (e) of this section shall be used as the utilities expense level and no change factor shall be applied.

(3) *Computation of Allowable Utilities Consumption Levels for New Projects.* (i) A new project, for the purpose of establishing the rolling base period and the utilities expense level, is defined as either:

(A) A project that had not been in operation during at least 12 months of the rolling base period, or a project that enters management after the rolling base period and before the end of the requested budget year, or

(B) A project that during or after the rolling base period, has experienced conversion from one energy source to another; interruptible service; deprogrammed units, a switch from tenant-purchased to IHA-supplied utilities; or a switch from IHA-supplied to tenant-purchased utilities.

(ii) The actual consumption for new projects shall be determined so as not to distort the rolling base period in accordance with a method prescribed by HUD.

(4) *Freezing the Allowable Utilities Consumption Level (AUCL).*

(i) Notwithstanding the provisions of paragraphs (c)(1) and (c)(2) of this section, if an IHA undertakes energy conservation measures that are approved by HUD under paragraph (g) of this section, the AUCL for the project and the utilities involved may be frozen during the contract period. Before the AUCL is frozen, it shall be adjusted to reflect any energy savings resulting from the use of any HUD funding. The AUCL is then frozen at the level calculated for the year during which the conservation measures initially will be implemented, as determined in accordance with paragraph (g) of this section.

(ii) See § 950.730(c)(2)(ii) for the method of adjusting the AUCL for heating degree days.

(iii) If the AUCL is frozen during the contract period, the annual three-year rolling base procedures for computing the AUCL shall be reactivated after the IHA satisfies the conditions of the contract. The three years of consumption data to be used in calculating the AUCL after the end of the contract period will be as follows:

(A) *First year:* The energy consumption during the year before the year in which the contract ended and the energy consumption for each of the two years before installation of the energy conservation improvements;

(B) *Second year:* The energy consumption during the year the contract ended, energy consumption during the year before the contract ended, and energy consumption during the year before installation of the energy conservation improvements;

(C) *Third year:* The energy consumption during the year after the contract ended, energy consumption during the year the contract ended, and energy consumption during the year before the contract ended.

(d) *Adjustment to utilities used for space heating.* For project utilities with consumption data for the entire rolling base period, and for new projects, consumption of utilities used for space heating shall be adjusted, after the end of the affected year, using a change factor as follows:

(1) *Adjustment of the rolling base period data.* (i) *Use of Change Factors.* A change factor will be developed each year by HUD that indicates the relationship of the affected IHA fiscal year Heating Degree Days (HDD) to the average HDD of the rolling base period. This change factor is to be used to establish an AUCL for utilities used for space heating which reflects the severity of the winter weather of the affected IHA fiscal year. The change factors are developed by the National Climatic Center of the Department of Commerce for each established standard weather division of the country, by IHA fiscal year. Change factors will be supplied by HUD to the IHAs. When a change factor is greater than 1.000, it means that the HDD of the affected fiscal year were greater than the average annual HDD of the rolling base period. An example of the effect of the change factor on the rolling base period consumption is:

Assume:

Affected fiscal year HDD—5,250

Rolling Base Period average HDD—5,000

Rolling Base Period average annual consumption for heating purposes—1,000 gallons

Results:

Change Factor is (5,250 divided by 5,000) = 1.050

Adjusted Rolling Base Period average consumption for heating purposes (1,000 × 1.050) = 1,050 gallons

(ii) *Application of change factor to consumption of the Rolling Base Period.* The change factor is to be applied only to the consumption readings of meters of utilities, or gallons of oil, or tons of coal used for the purpose of generating heat for dwelling units and other IHA associated buildings. The change factor shall not be applied to the consumption readings of meters of utilities not used for the purpose of generating heat; *e.g.*, water and sewer or electricity used solely for non-heating purposes. The change factor shall be applied to the total consumption reading of meters of utilities, or gallons of oil, or tons of coal used for heating even though the same meter or same energy source is used for other purposes; *e.g.*, heating and cooking gas usage metered on the same meter or oil used for space heating and also heating of water. Such consumption for each fiscal year of the rolling base period shall be adjusted by the change factor. The adjusted consumption for each year shall be totalled. These totals then will be averaged. The consumption readings of meters of utilities not used for heating (not adjusted by the change factor) shall be included in the total consumption.

EXAMPLE SHOWING APPLICATION OF CHANGE FACTOR

	Base years		
	1st year	2nd year	3rd year
Gas meters used for heating:			
No. 1234 (In therms)	15,000	18,000	17,000
No. 2345	10,000	12,000	11,000
Subtotal	25,000	30,000	28,000
Change Factor (from HUD)	×1.050	×1.050	×1.050
Subtotal	26,250	31,500	29,400
Gas meters not used for heating:			
No. 3456	2,500	2,600	2,650
Total adjusted allowable gas consumption level	28,750	34,100	32,050

(iii) IHAs will be required to use change factors of less than 1.000. Change factors are listed by county. If an IHA manages units in more than one county and those counties have different change factors, the above calculation shall be done considering the units in each county and each county's assigned change factor. If an IHA manages units in an independent city not within the jurisdiction of a county, it shall:

(A) If within one county, use that county's change factor; or

(B) If the city abuts more than one county, use the average of the change factors of the contiguous counties.

(2) *Adjusted consumption for new projects.* (i) *Use of change factor.* For new projects, the IHA shall apply the change factor to the HUD approved consumption level of utilities used for heating.

(ii) *Application of change factor to consumption of new projects.* The annual AUCL for new projects shall be adjusted by applying the change factor to the estimated consumption where the utility is used for heating in part or in total. This consumption shall be from a comparable project during the permissible rolling base period. Any other consumption of this utility which is not used for heating shall not be adjusted by the change factor, but the estimated annual consumption based upon data from a comparable project during the permissible rolling base period shall be added to the adjusted consumption.

(e) *Utilities expense level where consumption data for the full rolling base period is unavailable.* If an IHA does not obtain the consumption data for the entire rolling base period, or for 12 or 24 months of the rolling base period, either for its own project(s) or by using comparable consumption data as required in paragraph (c)(2) of this section, it shall request HUD Field Office approval to use actual per-unit per-month utility expenses. These expenses shall exclude utilities labor and other utilities expenses. The actual per-unit per-month utility expenses shall be taken from the year-end statement of operating receipts and expenditures Form HUD–52599 (Office of Management and Budget approval number 2577–0067), prepared for the IHA fiscal year which ended 12 months before the beginning of the IHA requested budget year (e.g., for an IHA fiscal year beginning January 1, 1983, the IHA would use data from the fiscal year ended December 31, 1981). No change factor shall be applied to actual per-unit per-month utility expenses, and subsequent adjustments will not be approved for a budget year for which the utility expense level is established based upon actual per-unit per-month utility expenses.

(f) *Adjustments.* IHAs shall request adjustments of utilities expense levels in accordance with § 950.730(c), which requires an adjustment based upon a comparison of actual experience and estimates of consumption (after adjustment for heating degree days in accordance with paragraph (d) of this section) and of utility rates.

(g) *Incentives for energy conservation improvements.* If an IHA undertakes energy conservation measures (including measures to save water, fuel oil, electricity, and gas) that are financed by an entity other than the Secretary, such as physical improvements financed by a loan from a utility or governmental entity, management of costs under a performance contract, or a shared savings agreement with a private energy service company, the IHA may qualify for one of two possible incentives under this part. For an IHA to qualify for these incentives, HUD approval shall be obtained. Approval will be based upon a determination that payments under the contract can be funded from the reasonably anticipated energy cost savings, and the contract period does not exceed 12 years.

(1) If the contract allows the IHA's payments to be dependent on the cost savings it realizes, the IHA shall use at least 50 percent of the cost savings to pay the contractor. With this type of contract, the IHA may take advantage of a frozen AUCL under paragraph (c)(4) of this section, and it may use the full amount of the cost savings, as described in § 950.730(c)(2)(ii).

(2) If the contract does not allow the IHA's payments to be dependent on the cost savings it realizes, then the AUCL will continue to be calculated in accordance with paragraphs (c)(1) through (c)(3) of this section, as appropriate; the IHA will be able to retain part of the cost savings, in accordance with § 950.730(c)(2)(i); and the IHA will qualify for additional operating subsidy eligibility (above the amount based on the allowable expense level) to cover the cost of amortizing the improvement loan during the term of the contract, in accordance with § 950.730(f).

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§ 950.720 Other costs.

(a) *Costs of independent audits.* (1) Eligibility to receive operating subsidy for independent audits is considered separately from the PFS. However, the IHA shall not request, nor will HUD approve, an operating subsidy for the cost of an independent audit if the audit has been funded by subsidy in a prior year. The IHA's estimate of cost of the independent audit is subject to adjustment by HUD. If the IHA requires assistance in determining the amount of cost to be estimated, the HUD Field Office should be contacted.

(2) An IHA that is required by the Single Audit Act (31 U.S.C. 7501–7507) (see 24 CFR part 44) to conduct a regular independent audit may receive operating subsidy to cover the cost of the audit. The amount shall be prorated between the IHA's development cost budget and one or all of its operating budgets, as appropriate. The estimated cost of an independent audit, applicable

to the operations of IHA-owned rental housing, is not included in the allowable expense level, but it is allowed in full in computing the amount of operating subsidy under § 950.705.

(3) An IHA that is exempt from the audit requirements of the Single Audit Act (31 U.S.C. 7501–7507); see 24 CFR part 44) may receive operating subsidy to offset the cost of an independent audit chargeable to operations (after the end of the initial operating period) if the IHA chooses to have an audit.

(b) *Costs attributable to units approved for deprogramming and vacant.*

(1) Units approved for deprogramming are those for which the IHA's formal request has been approved by HUD but for which deprogramming has not been completed. Costs for these units may be eligible for inclusion, but shall be limited to the minimum services and protection necessary to protect and preserve the units until the units are deprogrammed. Costs attributable to units temporarily unavailable for occupancy because they are utilized for IHA related activities are not eligible for inclusion. In determining the PFS operating subsidy, these units shall not be included in the calculation of unit months available. Units approved for deprogramming shall be listed by the IHA and supporting documentation regarding direct costs attributable to such units shall be included as part of the operating budget in which the IHA requests operating subsidy for these units. If the IHA requires assistance in this matter, the HUD Field Office should be contacted.

(2) Units approved for nondwelling use to promote economic self-sufficiency services and anti-drug activities are eligible for operating subsidy under the conditions provided in this paragraph (b)(2), and the costs attributable to them are to be included in the operating budget. If a unit satisfies the conditions stated in paragraphs (b)(2) (i) through (v) of this section, it will be eligible for subsidy at the rate of the AEL for the number of months the unit is devoted to such use. Approval will be given for a period of no more than three years. Renewal of the approval to allow payments after that period may be made only if the IHA can demonstrate that no other sources for paying the non-utility operating costs of the unit are available:

(i) The unit must be used for either economic self-sufficiency activities directly related to maximizing the number of employed residents or for anti-drug programs directly related to ridding the development of illegal drugs and drug-related crime. The activities must be directed toward and for the benefit of residents of the development.

(ii) The IHA must demonstrate that space for the service or program is not available elsewhere in the locality and that the space used is safe and suitable for its intended use or that resources are committed to make the space safe and suitable.

(iii) The IHA must demonstrate satisfactorily that other funding is not available to pay for the non-utility operating costs. All rental income generated as a result of the activity must be reported as income in the operating subsidy calculation.

(iv) Operating subsidy may be approved for only one site (involving one or more contiguous units) per Indian housing development for economic self-sufficiency services or anti-drug programs, and the number of units involved should be the minimum necessary to support the service or program. Operating subsidy for any additional sites per development can only be approved by HUD Headquarters.

(v) The IHA must submit a certification with its Performance Funding System calculation that the units are being used for the purpose for which they were approved and that any rental income generated as a result of the activity is reported as income in the operating subsidy calculation. The IHA must maintain specific documentation of the units covered. Such documentation should include a listing of the units and project/management control numbers.

(c) *Costs attributable to changes in Federal law or regulation.* In the event that HUD determines that enactment of a Federal law or revision in HUD or other Federal regulation has caused or will cause a significant increase in expenditures of a continuing nature above the allowable expense level and utilities expense level, and upon a determination that sufficient other funds are not available to cover the required expenditures, HUD may in HUD's sole discretion decide to prescribe a procedure under which the IHA may apply for or may receive an increase in operating subsidy.

(d) *Costs beyond the control of the IHA.* Costs attributable to unique circumstances that are beyond the control of the IHA and were not reflected in the IHA's Base Year Expense Level may be considered for supplemental operating subsidy funding. Where costs were reflected in the IHA's Base Year Expense Level, but the rate of increase for such costs is greater than the prescribed PFS inflation rate(s), then the increase in excess of that provided by the inflation rate may be considered for supplemental operating subsidy funding. The IHA shall submit to the HUD Field Office complete documentation relating to those cost items which it claims to be beyond its control. Such documentation shall not be submitted as part of the requested operating budget, but shall be submitted separately as an addendum to the budget. The IHA also shall show that these additional costs cannot be funded from its own resources. In the event that excess funds are available after making all payments approvable under §§ 990.705 and 950.720 of these regulations, HUD may, in HUD's sole discretion, solicit, evaluate and approve or disapprove, in full or in part, these requests for additional operating subsidy for costs beyond the control of the IHA.

(e) *Costs resulting from combination of two or more units.* When an IHA redesigns or rehabilitates a project and combines two or more units into one larger unit and the combination of units results in a unit that houses at least the same number of people as were previously served, the AEL for the requested year shall be multiplied by the number of unit months not included in the requested year's unit months available as a result of these combinations that have occurred since the Base Year. The number of people served in a unit will be based on the formula [(2 x No. of bedrooms) minus 1], which yields the *average* number of people that would be served. An efficiency unit will be counted as a one bedroom unit for purposes of this calculation.

(f) *User fee.* Additional operating subsidy will be provided to IHAs for payment of an annual User Fee separate from the PFS. An IHA operating a rental program shall pay an annual User Fee to municipalities, which may include Tribal, city, county government, or other political subdivision that provides any roads, water supply, sewage facilities, electrical systems or fuel distribution systems. The annual User Fee will be paid in an amount equal to 10 percent of the applicable shelter rent, minus the utility allowance; or $150, whichever is greater, for each rental housing unit covered by this section.

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§ 950.725 Projected operating income level.

(a) *Policy.* PFS determines the amount of operating subsidy for a particular IHA based in part upon a projection of the actual dwelling rental income and other

income for the particular IHA. The projection of dwelling rental income is obtained by computing the average monthly dwelling rental charge per unit for the IHA, and projecting this amount for the requested budget year by applying an upward trend factor (subject to updating) of 3 percent, and multiplying this amount by the projected occupancy percentage for the requested budget year. Nondwelling income is projected by the IHA subject to adjustment by HUD. There are special provisions for projection of dwelling rental income for new projects.

(b) *Computation of projected average monthly dwelling rental income.* The projected average monthly dwelling rental income per unit for the IHA is computed as follows:

(1) *Average monthly dwelling rental charge per unit.* The dollar amount of the average monthly dwelling rental charge per unit shall be computed on the basis of the total dwelling rental charges (total of the adjusted rent roll amounts) for all project units, as shown on the rent roll control and analysis of dwelling rent charges, which the IHA is required to maintain, for the first day of the month which is six months before the first day of the requested budget year, except that if a change in the total of the rent rolls has occurred in a subsequent month which is before the beginning of the requested budget year and before the submission of the requested budget year operating budget, the IHA shall use the latest changed rent roll for the purpose of the computation. This aggregate dollar amount shall be divided by the number of occupied dwelling units as of the same date.

(2) *Three percent increase.* The average monthly dwelling rental charge per unit, computed under paragraph (b)(1) of this section, is increased by 3 percent to obtain the projected average monthly dwelling rental charge per unit of the IHA for the requested budget year.

(3) *Projected occupancy percentage.* The IHA shall determine its projected percentage of occupancy for all project units (projected occupancy percentage) as follows:

(i) *High occupancy IHAs.* If the IHA's actual occupancy percentage (see § 950.760) is equal to or greater than 97 percent, the IHA's projected occupancy percentage is 97 percent.

(ii) *High occupancy IHAs exclusive of scheduled modernization.* If the IHA's actual occupancy percentage (see § 950.760) is less than 97 percent solely because of vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section, the IHA's projected occupancy percentage is its actual occupancy percentage. An IHA may also use its actual occupancy percentage as its projected occupancy percentage if the IHA has five or fewer vacant units other than vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section.

(iii) *Low occupancy IHAs with an approved Comprehensive Occupancy Plan (COP).* If the IHA has an actual occupancy percentage (see § 950.760) less than 97 percent and more than five vacant units, not solely because of vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section and if the IHA has a HUD-approved COP, the IHA's projected occupancy percentage is determined under § 950.770(h).

(iv) *Low Occupancy IHAs without an approved COP.* (A) The IHA shall use 97 percent as its projected occupancy percentage, if the IHA:

(*1*) Has an actual occupancy percentage (see § 950.760) less than 97 percent and has more than five vacant units, not solely because of vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section; and the IHA:

(*2*)(*i*) Has completed the term of its approved COP but has not achieved a 97 percent actual occupancy percentage or has not had five or fewer vacant units other than vacant, on-schedule modernization units described in paragraph (b)(3)(v) of this section; or

(*ii*) Is authorized to submit a COP but elects not to submit one; or

(*iii*) Submits a COP that is disapproved by HUD.

(B) Notwithstanding the requirement in paragraph (b)(3)(iv)(A) of this section that 97 percent be the projected occupancy percentage, a low occupancy IHA which satisfies all the conditions described in paragraph (b)(3)(iv)(A)(*2*)(*i*) of this section, may adjust the 97 percent projected occupancy percentage to discount units that are vacant for reasons beyond its control, as provided in § 950.770(i).

(v) *Vacant, on-schedule modernization units.* Vacant, on-schedule modernization units are vacant units in an otherwise occupiable project that has received funding for modernization through the comprehensive improvement assistance program (subpart I of this part) or other sources; and for which:

(A) It is expected that the vacant units will be occupied on completion of modernization work;

(B) The IHA has a schedule for carrying out the modernization which is acceptable to HUD; and

(C) The modernization work is on schedule.

(4) *Projected average monthly dwelling rental income.* The projected occupancy percentage under paragraph (b)(3) of this section shall be multiplied by the projected average monthly dwelling rental charge under paragraph (b)(2) of this section to obtain the projected monthly dwelling rental income per unit.

(c) *Projected average monthly dwelling rental charge per unit for new projects.* The projected average monthly dwelling rental charge for new projects that were not available for occupancy during the budget year before the requested budget year and which will reach the end of the initial operating period (EIOP) within the first nine months of the requested budget year, shall be calculated as follows:

(1) If the IHA has another project or projects under management which are comparable in terms of elderly and nonelderly tenant composition, the IHA shall use the projected average monthly dwelling rental charge for such project or projects.

(2) If the IHA has no other projects which are comparable in terms of elderly and nonelderly tenant composition, the HUD Field Office will provide the projected average monthly dwelling rental charge for such project or projects, based on comparable projects located in the area.

(d) *Estimate of additional dwelling rental income.* After implementation of the provisions of any legislation enacted or any HUD administrative action taken after [THE EFFECTIVE DATE OF THE FINAL RULE], which affects rent paid by tenants of projects, each IHA shall submit a revision of its annual operating budget showing an estimate of any change in rental income which it anticipates as the result of the implementation of said provisions. HUD shall have complete discretion to adjust the projected average monthly dwelling rental charge per unit to reflect the IHA's estimate of change or, in the absence of this submission, to reflect HUD's estimate of such change. HUD also shall have complete discretion to reduce or increase the operating subsidy approved for the IHA current fiscal year in an amount equivalent to the change in the rental income.

(e) *IHA's estimate of income other than dwelling rental income.*

(1) *Investment income.* IHAs with an estimated average cash balance of less than $20,000, excluding investment income earned from a funded replacement reserve under § 950.666(f), shall make a reasonable estimate of investment income for the Requested Budget Year. IHAs with an estimated average cash balance of $20,000 or

more, excluding investment income earned from a funded replacement reserve under § 950.666(f), shall estimate interest on general fund investments based on the estimated average yield for 91-day Treasury bills for the IHA's Requested Budget Year (yield information will be provided by HUD). The determination of average cash balance will allow a deduction of $10,000, plus $10 per unit for each unit over 1,000, subject to a total maximum deduction of $250,000. In all cases, the estimated investment income amount shall be subject to HUD approval. (See § 950.730(b).)

(2) *Other income.* All IHAs shall estimate other income based on past experience and a reasonable projection for the requested budget year, which estimate shall be subject to HUD approval.

(3) *Total.* The estimated total amount of income from investments and other income, as approved, shall be divided by the number of unit months available to obtain a per-unit per-month amount. Such amount shall be added to the projected average dwelling rental income per unit to obtain the projected operating income level. This amount shall not be subject to the provisions regarding program income in 24 CFR 85.25.

(f) *Required adjustments to estimates.* The IHA shall submit year-end adjustments of projected operating income levels in accordance with § 950.730(b), which covers investment income.

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§ 950.730 Adjustments.

Adjustment information submitted to HUD under this section shall be accompanied by an original or revised operating budget.

(a) *Adjustment of Base Year Expense Level.* (1) *Eligibility.* An IHA with projects that have been in management for at least one full fiscal year, for which operating subsidy is being requested under the formula for the first time, may, during its first budget year under PFS, request HUD to increase its Base Year Expense Level. Included in this category are existing IHAs requesting subsidy for a project or projects in operation at least one full fiscal year under separate ACC for which operating subsidy has never been paid, except for IPA audit costs. This request may be granted by HUD, in its discretion, only where the IHA establishes to HUD's satisfaction that the Base Year Expense Level computed under § 950.710(a) will result in operating subsidy at a level insufficient to support a reasonable level of essential services. The approved increase cannot exceed the per-unit per-month amount by which the top of the range exceeds the Base Year Expense Level or $10.31.

(2) *Procedure.* An IHA that is eligible for an adjustment under paragraph (a)(1) of this section may only make a request for such adjustment once for projects under a particular ACC, at the time it submits the operating budget for the first budget year under PFS. Such request shall be submitted to the HUD Field Office, which will review, modify as necessary, and approve or disapprove the request. A request under this paragraph shall include a calculation of the amount per-unit per-month of requested increase in the Base Year Expense Level, and shall show the requested increase as a percentage of the Base Year Expense Level.

(b) *Adjustments to estimated investment income.* An IHA that has an estimated average cash balance of at least $20,000 shall submit a year-end adjustment to the estimated amount of investment income that was used to determine subsidy eligibility at the beginning of the IHA's fiscal year. The amount of the adjustment will be the difference between the estimate and a target investment income amount based on the actual average yield on 91-day Treasury bills for the IHA's fiscal year being adjusted and the actual average cash balance available for investment during the IHA's fiscal year, computed in accordance with HUD requirements. HUD will provide the IHA with the actual average yield on 91-day Treasury bills for the IHA's fiscal year. Failure of an IHA to submit the required adjustment of investment income by the date due may, in the discretion of HUD, result in the withholding of approval of future obligation of operating subsidies until the adjustment is received.

(c) *Adjustments to Utilities Expense Level.* An IHA receiving operating subsidy under § 950.705, excluding those IHAs that receive operating subsidy solely for IPA audit (§ 950.720(a)), shall submit a year-end adjustment regarding the utility expense level approved for operating subsidy eligibility purposes. This adjustment, which will compare the actual utility expense and consumption for the IHA fiscal year to the estimates used for subsidy eligibility purposes, shall be submitted on forms prescribed by HUD. This request shall be submitted to the HUD Field Office by a deadline established by HUD, which will be during the IHA fiscal year following the IHA fiscal year for which an operating subsidy was received by the IHA, exclusive of a subsidy solely for IPA audit costs. Failure to submit the required adjustment of the utilities expense level by the due date may, in the discretion of HUD, result in the withholding of approval of future obligation of operating subsidies until it is received. Adjustments under this subsection normally will be made in the IHA fiscal year following the year for which the adjustment is applicable, except as provided in paragraph (c)(5) of this section or unless a repayment plan is necessary as noted in paragraph (d) of this section.

(1) *Rates.* (i) A decrease in the utilities expense level because of decreased utility rates—to the extent funded by operating subsidy—will be deducted by HUD from future operating subsidy payments. However, where the rate reduction covering utilities, such as water, fuel oil, electricity, and gas, is directly attributable to action by the IHA, such as well-head purchase of natural gas, or administrative appeals or legal action beyond normal public participation in ratemaking proceedings, then the IHA will be permitted to retain one-half of the cost savings attributable to its actions for the first year and, upon determination that the action was cost-effective in the first year, for up to an additional six years, as long as the actions continue to be cost-effective, and the other one-half of the cost savings will be deducted from operating subsidy otherwise payable.

(ii) An increase in the utilities expense level because of increased utility rates—to the extent funded by operating subsidy—will be fully funded by increased operating subsidy, subject to availability of funds.

(2) *Consumption.* (i) Generally, 50 percent of any decrease in the utilities expense level attributable to decreased consumption (adjusted for heating degree days in accordance with § 950.715(d)), after adjustment for any utility rate change, will be retained by the IHA; 50 percent will be offset by HUD against subsequent payment of operating subsidy.

(ii) However, in the case of an IHA whose energy conservation measures have been approved by HUD as satisfying the requirements of § 950.715(g)(1), the IHA may retain 100 percent of the savings from decreased consumption after payment of the amount due the contractor until the term of the financing agreement is completed. The decreased consumption is to be determined using a heating degree day adjustment for space heating utilities and by adjusting for any utility rate changes. The heating degree day experience during the frozen rolling base period will be used instead of the

degree days in the year being adjusted. The documentation on the degree days shall be supplied by the IHA and is subject to HUD approval. The savings realized shall be applied in the following order:

(A) Retention of up to 50 percent of the total savings from decreased consumption to cover training of IHA employees, counseling of tenants, IHA management of the cost reduction program and any other eligible costs; and

(B) Prepayment of the amount due the contractor under the contract.

(iii) Fifty percent of the increase in the Utilities Expense Level attributable to increased consumption will be funded by increased operating subsidy payments, subject to the availability of funds.

(3) *Emergency adjustments.* In emergency cases, where an IHA establishes to HUD's satisfaction that a severe financial crisis would result from a utility rate increase, an adjustment covering only the rate increase may be submitted to HUD at any time during the IHA's Current Budget Year. Unlike the adjustments mentioned in paragraphs (c)(1) and (c)(2) of this section, this adjustment shall be submitted to the HUD Field Office by revision of the original submission of the estimated Utility Expense Level for the fiscal year to be adjusted.

(4) *Documentation.* Supporting documentation substantiating the requested adjustments shall be retained by the IHA pending HUD audit.

(d) *Requests for adjustments to projected average monthly dwelling rental income.* Requests for adjustments to projected average monthly dwelling rental income may be made as follows:

(1) *Criteria for granting request.* An IHA may request an adjustment to projected average monthly dwelling rental income under PFS if the IHA can establish to HUD's satisfaction that the projected amount computed under § 950.725 was not attained because of circumstances beyond the control of the IHA, such as a substantial increase in general unemployment in the locality, or because of a revision of the IHA's rent schedule which has been approved by HUD. The IHA shall also demonstrate to HUD's satisfaction that it has established and is effectively implementing tenant selection criteria in compliance with HUD requirements. HUD shall have complete discretion to approve completely, approve in part or deny any requested adjustments to projected average monthly dwelling rental income.

(2) *Procedure.* A request for an adjustment under this subsection shall be submitted to the HUD Field Office by a deadline established by HUD, which will be within twelve months following the IHA's fiscal year being adjusted. In emergency cases, however, where an IHA establishes to HUD's satisfaction that decreased rental income would result in a severe financial crisis, a request for adjustments may be submitted to HUD at an earlier time.

(e) *Energy conservation financing.* If HUD has approved an energy conservation contract under § 950.715(g)(2), then the IHA is eligible for additional operating subsidy each year of the contract to amortize the cost of the energy conservation measures under the contract, subject to a maximum annual limit equal to the cost savings for that year (and a maximum contract period of 12 years).

(1) Each year, the energy cost savings would be determined as follows:

(i) The consumption level that would have been expected if the energy conservation measure had not been undertaken would be adjusted for the Heating Degree Days experience for the year, and for any change in utility rate.

(ii) The actual cost of energy (of the type affected by the energy conservation measure) after implementation of the energy conservation measure would be subtracted from the expected energy cost, to produce the energy cost savings for the year. (See also paragraph (c)(2)(ii) of this section for retention of consumption savings.)

(2) If the cost savings for any year during the contract period is less than the amount of operating subsidy to be made available under this paragraph (e) to pay for the energy conservation measure in that year, the deficiency will be offset against the IHA's operating subsidy eligibility for the IHA's next fiscal year.

(3) If energy cost savings are less than the amount necessary to meet amortization payments specified in a contract, the contract term may be extended (up to the 12-year limit) if HUD determines that the shortfall is the result of changed circumstances rather than a miscalculation or misrepresentation of projected energy savings by the contractor or IHA. The contract term may only be extended to accommodate payment to the contractor and associated direct costs.

(f) *Formal review process (1992).* (1) *Eligibility for consideration.* Any IHA with an established Allowable Expense Level may request to use a revised Allowable Expense Level for its requested budget year that starts on or after April 1, 1992 (and ends during calendar year 1993).

(2) *Eligibility for adjustment.* (i) If an IHA's AEL for the budget year that ends during calendar year 1992 is either less than 85 percent of the Formula Expense Level or more than 115 percent of the Formula Expense Level, as calculated using the revised formula and the characteristics for the IHA and its community, then the IHA's AEL for the budget year that ends during calendar year 1993 is subject to adjustment at the IHA's request. The revised formula expense level for the fiscal year ending during calendar year 1992 is the IHA's value of the following formula, after updating by the local inflation factors from FY 1989 to the requested budget year.

(ii) The revised formula is the *sum of* the following six numbers:

(A) *The number of pre-1940 rental units occupied by poor households in 1980 as a percentage of the 1980 population of the community multiplied by a weight of 7.954.* This Census-based statistic applies to the county of the IHA, except that, if the IHA has 80 percent or more of its units in an incorporated city of more than 10,000 persons, it uses city-specific data. County data will exclude data for any incorporated cities of more than 10,000 persons within its boundaries.

(B) *The Local Government Wage Rate multiplied by a weight of 116.496.* The wage rate used is a figure determined by the Bureau of Labor Statistics. It is a county-based statistic, calibrated to a unit-weighted IHA standard of 1.0. For multi-county IHAs, the local government wage is unit-weighted. For this formula, the local government wage index for a specific county cannot be less than 85 percent or more than 115 percent of the average local government wage for counties of comparable population and metro/non-metro status, on a state-by-state basis. In addition, for counties of more than 150,000 population in 1980, the local government wage cannot be less than 85 percent or more than 115 percent of the wage index of private employment determined by the Bureau of Labor Statistics and the rehabilitation cost index of labor and materials determined by the R.S. Means Company.

(C) *The lesser of the current number of the IHA's two or more bedroom units available for occupancy, or 15,000 units, multiplied by a weight of .002896.*

(D) *The current ratio of the number of the IHA's two or more bedroom units available for occupancy in high-rise family projects to the number of all the IHA's units available for occupancy multiplied by a weight of 37.294.* For this indicator, a high-rise family project is defined as averaging 1.5 or more

bedrooms per unit available for occupancy and averaging 35 or more units available for occupancy per building and containing at least one building with units available for occupancy that is 5 or more stories high.

(E) *The current ratio of the number of the IHA's three or more bedroom units available for occupancy to the number of all the IHA's units available for occupancy multiplied by a weight of 22.303.*

(F) *An equation calibration constant of −.2344.*

(3) *Procedure.* If an IHA wants to request a revision to its AEL, it should determine whether its AEL for the fiscal year ending in calendar year 1992 (for purposes of this section, the "unrevised AEL") is either less than 85 percent of the Formula Expense Level or more than 115 percent of the Formula Expense Level. Then, in lieu of using the unrevised AEL as the basis for developing the IHA's AEL and operating budget for the fiscal year ending in calendar year 1993, the IHA will use 85 percent of the FEL (if this is higher than the unrevised AEL) or 115 percent of the FEL (if this is lower than the unrevised AEL). If an IHA has submitted its original operating budget before the publication of a change to the PFS handbook containing forms and instructions necessary to implementation of this regulatory change, the IHA shall submit a revision to its operating budget with calculations based on the new AEL. If an IHA requests such revision of its AEL in connection with submission of an operating budget and its current AEL *is* within 85 to 115 percent of the FEL, HUD will not adjust the AEL. If an IHA requests revision and its AEL *is not* within 85 to 115 percent of the FEL, HUD will increase it to 85 percent or decrease it to 115 percent. The revised Allowable Expense Levels approved by HUD will be put into effect for the IHA's budget year that begins on or after April 1, 1992 (and thus ends in calendar year 1993).

(g) *Additional HUD-initiated adjustments.* Notwithstanding any other provisions of this subpart, HUD may at any time make an upward or downward adjustment in the amount of the IHA's operating subsidy as result of data subsequently available to HUD which alters projections upon which the approved operating subsidy was based. Normally adjustments shall be made in total in the IHA fiscal year in which the needed adjustment is determined; however, if a downward adjustment would cause a severe financial hardship on the IHA, the HUD Field Office may establish a recovery schedule which represents the minimum number of years needed for repayment.

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§ 950.735 Transition funding for excessive high-cost IHAs.

If an IHA's Base Year Expense Level exceeds its allowable expense level, computed as provided in § 950.710, for any budget year under PFS, the IHA may be eligible for transition funding. Transition funding shall be an amount not to exceed the difference between the Base Year Expense Level and the allowable expense level for the requested budget year, multiplied by the number of units months available. HUD shall have the right to discontinue payment of all or part of the transition funding in the event HUD at any time determines that the IHA has not achieved a satisfactory level of management efficiency, or is not making efforts satisfactory to HUD to improve its management performance.

§ 950.740 Operating reserves.

(a) The IHA shall maintain an operating reserve for the project in an amount sufficient for working capital purposes, for estimated future nonroutine maintenance requirements for IHA-owned administrative facilities, common property and dwelling units, for the payment of advanced insurance premiums and unanticipated project requirements. If an IHA fails to maintain an adequate operating reserve level, HUD may declare the IHA to be "high risk" and require that the IHA develop a plan for improving its financial condition.

(b) At the end of each fiscal year or other budget period, the project operating reserve shall be:

(1) Credited with the amount by which operating receipts exceed operating expenses of the project for the budget period, or

(2) Charged with the amount by which operating expenses exceed operating receipts of the project for the budget period.

§ 950.745 Operating budget submission and approval.

(a) *Required board resolution.* In addition to other budget documentation required by HUD, each operating budget or operating budget revision shall include a certified copy of a resolution of the board of commissioners stating that the board has reviewed and approved the operating budget or operating budget revision and has found:

(1) That the proposed expenditures are necessary in the efficient and economical operation of the housing for the purpose of serving low income families.

(2) That the financial plan is reasonable in that:

(i) It indicates a source of funding adequate to cover all proposed expenditures.

(ii) It does not provide for use of Federal funding in excess of that payable under the provisions of these regulations.

(3) That all proposed rental charges and expenditures will be consistent with provisions of law and the annual contributions contract.

(b) *HUD limited operating budget review.* Detailed HUD review of the operating budgets or operating budget revisions normally will be limited to the prescribed PFS forms. Under this procedure, although the operating budget normally will not be reviewed in depth, the operating reserve calculation in all cases will be examined and budget modifications will be made where the operating reserve provisions are not in accordance with HUD requirements. In addition, if the HUD Field Office finds that an operating budget is incomplete, includes illegal or ineligible expenditures, mathematical errors or errors in the application of accounting procedures, or is otherwise unacceptable, the HUD Field Office may at any time require the submission by the IHA of further information regarding an operating budget or operating budget revision.

(c) *Withdrawal by HUD of limited operating budget review.* HUD reserves the right at any time to deviate from the limited operating budget review provided in paragraph (b) of this section if HUD finds that the IHA is operating its program in a manner which threatens the future serviceability, efficiency, economy, or stability of the housing that it operates. If such action is deemed necessary, the HUD Field Office will normally notify the IHA before its submission of the operating budget that HUD will subject the operating budget to a detailed review. When the IHA's operating no longer threaten the future serviceability, efficiency, economy or stability of the housing, HUD will notify the IHA that the limited review as provided in paragraph (b) of this section is being reinstated.

(Approved by the Office of Management and Budget under control number 2577–00267.)

§ 950.750 Payment procedure for operating subsidy under PFS.

(a) *General.* Subject to the availability of funds, payments of operating subsidy under PFS shall be made generally by electronic funds transfers, based on a

schedule submitted by the IHA and approved by HUD, reflecting the IHA's projected cash needs. The schedule may provide for several payments per month. If an IHA has an unanticipated, immediate need for disbursement of approved operating subsidy, it may make an informal request to HUD to revise the approved schedule. (Requests by telephone are acceptable.)

(b) *Payments procedure.* In the event that the amount of operating subsidy has not been determined by HUD as of the beginning of an IHA's budget year under the PFS regulations in this subpart, annual or monthly or quarterly payments of operating subsidy shall be made, as provided in paragraph (a) of this section, based upon the amount of the IHA's operating subsidy for the previous budget year or such other amount as HUD may determine to be appropriate.

(c) *Availability of funds.* In the event that insufficient funds are available to make payments approvable under PFS for operating subsidy payable by HUD, HUD shall have complete discretion to revise, on a pro rata basis or other basis established by HUD, the amounts of operating subsidy to be paid to IHAs.

§ 950.755 Payments of operating subsidy conditioned upon reexamination of income of families in occupancy.

(a) *Policy.* The income and composition of each family shall be reexamined at least annually (see § 950.315). IHAs must be in compliance with this reexamination requirement to be eligible to receive full operating subsidy payments.

(b) *IHAs in compliance with requirements.* Each submission of the original operating budget for a fiscal year shall be accompanied by a certification by the IHA that it is in compliance with the annual income reexamination requirements and that rents have been or will be adjusted in accordance with subpart D of this part.

(c) *IHAs not in compliance with requirements.* Any IHA not in compliance with the annual income reexamination requirement at the time of operating budget submission shall furnish to the HUD Field Office a copy of the procedure it is using to attain compliance and a statement of the number of families that have undergone reexamination during the twelve months preceding the date of the operating budget submission, or the revision thereof. If, on the basis of such submission, or any other information, the Field Office Director determines that the IHA is not substantially in compliance with the annual income reexamination requirement, HUD shall withhold payments to which the IHA might otherwise be entitled under this part, equal to his or her estimate of the loss of rental income to the IHA resulting from its failure to comply with those requirements.

(Approved by the Office of Management and Budget under control number 2577–0026.)

§ 950.760 Determining actual occupancy percentage.

(a) For each requested budget year beginning on or after July 1, 1986, the IHA shall determine the percentage of occupancy for all project units included in the unit months available (actual occupancy percentage), at its option, either:

(1) For the last day of the month that ends six months before the beginning of the requested budget year; or

(2) Based on the average occupancy during the month ending six months before the beginning of the requested budget year.

(b) If the IHA elects to use an average, it shall maintain a record of its computation of its actual occupancy percentage. The actual occupancy percentage shall be adjusted to reflect expected changes in occupancy because of modernization, new development, demolition or disposition in order to reflect the expected average occupancy rate throughout the year. If, after that date, there are changes, up or down, in occupancy because of modernization, new development, demolition, or disposition not reflected in the adjustment, the IHA shall submit a budget revision to reflect the actual change in occupancy due to these actions.

§ 950.770 Comprehensive Occupancy Plan requirements.

(a) *IHAs that may submit a Comprehensive Occupancy Plan.* An IHA may prepare and submit a COP to HUD in accordance with the provisions of this section:

(1) For its first requested budget year beginning on or after July 1, 1986, if the IHA has an actual occupancy percentage (§ 950.760) less than 97 percent, and has more than five vacant units, not solely because of vacant, on-schedule modernization units (as defined in § 950.725(b)(3)(v)); or

(2) For a requested budget year beginning on or after July 1, 1987, if:

(i) The IHA projects an actual occupancy percentage (§ 950.760) for the requested budget year of less than 97 percent and has more than five vacant units, other than vacant, on-schedule modernization units;

(ii) The IHA is not currently a low occupancy IHA, that is, the IHA had an actual occupancy percentage determined under § 950.760 for the current requested budget year that equalled or exceeded 97 percent or had five or fewer vacant units other than vacant, on-schedule modernization units; and

(iii) The IHA is not currently under a COP.

(b) *Comprehensive Occupancy Plan content.* A COP shall provide a general IHA-wide strategy for returning to occupancy or deprogramming all vacant units and a specific strategy for returning to occupancy or deprogramming units for each project that has an occupancy percentage of less than 97 percent.

(1) The general IHA-wide strategy for returning to occupancy or deprogramming all vacant units shall specify management actions the IHA is taking or intends to take to eliminate vacancies, such as revised occupancy policies, actions to reduce time to return vacated units to occupancy, and identification of the need to use the exception for nonelderly tenants in elderly projects, and shall include a schedule for completing these actions.

(2) The project-specific strategy shall:

(i) Identify each project that has a percentage of occupancy less than 97 percent.

(ii) State the project-specific actions the IHA is taking or intends to take to eliminate vacancies, such as:

(A) Modernization;

(B) Demolition;

(C) Disposition;

(D) Change in occupancy policy; or

(E) Physical or management improvements; and

(iii) For each project identified, include a schedule for completing these actions and returning the units to occupancy.

(3) The COP shall also include yearly IHA-wide occupancy goals and yearly occupancy goals for each project with an occupancy rate below 97 percent stated for each year until there is a projected IHA-wide occupancy rate of at least 97 percent or an estimate that the IHA will have five or fewer vacant units, excluding units that are vacant, on-schedule modernization units. These goals should reflect the average occupancy percentage for each year. The yearly occupancy goals (both IHA-wide and project specific) for the first year of a COP that is submitted with an IHA's budget for its first requested budget year beginning on or after July 1, 1986, shall take into account actions taken by the IHA from August 2, 1985, to reduce vacancies.

(c) *Time for submitting a Comprehensive Occupancy Plan.* An

IHA that submits a COP to HUD for approval in accordance with paragraph (a) of this section shall submit the COP with its budget.

(d) *Maximum term of a Comprehensive Occupancy Plan.* (1) Except as provided in paragraph (d)(2) of this section, a COP:

(i) Submitted for an IHA's first requested budget year beginning on or after July 1, 1986, shall be for a period approved by HUD as reasonable, which shall not exceed five years; or

(ii) Submitted for a requested budget year beginning on or after July 1, 1987, shall be for a period of one or two years, as approved by HUD.

(2) A COP that exceeds the maximum period provided in paragraphs (d)(1) (i) or (ii) of this section may be approved only if the Assistant Secretary for Public and Indian Housing has given written authorization for such longer period before the approval of the COP.

(e) *Local governing body review.* The IHA shall have the COP reviewed by the local governing body for comment and shall submit any comments from the local governing body to HUD with the COP.

(f) *HUD review of Comprehensive Occupancy Plan.* If HUD fails to approve, disapprove or otherwise substantively comment on a COP within 45 days of receipt of the plan, the IHA-wide yearly occupancy goal for the first year of the COP shall be considered approved for the purpose of determining the IHA's projected occupancy percentage under paragraph (h) of this section.

(g) *Projected Occupancy Percentage (Comprehensive Occupancy Plan).* An IHA that has a HUD-approved COP shall use as its projected occupancy percentage for computing its projected operating income level under § 950.725 the greater of its actual occupancy percentage, as determined under § 950.760 or its approved, yearly IHA-wide occupancy goal, adjusted, as necessary, to discount units that are vacant for reasons beyond the IHA's control, as provided in paragraph (i) of this section.

(h) *Units vacant for reasons beyond an IHA's control.* A vacant unit is considered vacant for reasons beyond an IHA's control only if the unit is located in a project that meets one of the following conditions:

(1) The IHA has applied for modernization, HUD cannot fund the project because of lack of sufficient funding, and it is expected that the units will be occupied when the units are modernized.

(2) The vacant units are vacant, on-schedule modernization units.

(3) The units are vacant because of natural disasters, or as a result of court-ordered, or HUD-approved, constraints relating to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d).

§ 905.772 Financial management systems, monitoring and reporting.

The financial management systems, reporting and monitoring on program performance and financial reporting will be in compliance with the requirements of 24 CFR 85.20, 85.40, and 85.41, except to the extent that HUD requirements provide for additional specialized procedures necessary to permit the Secretary to make the determinations regarding the payment of operating subsidy specified in section 9(a)(1) of the United States Housing Act of 1937 (42 U.S.C 1437g(a)(1)).

(Approved by the Office of Management and Budget under OMB control number 2577–0066.)

§ 950.774 Operating subsidy eligibility for projects owned by IHAs in Alaska.

The provisions of this subpart are applicable to the development, modernization, and operation of the rental housing owned by the IHAs in the State of Alaska, excluding the formula calculation for the PFS.

Subpart K—Energy Audits, Energy Conservation Measures and Utility Allowances

§ 950.801 Purpose and applicability.

(a) *Purpose.* The purpose of this subpart is to implement HUD policies in support of national energy conservation goals by reducing energy consumption, with consequent reduction of operating costs of IHA-owned housing projects, by requiring that IHAs conduct energy audits and undertake certain cost-effective, energy conservation measures. This subpart also provides for the establishment of utility allowances for tenants based on reasonable consumption of utilities by an energy-conscious household.

(b) *Applicability.* The provisions of this subpart apply to all IHAs with IHA-owned housing including Mutual Help and Turnkey III.

Energy Audits and Energy Conservation Measures

§ 950.805 Requirements for energy audits.

All IHAs shall complete an appropriate energy audit for each IHA-owned project under management in accordance with the schedule specified in § 950.822. Energy audits shall be conducted by IHA personnel or consultants as appropriate. Standards for energy audits shall be equivalent to State or Tribal standards for energy audits or as approved by HUD. Energy audits shall analyze all of the energy conservation measures, and the payback period for these measures, that are pertinent to the type of buildings and equipment operated by the IHA.

§ 950.810 Order of funding.

Within the funds available to an IHA, energy conservation measures should be accomplished with the shortest pay-back periods funded first. However, HUD Field Offices should permit IHAs to make adjustments to this funding order because of insufficient funds to accomplish high-cost energy conservation measures (ECM) or a situation in which an ECM with a longer pay-back period can be more efficiently installed in conjunction with other planned modernization. Field Offices may not authorize installation of individual utility meters that measure the energy or fuel used for space heating in dwelling units that need substantial weatherization, when installation of meters would result in economic hardship for tenants. In these cases, the ECMs related to weatherization must be accomplished before the installation of individual utility meters.

§ 950.812 Funding.

(a) The cost of accomplishing cost-effective energy conservation measures, including the cost of performing energy audits, shall be funded from operating funds of the IHA to the extent feasible. When sufficient operating funds are not available for this purpose, such costs are eligible for inclusion in a modernization program, for funding from any available development funds in the case of projects still in development or for other available funds that HUD may designate to be used for energy conservation.

(b) If an IHA finances energy conservation measures from sources other than CIAP or operating reserves, such as on the basis of a promise to repay, HUD may agree to provide adjustments in its calculation of the IHA's operating subsidy eligibility under the PFS for the project and utility involved if the financing arrangement is cost-beneficial to HUD. (See § 950.730(e).)

§ 950.815 Energy conservation equipment and practices.

In purchasing original or, when needed, replacement equipment, IHAs shall acquire only equipment that meets or exceeds the minimum efficiency requirements established by the U.S. Department of Energy. In the operation of their facilities, IHAs shall follow

operating practices directed to maximum energy conservation.

§ 950.822 Compliance schedule.

All energy conservation measures determined by energy audits to be cost effective shall be accomplished as funds are available.

§ 950.825 Energy performance contracts.

(a) *Method of procurement.* Energy performance contracting shall be conducted using one of the following methods of procurement:

(1) Competitive proposals (see § 950.175(d)). In identifying the evaluation factors and their relative importance, as required by § 950.175(d)(1), the solicitation shall state that technical factors are significantly more important than price (of the energy audit); or

(2) If the services are available only from a single source, noncompetitive proposals (see § 950.175(e)(2)).

(b) *HUD review.* Solicitations for energy performance contracts shall be submitted to the HUD Field Office for review and approval before issuance. Energy performance contracts shall be submitted to the Office of Native American Programs for review and approval before award.

Individual Metering of Utilities

§ 950.840 Individually metered utilities.

(a) All utility service shall be individually metered to tenants, either through provision of retail service to the tenants by the utility supplier or through the use of checkmeters unless:

(1) Individual metering is impractical, such as in the case of a central heating system in an apartment building;

(2) Change from a mastermetering system to individual meters would not be financially justified based upon a benefit/cost analysis; or

(3) Checkmetering is not permissible under state or local law, or under the policies of the particular utility supplier or public service commission.

(b) If checkmetering is not permissible, retail service must be considered. Where checkmetering is permissible, the type of individual metering offering the most savings to the IHA shall be selected.

§ 950.842 Benefit/cost analysis.

(a) A benefit/cost analysis shall be made to determine whether a change from a mastermetering system to individual meters will be cost effective, except as otherwise provided in § 950.846.

(b) Proposed installation of checkmeters must be justified on the basis that the cost of debt service (interest and amortization) of the estimated installation costs plus the operating costs of the checkmeters will be more than offset by reduction in future utilities expenditures to the IHA under the mastermeter system.

(c) Proposed conversion to retail service must be justified on the basis of net savings to the IHA. This determination involves making a comparison between the reduction in utility expense obtained through eliminating the expense to the IHA for IHA-supplied utilities compared to the resultant allowance for tenant-supplied utilities, based on the cost of utility service to the tenants after conversion.

§ 950.844 Funding.

The cost to change mastermeter systems to individual metering of tenant consumption, including the costs of benefit/cost analysis and complete installation of checkmeters, shall be funded from operating funds of the IHA to the extent feasible. When sufficient operating funds are not available for this purpose, such costs are eligible for inclusion in a modernization project or for funding from any available development funds.

§ 950.845 Order of conversion.

Conversions to individually metered utility service shall be accomplished in the following order where an IHA has projects of two or more of the designated categories, unless otherwise approved by the HUD Field Office:

(a) In projects where retail service is provided by the utility supplier and the IHA is paying all the individual utility bills, no benefit/cost analysis is necessary and tenants shall be billed directly after the IHA adopts revised payment schedules providing appropriate allowances for tenant-supplied utilities.

(b) In projects where checkmeters have been installed but are not being utilized as the basis for determining utility charges to the tenants, no benefit/cost analysis is necessary and the checkmeters shall be used as the basis for utility charges, and tenants shall be surcharged for excess utility use.

(c) Projects where meter loops have been installed for utilization of checkmeters shall be analyzed both for the installation of checkmeters and for conversion to retail service.

(d) Low or medium rise family units with a mastermeter system should be analyzed for both checkmetering and conversion to retail service, because of their large potential for energy savings.

(e) Low or medium rise housing for elderly should next be analyzed for both checkmetering and conversion to retail service, since the potential for energy saving is less than for family units.

(f) Electric service under mastermeters for high rise buildings, including projects for the elderly, should be analyzed for both use of retail service and of checkmeters.

§ 950.846 Actions affecting residents.

(a) Before making any conversion to retail service, the IHA shall adopt revised payment schedules, providing appropriate allowances for the tenant-supplied utilities resulting from the conversion.

(b) Before implementing any modifications to utility services arrangements with the tenants or charges with respect thereto, the requisite changes shall be made in tenant dwelling leases in accordance with subpart D of this part.

(c) To the extent practicable, IHAs should work closely with resident organizations in making plans for conversion of utility service to individual metering, explaining the national policy objectives of energy conservation, the changes in charges and rent structure that will result, and the goals of achieving an equitable structure that will be advantageous to tenants who conserve energy.

(d) A transition period of at least six months shall be provided in the case of initiation of checkmeters during which tenants will be advised of the charges but during which no surcharge will be made, based on the readings. This trial period will afford tenants ample notice of the effects the checkmetering system will have on their individual utility charges and also afford a test period for the adequacy of the utility allowances established.

(e) During and after the transition period, IHAs shall advise and assist tenants with high utility consumption on methods for reducing their usage. This advice and assistance may include counseling, installation of new energy conserving equipment or appliances, and corrective maintenance.

§ 950.849 Waivers for similar projects.

IHAs with more than one project of similar design and utilities service may prepare a benefit/cost analysis for a representative project. A finding that a change in metering is not cost effective for the representative project is sufficient reason for the HUD Field Office to waive the requirements of this subpart for benefit/cost analysis on the remaining similar projects.

§ 950.850 Reevaluations of mastermeter systems.

Because of changes in the cost of utility services and the periodic changes

in utility regulations, IHAs with mastermeter systems are required to reevaluate mastermeter systems without checkmeters by making benefit/cost analyses at least every 36 months. HUD Field Offices may grant waivers of this requirement upon making a finding as provided in § 950.849.

Resident Utility Allowances

§ 950.860 Applicability.

(a) Sections 950.860 through 950.876 apply to all Indian housing dwelling units, including those operated under the Mutual Help Homeownership Opportunity Program.

(b) In rental units where utilities are furnished by the IHA but there are no checkmeters to measure the actual utilities consumption of the individual units, tenants shall be subject to charges for consumption of tenant-owned major appliances, or for optional functions of IHA-furnished equipment, in accordance with § 950.865(e), but no utility allowance will be established.

§ 950.865 Establishment of utility allowances by IHAs.

(a) IHAs shall establish allowances for IHA-furnished utilities for all checkmetered utilities and allowances for tenant-purchased utilities for all utilities purchased directly by tenants from the utilities suppliers.

(b) The IHA shall maintain a record that documents the basis on which allowances and scheduled surcharges, and revisions thereof, are established and revised. Such record shall be available for inspection by tenants.

(c) The IHA shall give notice to all tenants of proposed allowances and scheduled surcharges and revisions thereof. Such notice shall be given, in the manner provided in the lease or homebuyer agreement, not less than 60 days before the proposed effective date of the allowances or scheduled surcharges or revisions; shall describe with reasonable particularity the basis for determination of the allowances, scheduled surcharges or revisions, including a statement of the specific items of equipment and function whose utility consumption requirements were included in determining the amounts of the allowances or scheduled surcharges; shall notify tenants of the place where the IHA's record maintained in accordance with paragraph (b) of this section is available for inspection; and shall provide all tenants an opportunity to submit written comments during a period expiring not less than 30 days before the proposed effective date of the allowances or scheduled surcharges or revisions. Such written comments shall be retained by the IHA and shall be available for inspection by tenants and, upon request, by HUD.

(d) The IHA shall furnish to HUD, as instructed, a copy of its schedule of allowances and scheduled surcharges, and each revision thereof, promptly upon such schedule becoming effective. Schedules of allowances and scheduled surcharges shall not ordinarily be subject to approval by HUD before becoming effective but will be reviewed in the course of audits or reviews of IHA operations. Following such audits or reviews, HUD may require additional data concerning the IHA's basis for determination of allowances or scheduled surcharges, may require additional or different relevant data to be considered by the IHA in its next annual review on an exception basis, and may require that an IHA submit its proposed revision of allowances or scheduled surcharges to HUD for review and approval before the revision is adopted.

(e) The IHA's determinations of allowances, scheduled surcharges and revisions thereof shall be final and valid unless found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

(Approved by the Office of Management and Budget under control number 2577–0062)

§ 950.867 Categories for establishment of allowances.

Separate allowances shall be established for each utility and for each category of dwelling units determined by the IHA to be reasonably comparable as to factors affecting utility usage. The IHA will establish allowances for different size units, in terms of numbers of bedrooms. Other categories may be established at the discretion of the IHA.

§ 950.869 Period for which allowances are established.

(a) *IHA-furnished utilities.* Allowances will normally be established on a quarterly basis; however, tenants may be surcharged on a monthly basis. The allowances established may provide for seasonal variations.

(b) *Tenant-purchased utilities.* Monthly allowances shall be established at a uniform monthly amount based on an average monthly utility requirement for a year; however, if the utility supplier does not offer tenants a uniform payment plan, the allowances established may provide for seasonal variations.

§ 950.870 Standards for allowances for utilities.

(a) The objective of an IHA in designing methods of establishing utility allowances for each dwelling unit category and unit size shall be to approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment.

(b) Allowances for both IHA-furnished and tenant-purchased utilities shall be designed to include such reasonable consumption for major equipment or for utility functions furnished by the IHA for all tenants (*e.g.*, heating furnace, hot water heater), for essential equipment whether or not furnished by the IHA (*e.g.*, range and refrigerator), and for minor items of equipment (such as toasters and radios) furnished by tenants.

(c) The complexity and elaborateness of the methods chosen by the IHA, in its discretion, to achieve the foregoing objective will be dependent upon the data available to the IHA and the extent of the administrative resources reasonably available to the IHA to be devoted to the collection of such data, the formulation of methods of calculation, and actual calculation and monitoring of the allowances.

(d) In establishing allowances, the IHA shall take into account relevant factors affecting consumption requirements, including:

(1) The equipment and functions intended to be covered by the allowance for which the utility will be used. For instance, natural gas may be used for cooking or heating domestic water or space heating or any combination of the three.

(2) The climatic location of the housing projects.

(3) The size of the dwelling units and the number of occupants per dwelling unit.

(4) Type of construction and design of the housing project.

(5) The energy efficiency of IHA-supplied appliances and equipment.

(6) The utility consumption requirements of appliances and equipment whose reasonable consumption is intended to be covered by the total tenant payment.

(7) The physical condition, including insulation and weatherization, of the housing project.

(8) Temperature levels intended to be maintained in the unit during the day and at night, and in cold and warm weather.

(9) Temperature of domestic hot water.

§ 950.872 Surcharges for excess consumption of IHA-furnished utilities.

(a) For dwelling units subject to allowances for IHA-furnished utilities

where checkmeters have been installed, the IHA shall establish surcharges for utility consumption in excess of the allowances. Surcharges may be computed on a straight per unit of purchase basis (*e.g.*, cents per kilowatt hour of electricity) or for stated blocks of excess consumption, and shall be based on the IHA's average utility rate. The basis for calculating such surcharges shall be described in the IHA's schedule of allowances. Changes in the dollar amounts of surcharges based directly on changes in the IHA's average utility rate shall not be subject to the advance notice requirements of this section.

(b) For dwelling units served by IHA-furnished utilities where checkmeters have not been installed, the IHA shall establish schedules of surcharges indicating additional dollar amounts tenants will be required to pay by reason of estimated utility consumption attributable to tenant-owned major appliances or to optional functions of IHA-furnished equipment. Such surcharge schedules shall state the tenant-owned equipment (or functions of IHA-furnished equipment) for which surcharges shall be made and the amounts of such charges, which shall be based on the cost to the IHA of the utility consumption estimated to be attributable to reasonable usage of such equipment.

§ 950.874 Review and revision of allowances.

(a) *Annual review.* The IHA shall review at least annually the basis on which utility allowances have been established and, if reasonably required in order to continue adherence to the standards stated in § 950.870, shall establish revised allowances. The review shall include all changes in circumstances (including completion of comprehensive or special purpose modernization under the Comprehensive Improvement Assistance Program and/or other energy conservation measures implemented by the IHA) indicating probability of a significant change in reasonable consumption requirements and changes in utility rates.

(b) *Revision as a result of rate changes.* The IHA may revise its allowances for tenant-purchased utilities between annual reviews if there is a rate change (including fuel adjustments) and shall be required to do so if such change, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more from the rates on which such allowances were based. Adjustments to tenant payments as a result of such changes shall be retroactive to the first day of the month following the month in which the last rate change taken into account in such revision became effective.

(Approved by the Office of Management and Budget under control number 2577–0062)

§ 950.876 Individual relief.

Requests for relief from surcharges for excess consumption of IHA-purchased utilities, or from payment of utility supplier billings in excess of the allowances for tenant-purchased utilities, may be granted by the IHA on reasonable grounds, such as special needs of elderly, ill or handicapped tenants, or special factors affecting utility usage not within the control of the tenant, as the IHA shall deem appropriate. The IHA's criteria for granting such relief, and procedures for requesting such relief, shall be adopted at the time the IHA adopts the methods and procedures for determining utility allowances. Notice of the availability of such procedures (including identification of the IHA representative with whom initial contact may be made by tenants), and the IHA's criteria for granting such relief, shall be included in each notice to tenants given in accordance with § 950.865(c) and in the information given to new tenants upon admission.

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Subpart M—Disposition or Demolition of Projects

§ 950.921 Purpose and applicability.

(a) *Purpose.* This subpart sets forth requirements for HUD approval of an IHA's application to dispose of or demolish (in whole or in part) IHA-owned projects assisted under the Act. The rules and procedures contained in 24 CFR part 85 are inapplicable.

(b) *Applicability.*—(1) *Type of projects.* This subpart applies to any Indian housing project which is owned by an IHA and is subject to an ACC under section 5 of the United States Housing Act of 1937 (42 U.S.C. 1437c), including rental, Turnkey III, or Mutual Help housing. This subpart does not apply to:

(i) IHA-owned Section 8 housing or housing leased under section 10(c) or section 23 of the Act (42 U.S.C. 1437h(c) or 1437u);

(ii) Demolition or disposition before the end of the initial operating period (EIOP), as determined under the ACC, of property acquired incident to the development of an Indian housing project (however, this exception does not apply to units occupied or available for occupancy by Indian housing tenants before EIOP);

(iii) Conveyance of Indian housing for the purpose of providing homeownership opportunities for low-income families under section 21 of the Act, the Turnkey III or Mutual Help Homeownership Opportunity programs, or any other homeownership programs established under sections 5(h) and 6(c)(4)(D) of the Act (42 U.S.C. 1437c(h), 1437d(c)(4)(3)) or titles II and III of the Act (42 U.S.C. 1437aa, 1437aaa).

(iv) Leasing of dwelling or nondwelling space incident to the normal operation of the project for Indian housing purposes, as permitted by the ACC;

(v) Easements, rights-of-way and transfers of utility systems incident to the normal operation of the project for Indian housing purposes, as permitted by the ACC;

(vi) Reconfiguration of the interior space of buildings (e.g., moving or removing interior walls to change the design, sizes or number of units) without demolition; and

(vii) A whole or partial taking by a public or quasi-public entity through the exercise of its power of eminent domain.

(2) [Reserved]

(c) *Type of actions.* Any action by an IHA to dispose of or demolish an Indian housing project or a portion of an Indian housing project is subject to the requirements of this subpart. Until such time as HUD approval may be obtained, the IHA may not take any action to dispose of or demolish an Indian housing project or portion of an Indian housing project, and the IHA shall continue to meet its ACC obligations to maintain and operate the property as housing for low-income families. This does not mean that HUD approval under this subpart is required for planning activities, analysis, or consultations, such as project viability studies, comprehensive modernization planning or comprehensive occupancy planning.

§ 950.923 General requirements for HUD approval of disposition or demolition.

(a) For purposes of this subpart, the term "tenant" will also include "homebuyer" where the development involved is a homeownership project, and the term "unit of general government" will include the tribal government, where applicable.

(b) HUD will not approve an application for disposition or demolition unless:

(1) The application has been developed in consultation with tenants of the project involved, any tenant organizations for the project, and any

IHA-wide tenant organizations that will be affected by the disposition or demolition;

(2) The IHA has complied with the requirement to offer the project or portion of the project proposed for demolition or disposition to the resident organizations as required under § 950.925 of this subpart;

(3) The application contains a certification by the chief executive officer, or designee, that the unit of general government will comply with displacement, relocation, and real property acquisition policies described in § 950.117;

(4) Demolition or disposition (including any related replacement housing plan) will meet the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321), the National Historic Preservation Act of 1966 (16 U.S.C. 469), and related laws, as stated in the HUD's regulations at 24 CFR part 50. Where the site of the replacement housing is unknown at the time of submission of the application for demolition or disposition, the application shall contain a certification that the applicant agrees to assist HUD to comply with 24 CFR part 50 and that the applicant shall:

(i) Supply HUD with all available, relevant information necessary for HUD to perform for each property any environmental review required by 24 CFR part 50;

(ii) Carry out mitigating measures required by HUD or select alternate eligible property; and

(iii) Not acquire, rehabilitate, convert, lease, repair or construct property, or commit HUD funds or other funds to such program activities with respect to any eligible property, until HUD approval is received.

(5) The IHA has developed a replacement housing plan, in accordance with § 950.935, and has obtained a commitment for the funds necessary to carry out the plan over the approved schedule of the plan. To the extent such funding is not provided from other sources (e.g., State, tribal or local programs or proceeds of disposition), HUD approval of the application for demolition or disposition is conditioned on HUD's agreement to commit the necessary funds (subject to availability of future appropriations).

§ 950.925 Resident organization opportunity to purchase.

(a) *Applicability.* (1) This section applies to applications for demolition or disposition of a development which involve dwelling units, nondwelling spaces (e.g., administration and community buildings, maintenance facilities), and excess land.

(2) The requirements of this section do not apply to the following cases which it has been determined do not present appropriate opportunities for resident purchase:

(i) The IHA has determined that the property proposed for demolition is an imminent threat to the health and safety of residents;

(ii) The tribal or local government has condemned the property proposed for demolition;

(iii) A tribal or local government agency has determined and notified the IHA that units must be demolished to allow access to fire and emergency equipment;

(iv) The IHA has determined that the demolition of selected portions of the development in order to reduce density is essential to ensure the long term viability of the development or the IHA (but in no case should this be used cumulatively to avoid Section 412 requirements); or

(v) A public body has requested to acquire vacant land that is less than two acres in order to build or expand its services (e.g., a tribal or local government wishes to use the land to build or establish a police substation).

(3) In the situations listed in paragraph (a)(2) of this section, the IHA may proceed to submit its request to demolish or dispose of the property, or the portion of the property, to HUD, in accordance with section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart without affording an opportunity for purchase by a resident organization. However, resident consultation would be required in accordance with § 950.923(b)(1). The IHA must submit written documentation, on official stationery, with date and signatures to justify paragraphs (a)(2)(i) through (v) of this section. Examples of such documentation include:

(i) A certification from a tribal or local agency, such as the fire or health department, that a condition exists in the development that is an imminent threat to residents; or

(ii) A copy of the condemnation order from the local health department. If, however, at some future date, the IHA proposes to sell the remaining property described in paragraphs (a)(2)(i) through (iii) of this section, the IHA will be required to comply with this section.

(b) *Opportunity for residents to organize.* Where the affected development does not have an existing resident organization, resident management corporation or resident cooperative at the time of the IHA proposal to demolish or dispose of the development or a portion of the development, the IHA shall make a reasonable effort to inform residents of the development of the opportunity to organize and purchase the property proposed for demolition or disposition. Examples of "reasonable effort" at a minimum include at least one of the following activities: convening a meeting, sending letters to all residents, publishing an announcement in the resident newsletter, where available, or hiring a consultant to provide technical assistance to the residents. HUD will not approve any application that cannot demonstrate that the IHA has allowed at least 45 days for the residents of the affected development to organize a resident organization. The IHA should initiate its efforts to inform the residents of their right to organize as an integral part of the resident consultation requirement under § 950.923(b)(1).

(c) *Established organizations.* Where there are duly formed resident management corporations, resident organizations or resident cooperatives at the affected development, the IHA should follow the procedures beginning in paragraph (d) of this section. Where the affected development is fully or partially occupied, the residents must be given the opportunity to form under the procedures in paragraph (b) of this section.

(d) *Offer of sale to resident organizations.* (1) The IHA shall make the formal offer for sale which must include the information listed in this section. All contacted organizations shall have 30 days to express an interest in the offer. The IHA must offer to sell the property proposed for demolition or disposition to the resident management corporation, the resident organization or resident cooperative of the affected development under at least as favorable terms and conditions as the IHA would offer it for sale to another purchaser. The offer shall include:

(i) An identification of the development, or portion of the development, in the proposed demolition or disposition, including the development number and location, the number of units and bedroom configuration, the amount of space and use for non-dwelling space, the current physical condition (e.g., fire damaged, friable asbestos, lead based paint test results), and occupancy status (e.g., percent occupancy);

(ii) In the case of disposition, a copy of the appraisal of the property and any terms of sale;

(iii) An IHA disclosure and description of plans proposed for reuse

of land, if any, after the proposed demolition or disposition;

(iv) An identification of available resources (including its own and HUD's) to provide technical assistance to the resident management corporation, resident organization or resident cooperative of the affected development to enable the organization to better understand its opportunity to purchase the development, the development's value and potential use;

(v) Any and all terms of sale that the IHA requires for the Section 18 action; [If the resident management corporation, resident organization or resident cooperative of the affected development submits a proposal that is other than the terms of sale (e.g., purchase at less than fair market value with demonstrated commensurate public benefit or for the purposes of homeownership), the IHA may consider accepting the offer.]

(vi) A date by which the resident management corporation, resident organization or resident cooperative of the affected development must respond to the IHA's offer to sell the property proposed for demolition or disposition, which shall be no less than 30 days from the date of the official offering of the IHA which will be made sometime after the meeting. The response from the resident management corporation, resident organization or resident cooperative of the affected development shall be in the form of a letter expressing its interest in accepting the IHA's written offer.

(vii) A statement that the resident management corporation, resident organization and resident cooperative of the affected development will be given up to 60 days to develop and submit a proposal to the IHA to purchase the property and to obtain a firm financial commitment. It shall explain that the IHA shall approve the proposal from the resident management corporation, resident organization or resident cooperative of the affected development, if it meets the terms of sale. However, the statement shall indicate that the IHA can consider accepting an offer from the resident management corporation, resident organization or resident cooperative of the affected development that is other than the terms of sale; e.g., purchase at less than fair market value with demonstrated commensurate public benefit or for the purposes of homeownership. The statement shall explain that if the IHA receives more than one proposal from a resident management corporation, resident organization or resident cooperative at the affected development, the IHA shall select the proposal that meets the terms of sale. In the event that two proposals from the affected development meet the terms of sale, the IHA shall choose the best proposal.

(2) After the 30 day time frame for the resident management corporation, resident organization or resident cooperative of the affected development to respond to the notification letter has expired, the IHA is to prepare letters to those organizations that responded affirmatively inviting them to submit a formal proposal to purchase the property. The organization has up to 60 days from the date of its affirmative response to prepare and submit a proposal to the IHA that provides all the information requested in paragraph (d)(1) of this section and meets the terms of sale.

(e) *IHA review of proposals.* The IHA has up to 60 days from the date of receipt of the proposals to review them and determine whether they meet the terms of sale set forth in its offer. If the resident management corporation, resident organization or resident cooperative of the affected development submits a proposal that is other than the terms of sale (e.g., purchase at less than the fair market value with demonstrated commensurate public benefit or for the purposes of homeownership), the IHA may consider accepting the offer. If the terms of sale are met, within 14 days of the IHA's final decision, the IHA shall notify the resident management corporation, resident organization or resident cooperative of the affected development of that fact and that the proposal has been accepted or rejected.

(f) *Appeals.* The resident management corporation, resident organization or resident cooperative of the affected development has the right to appeal the IHA's decision to the HUD Field Office. A written appeal must be made within 30 days of the decision by the IHA. The appeal should include copies of the proposal and any related correspondence. The HUD Field Office will render a final decision within 30 days. A letter communicating the decision is to be prepared and sent to the IHA and the resident management corporation, resident organization or resident cooperative of the affected development.

(g) *Contents of proposal.* (1) The proposal from the resident management corporation, resident organization or resident cooperative of the affected development shall at a minimum include the following:

(i) The length of time the organization has been in existence;

(ii) A description of current or past activities which demonstrate the organization's organizational and management capability or the planned acquisition of such capability through a partner or other outside entities;

(iii) A statement of financial capability;

(iv) A description of involvement of any non-resident organization (non-profit, for-profit, governmental or other entities), if any, the proposed division of responsibilities between the two, and the non-resident organization's financial capabilities;

(v) A plan for financing the purchase of the property and a firm commitment for funding resources necessary to purchase the property and pay for any necessary repairs;

(vi) A plan for the use of the property;

(vii) The proposed purchase price in relation to the appraised value;

(viii) Justification for purchase at less than the fair market value in accordance with § 950.931(h), if appropriate;

(ix) Estimated time schedule for completing the transaction;

(x) The response to the IHA's terms of sale;

(xi) A resolution from the resident organization approving the proposal; and

(xii) A proposed date of settlement, generally not to exceed six months from the date of IHA approval of the proposal, or such period as the IHA may determine to be reasonable.

(2) If the proposal is to purchase the property for homeownership under section 5(h) or HOPE 1, then the requirements of section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart do not apply, and the applicable requirements shall be those under the HOPE 1 guidelines, as set forth at 24 CFR Subtitle A, App. A, or the section 5(h) regulation, as set forth in subpart P of this part. In order for the IHA to consider a proposal to purchase under section 412, using homeownership opportunities under section 5(h) or HOPE 1, the resident management corporation, organization or resident cooperative of the affected development shall meet the provisions of this paragraph (g), including items in paragraph (g)(1) of this section.

(3) If the proposal is to purchase the property for other than the aforementioned homeownership programs or for uses other than homeownership, then the proposal must meet all the disposition requirements of section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart.

(h) *IHA Obligations.* (1) Prepare and disperse the formal offer of sale to the resident management corporation, resident organization and resident cooperative of the affected development.

(2) Evaluate proposals received and make the selection based on the considerations set forth in paragraph (b) of this section. Issue letters of acceptance and rejection.

(3) Prepare certifications, where appropriate, as discussed in paragraph (j)(3) of this section. The IHA shall comply with its obligations under § 950.923(b)(1) regarding tenant consultation and provide evidence to HUD that it has met those obligations. The IHA shall not act in an arbitrary manner and shall give full and fair consideration to any qualified resident management corporation, resident organization or resident cooperative of the affected development and accept the proposal if it meets the terms of sale.

(i) *IHA application submission requirements for proposed demolition or disposition.* (1) If the proposal from the resident organization is rejected by the IHA, and either there is no appeal by the organization or the appeal has been denied, the IHA shall submit its demolition or disposition application to HUD in accordance with section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart. The demolition or disposition application must include complete documentation that the requirements of this section have been met. IHAs must submit written documentation that the resident management corporation, resident organization and resident cooperative of the affected development have been apprised of their opportunity to purchase under this section. This documentation shall include a copy of the signed and dated IHA notification letter(s) to each organization informing them of the IHA's intention to submit an application for demolition or disposition and the responses from each organization.

(2) If the IHA accepts the proposal of the resident organization, the IHA shall submit a disposition application in accordance with section 18 of the United States Housing Act of 1937 (42 U.S.C. 1437p) and this subpart, with appropriate justification for a negotiated sale and for sale at less than fair market value, if applicable.

(3) HUD will not process an application for demolition or disposition unless the IHA provides HUD with one of the following:

(i) Where no resident management corporation, resident organization or resident cooperative exists in the affected development and the residents of the affected development have not formed a new organization, a certification from either the executive director or the board of commissioners stating that no such organization(s) exists and documentation that a reasonable effort to inform residents of their opportunity to organize has been made; or

(ii) Where a resident management corporation, resident organization or resident cooperative exists in the affected development one of the following, either paragraph (i)(3), (ii) (A) or (B) of this section:

(A) A board resolution or its equivalent from each resident management corporation, resident organization or resident cooperative stating that such organization has received the IHA letter, and that it understands the offer and waives its opportunity to purchase the project, or portion of the project, covered by the demolition or disposition application. The response should clearly state that the resolution was adopted by the entire organization at a formal meeting; or

(B) A certification from the executive director or board of commissioners of the IHA that the thirty (30) day timeframe has expired and no response was received to its offer.

§ 950.927 Specific criteria for HUD approval of disposition requests.

In addition to other applicable requirements of this subpart, HUD will not approve a request for disposition unless HUD determines that retention is not in the best interests of the tenants and the IHA, because at least one of the following criteria is met:

(a) Developmental changes in the area surrounding the project adversely affect the health or safety of the tenants or the feasible operation of the project by the IHA.

(b) Disposition will allow the acquisition, development, or rehabilitation of other properties that will be more efficiently or effectively operated as low-income housing projects, and that will preserve the total amount of low-income housing stock available to the community.

(c) There are other factors justifying disposition that HUD determines are consistent with the best interests of the tenants and the IHA that are not inconsistent with other provisions of the Act.

(d) In the case of disposition of property other than dwelling units:

(1) The property is determined by HUD to be excess to the needs of the project (after the end of the initial operating period); or

(2) The disposition of the property is incidental to, or does not interfere with, continued operation of the remaining portion of the project.

§ 950.928 Specific criteria for HUD approval of demolition requests.

In addition to other applicable requirements of this subpart, HUD will not approve an application for demolition unless HUD determines that at least one of the following criteria is met:

(a) In the case of demolition of all or a portion of a project, the project, or a portion of the project, is obsolete as to physical condition, location, or other factors, making it unusable for housing purposes; and

(b) No reasonable program of modifications, in keeping with the provisions of subpart I of this part, is feasible to return the project or portion of the project to useful life.

§ 950.931 IHA application for HUD approval.

Written approval by HUD shall be required before the IHA may undertake any transaction involving demolition or disposition. To request approval, the IHA shall submit an application to the HUD Field Office that includes the following:

(a) A description of the property involved;

(b) A description of, as well as a timetable for, the specific action proposed (including, in the case of disposition, the specific method proposed);

(c) A statement justifying the proposed disposition or demolition under one or more of the applicable criteria of §§ 950.927 or 950.928;

(d) If applicable, a plan that meets the requirements of § 950.117 for the relocation of tenants who would be displaced by the proposed demolition or disposition;

(e) A description of the IHA's consultations with tenants and any tenant organizations (as required under § 950.923(b)(1)), with copies of any written comments which may have been submitted to the IHA and the IHA's evaluation of the comments;

(f) A replacement housing plan, as required under § 950.935, and a resolution by the governing body of the unit of tribal or general local government in which the project is located, indicating approval of the replacement plan;

(g) Evidence that the IHA has complied with the requirement to offer the project or portion of the project proposed for demolition or disposition to the resident organizations as required under § 950.925;

(h) The estimated balance of project debt, if any, under the ACC, for development and modernization;

(i) In the case of disposition, an estimate of the fair market value of the

property, established on the basis of one independent appraisal unless, as determined by HUD:

(1) More than one appraisal is warranted; or

(2) Another method of valuation is clearly sufficient and the expense of an independent appraisal is unjustified because of the limited nature of the property interest involved or other available data;

(j) In the case of disposition, estimates of the gross and net proceeds to be realized, with an itemization of estimated costs to be paid out of gross proceeds and the proposed use of any net proceeds in accordance with § 950.933;

(k) A copy of a resolution by the IHA's Board of Commissioners approving the application;

(l) If determined to be necessary by HUD, an opinion by the IHA's legal counsel that the proposed action is consistent with applicable requirements of Federal, State, Tribal and local laws; and

(m) Any additional information necessary to support the application and assist HUD in making determinations under this subpart.

§ 950.933 Use of proceeds.

(a) *Disposition.* (1) Where HUD approves the disposition of real property of a project, in whole or in part, the IHA shall dispose of it promptly by public solicitation of bids for not less than fair market value, unless HUD authorizes negotiated sale for reasons found to be in the best interests of the IHA or the Federal government, or for sale for less than fair market value (where permitted by State, Tribal or local law), based on commensurate public benefits to the community, the IHA or the Federal government justifying such an exception.

(2) Net proceeds (after payment of HUD-approved costs of disposition and relocation under paragraph (a) of this section) shall be used, subject to HUD approval, as follows: first for the retirement of outstanding obligations, if any, issued to finance development or modernization of the project, which in the case of scattered site housing of an IHA, shall be in an amount that bears the same ratio to the total of such costs and obligations as the number of units disposed of bears to the total number of units of the project at the time of disposition, and thereafter for the provision of housing assistance for low-income families, through such measures as modernization of low-income housing or the acquisition, development or rehabilitation of other properties to operate as low-income housing.

(b) *Demolition.* Where HUD has approved demolition of a project, or a portion of a project, and the proposed action is part of a modernization program under subpart I of this part, the costs of demolition and of relocation of displaced tenants may be included in the modernization budget.

§ 950.935 Replacement housing plan.

(a) HUD may not approve an application or furnish assistance under this subpart unless the IHA submitting the application for disposition or demolition also submits a plan for the provision of an additional decent, safe, sanitary, and affordable dwelling unit (at rents no higher than permitted under the Act) for each dwelling unit to be disposed of or demolished under the application. The plan must include any one or a combination of the following:

(1) The acquisition or development of additional low-income housing dwelling units;

(2) The use of 15-year project-based assistance under section 8 (as provided for in 24 CFR part 882, subpart G);

(3) The use of not less than 15-year project-based assistance under other Federal programs;

(4) The acquisition or development of dwelling units assisted under a State or local Tribal government program that provides for project-based assistance comparable in terms of eligibility, contribution to rent, and length of assistance contract (not less than 15 years) to assistance under section 8(b)(1) of the Act; or

(5) The use of 15-year tenant-based assistance under section 8 of the Act (excluding vouchers under section 8(o) of the Act (42 U.S.C. 1437f(o)), under the conditions described in paragraph (b) of this section.

(b) Fifteen-year tenant-based assistance under section 8 may be approved under the replacement plan only if:

(1) There is a finding by HUD that replacement with project-based assistance is not feasible; that the supply of private rental housing actually available to those who would receive project-based assistance under the plan is sufficient for the total number of certificates and vouchers available in the community after implementation of the plan; and that this available housing supply is likely to remain available for the full 15-year term of the assistance; and

(2) HUD's findings under paragraph (b)(1) of this section are based on objective information, which must include rates of participation by landlords in the Section 8 program; size, condition, and rent levels of available rental housing as compared to Section 8 standards; the supply of vacant existing housing meeting the Section 8 housing quality standards with rents at or below the fair market rent or the likelihood of adjusting the fair market rent; the number of eligible families waiting for housing assistance under the Act; the extent of discrimination practiced against the types of individuals or families to be served by the assistance; and such additional data as HUD may determine to be relevant in particular circumstances.

(c) The plan must be approved by the unit of general local government (including tribal government) in which the project is located.

(d) The plan must include a schedule for carrying out all its terms within a period consistent with the size of the proposed disposition or demolition, except that the schedule for completing the plan shall in no event exceed 6 years from the date specified to begin plan implementation.

(e) The plan must include a method that ensures that at least the same total number of individuals and families will be provided housing, allowing for replacement with units of different sizes to accommodate changes in local priority needs.

(f) The plan must include an assessment of the suitability of the location of proposed replacement housing based upon application of the site selection criteria established in § 950.230.

(g) The plan must contain assurances that any replacement units acquired, newly constructed or rehabilitated will meet the applicable accessibility requirements set forth in 24 CFR 8.25.

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Subpart Q—[Reserved]

Subpart R—Family Self-Sufficiency

§ 950.3001 Purpose, scope, and applicability.

(a) *Purpose.* The purpose of the Family Self-Sufficiency (FSS) program is to develop local strategies to coordinate the use of public and Indian housing assistance and housing assistance under the section 8 rental certificate and rental voucher programs with public and private resources, to enable families eligible to receive assistance under these programs to achieve economic independence and self-sufficiency.

(b) *Applicability.* This subpart applies to Indian housing authorities that elect to operate a local FSS program, and

where such an election is made, to Indian housing assisted under the U.S. Housing Act of 1937, and developed or operated by an IHA in an Indian area, as defined in § 950.102. This subpart does not apply to the Mutual Help Homeownership Program or the Turnkey III Program. Indian housing authorities that elect to participate in the FSS program are not subject to minimum program size requirements. Additionally, Indian housing authorities that received Indian housing units under the FSS incentive award competitions are not subject to the minimum program size requirements.

§ 950.3002 Program objectives.

The objective of the FSS program is to reduce the dependency of low-income families on welfare assistance and on section 8, public or Indian housing assistance or any Federal, State, or local rent or homeownership subsidies. The FSS program provides, low-income families opportunities for education, job training, counseling, and other forms of social service assistance, while living in assisted housing, so that they may obtain the education, employment, and business and social skills necessary to achieve self-sufficiency, as this term is defined in § 950.3003 of this subpart. HUD will measure the success of a local FSS program not only by the number of families who achieve self-sufficiency, but also by the number of FSS families who, as a result of participation in the program, have family members who obtain their first job, or who obtain higher paying jobs; no longer need benefits received under one or more welfare programs; obtain a high school diploma or higher education degree; or accomplish similar goals that will assist the family in obtaining economic independence.

§ 950.3003 Definitions.

As used in this subpart:

Act means the United States Housing Act of 1937 (42 U.S.C. 1437–1440).

Action Plan. See § 950.3011 of this subpart.

Certification means a written assertion based on supporting evidence, provided by the FSS family or the IHA, as may be required under this subpart, and which:

(1) Shall be maintained by the IHA in the case of the family's certification, or by HUD in the case of the IHA's certification;

(2) Shall be made available for inspection by HUD, the IHA, and the public, as appropriate; and

(3) Shall be deemed to be accurate for purposes of this subpart, unless the Secretary or the IHA, as applicable, determines otherwise after inspecting the evidence and providing due notice and opportunity for comment.

Chief executive officer (CEO). (1) The CEO of a unit of general local government means the elected official or the legally designated official who has the primary responsibility for the conduct of that entity's governmental affairs. Examples of the CEO of a unit of general local government are:

(i) The elected mayor of a municipality; the elected county executive of a county;

(ii) The chairperson of a county commission or board in a county that has no elected county executive; or

(iii) The official designated pursuant to law by the governing body of a unit of general local government (e.g., city manager).

(2) The CEO for an Indian tribe is the tribal governing official.

Contract of participation means a contract in a form approved by HUD, entered into between a participating family and an IHA operating an FSS program that sets forth the terms and conditions governing participation in the FSS program. The contract of participation includes all individual training and services plans entered into between the IHA and all members of the family who will participate in the FSS program, and which plans are attached to the contract as exhibits. For additional detail, see § 950.3022 of this subpart.

Earned income means income or earnings included in annual income from wages, tips, salaries, other employee compensation, and self-employment. (See § 950.102.) Earned income does not include any pension or annuity, transfer payments, any cash or in-kind benefits, or funds deposited in or accrued interest on the FSS escrow account established by an IHA on behalf of a participating family.

Effective date of contract of participation means the first day of the month following the month in which the FSS family and the IHA entered into the contract of participation.

Eligible families mean current residents of Indian housing.

Enrollment means the date that the FSS family entered into the contract of participation with the IHA.

Family Self-Sufficiency program or *FSS program* means the program established by an IHA within its jurisdiction to promote self-sufficiency among participating families, including the provision of supportive services to these families, as authorized by section 23 of the U.S. Housing Act of 1937 (42 U.S.C. 1437u).

FSS account means the FSS escrow account authorized by section 23 of the Act, and as provided by § 950.3025 of this subpart.

FSS credit means the amount credited by the IHA to the participating family's FSS account.

FSS family or *participating family* means a family that resides in Indian housing, and that elects to participate in the FSS program, and whose designated head of the family has signed the contract of participation.

FSS related service program means any program, publicly or privately sponsored, that offers the kinds of supportive services described in the definition of "supportive services" set forth in this § 950.3003.

FSS slots refer to the total number of Indian housing units that comprise the minimum size of an IHA's Indian housing FSS program.

FY means Federal Fiscal Year (starting with October 1, and ending September 30, and designated by the calendar year in which it ends).

Head of FSS family means the adult member of the FSS family who is the head of the household for purposes of determining income eligibility and rent.

Housing subsidies means assistance to meet the costs and expenses of temporary shelter, rental housing or homeownership, including rent, mortgage or utility payments.

HUD or *Department* means the Department of Housing and Urban Development Field Offices, unless HUD Headquarters is specified.

Indian housing authority or *IHA.* See definition in § 950.102.

Individual training and services plan means:

(1) A written plan that is prepared for the head of the FSS family, and each adult member of the FSS family who elects to participate in the FSS program, by the IHA in consultation with the family member, and which sets forth:

(i) The supportive services to be provided to the family member;

(ii) The activities to be completed by that family member; and

(iii) The agreed upon completion dates for the services and activities.

(2) Each individual training and services plan must be signed by the IHA and the participating family member, and is attached to, and incorporated as part of the contract of participation. An individual training and services plan must be prepared for the head of the FSS family.

JOBS Program means the Job Opportunities and Basic Skills Training Program authorized under part F of title IV of the Social Security Act (42 U.S.C. 402(a)(19)).

JTPA means the Job Training Partnership Act (29 U.S.C. 1579(a)).

Low-income family. See definition in 24 CFR 950.102.

Participating family. See definition for "FSS family" in this section.

Program Coordinating Committee or *PCC* is the committee described in § 950.3012 of this subpart.

Secretary means the Secretary of Housing and Urban Development.

Self-sufficiency means that an FSS family is no longer receiving section 8, public or Indian housing assistance, or any Federal, State, or local rent or homeownership subsidies or welfare assistance. Achievement of self-sufficiency, although an FSS program objective, is not a condition for receipt of the FSS account funds. (See § 950.3025.)

Supportive services means those appropriate services that an IHA will make available, or cause to be made available to an FSS family under a contract of participation, and may include:

(1) *Child care*—child care of a type that provides sufficient hours of operation and serves an appropriate range of ages;

(2) *Transportation*—transportation necessary to enable participating family members to receive available services, or to commute to their places of employment;

(3) *Education*—remedial education; education for completion of secondary or post secondary schooling;

(4) *Employment*—job training, preparation, and counseling; job development and placement; and follow-up assistance after job placement and completion of the contract of participation;

(5) *Personal welfare*—substance/alcohol abuse treatment and counseling;

(6) *Household skills and management*—training in homemaking and parenting skills; household management; and money management;

(7) *Counseling*—counseling in the areas of:

(i) The responsibilities of homeownership;

(ii) Opportunities available for affordable rental and homeownership in the private housing market; and

(iii) Money management; and

(8) *Other services*—any other services and resources, including case management, reasonable accommodations for individuals with disabilities, that the IHA may determine to be appropriate in assisting FSS families to achieve economic independence and self-sufficiency.

Unit size or *size of unit* refers to the number of bedrooms in a dwelling unit.

Very low-income family. See definition in § 950.102.

Welfare assistance means income assistance from Federal or State welfare programs, and includes assistance provided under the Aid to Families with Dependent Children (AFDC) Program, Supplemental Security Income (SSI) that is subject to an income eligibility test; Medicaid, food stamps, general assistance, or other assistance provided under a Federal or State program directed to meeting general living expenses, such as food, health care, child care, but does not include assistance solely directed to meeting housing expenses (e.g., rent, mortgage or utilities payments), and does not include transitional welfare assistance (e.g. medicaid) provided to JOBS participants.

§ 950.3004 Basic requirements of the FSS program.

(a) *Compliance with program regulations.* An FSS program established under this subpart shall be operated in conformity with the regulations of this part.

(b) *Compliance with Action Plan.* An FSS program established under this subpart shall be operated in compliance with an Action Plan, as described in § 950.3011, and provide comprehensive supportive services as defined in § 950.3003.

(c) *Compliance with equal opportunity requirements.* An FSS program established under this subpart shall be operated in compliance with all applicable Indian housing regulations and all applicable civil rights authorities including: the Indian Civil Rights Act of 1968 (25 U.S.C. 1301–1303); title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), the Fair Housing Act (42 U.S.C. 3601–3619); section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794); the Age Discrimination Act of 1975 (42 U.S.C. 6101–6107); Executive Order 11063 on Equal Opportunity in Housing, 27 FR 11527 (1962), as amended, 46 FR 1253 (1980); section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450(e)(b)); section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u); and the regulations implementing these authorities. (The Indian Civil Rights Act applies to IHAs organized pursuant to tribal laws; and Title VI of the Civil Rights Act of 1964 and the Fair Housing Act applies to state authorized IHAs.)

§ 950.3011 Action Plan.

(a) *General.* To participate in the FSS program, an IHA must have a HUD-approved Action Plan that complies with the requirements of this section.

(b) *Development of Action Plan.* The Action Plan shall be developed by the IHA in consultation with the chief executive officer of the applicable unit of general local government, and the Program Coordinating Committee.

(c) *Initial submission and revisions.* (1) *Initial submission.* Unless the dates set forth in this paragraph are extended by HUD for good cause, an IHA that is establishing its first FSS program must submit an Action Plan to HUD for approval within:

(i) 90 days of notification by HUD of approval of the IHA's application for FY 1991 or FY 1992 incentive award units; or

(ii) If the IHA did not apply for FSS incentive award units, within 90 days of notification by HUD of approval of the IHA's first application, commencing in FY 1993, for new Indian housing units.

(2) *Revision.* Following initial approval of the Action Plan by HUD, no further approval of the Action Plan is required unless the IHA proposes to make policy changes to the Action Plan, or changes are required by HUD. Any changes to the Action Plan must be submitted to, and approved by HUD.

(d) *Contents of Plan.* The Action Plan shall describe the policies and procedures of the IHA for operation of a local FSS program, and shall contain, at a minimum, the following information:

(1) *Family demographics*—a description of the number, size, characteristics, and other demographics (including racial and ethnic data), and the supportive service needs of the families expected to participate in the FSS program;

(2) *Estimate of participating families*—an estimate of the number of eligible FSS families who can reasonably be expected to receive supportive services under the FSS program, based on available and anticipated Federal, tribal, State, local, and private resources;

(3) *Eligible families from other self-sufficiency program*—if applicable, the number of eligible families, by program type, who are participating in Operation Bootstrap, Project Self-Sufficiency, or any other local self-sufficiency program who are expected to agree to execute an FSS contract of participation.

(4) *FSS family selection procedures*—a statement indicating the procedures to be utilized to select families for participation in the FSS program, subject to the requirements governing the selection of FSS families, set forth in § 950.3013.

(5) *Incentives to encourage participation*—a description of the incentives that the IHA intends to offer eligible families to encourage their participation in the FSS program (incentives plan). The incentives plan shall provide for the establishment of the FSS account in accordance with the requirements set forth in § 950.3025, and other incentives, if any, designed by the IHA. The incentives plan shall be part of the Action Plan.

(6) *Outreach efforts*—a description of:

(i) The IHA's efforts, including notification and outreach efforts, to recruit FSS participants from among eligible families; and

(ii) The IHA's actions to be taken to assure that both minority and non-minority groups are informed about the FSS program, and how the IHA will make this information known (e.g., through door-to-door flyers, posters in any common rooms, advertisements in newspapers of general circulation, as well as any media targeted to minority groups).

(7) *FSS activities and supportive services*—a description of the activities and supportive services to be provided by both public and private resources to FSS families, and identification of the public and private resources, which are expected to provide the supportive services.

(8) *Method for identification of family support needs*—a description of how the FSS program will identify the needs and deliver the services and activities according to the needs of the FSS families;

(9) *Program termination; withholding of services; and grievance procedures*—a description of the IHA's policies concerning: termination of participation in the FSS program, or withholding of supportive services on the basis of a family's failure to comply with the requirements of the contract of participation; and the grievance and hearing procedures available to FSS families.

(10) *Assurances of non-interference with rights of non-participating families*—an assurance that a family's election to not participate in the FSS program will not affect the family's admission to Indian housing or the family's right to occupancy in accordance with its lease.

(11) *Timetable for program implementation*—a timetable for implementation of the FSS program, as provided in § 950.3020(a)(1), including the schedule for filling FSS slots with eligible FSS families, as provided in § 950.3013;

(12) *Certification of coordination*—a certification that development of the services and activities under the FSS program has been coordinated with the JOBS Program; the programs provided under the JTPA; and any other relevant employment, child care, transportation, training, and education programs (e.g., Job Training for the Homeless Demonstration program) in the applicable area, and that implementation will continue to be coordinated, in order to avoid duplication of services and activities; and

(13) *Optional additional information*—such other information that would help HUD determine the soundness of the IHA's proposed FSS program.

(e) *Eligibility of a combined program.* An IHA that wishes to operate a joint FSS program with other IHAs may combine its resources with one or more IHAs to deliver supportive services under a joint Action Plan that will provide for the establishment and operation of a combined FSS program that meets the requirements of this subpart.

(f) *Single action plan.* IHAs implementing both a section 8 FSS program and an Indian housing FSS program may submit one Action Plan.

§ 950.3012 Program Coordinating Committee (PCC).

(a) *General.* Each participating IHA must establish a PCC whose functions will be to assist the IHA in securing commitments of public and private resources for the operation of the FSS program within the IHA's jurisdiction, including assistance in developing the Action Plan and in implementing the program.

(b) *Membership.* (1) The PCC may consist of representatives of the IHA and of residents of Indian housing.

(2) *Recommended membership.* Membership on the PCC also may include representatives of the unit of general local government served by the IHA, local agencies (if any) responsible for carrying out JOBS training programs, or programs under the JTPA, and other organizations, such as other State, local or tribal welfare and employment agencies, public and private education or training institutions, child care providers, nonprofit service providers, private business, and any other public and private service providers with resources to assist the FSS program.

(c) *Alternative committee.* The IHA may, in consultation with the chief executive officer of the unit of general local government served by the IHA, utilize an existing entity as the PCC if the membership of the existing entity consists or will consist of the individuals identified in paragraph (b)(1) of this section, and also includes individuals from the same or similar organizations identified in paragraph (b)(2) of this section.

§ 950.3013 FSS family selection procedures.

(a) *Preference in the FSS selection process.* An IHA has the option of giving a selection preference for up to 50 percent of its FSS slots to eligible families, as defined in § 950.3003, who have one or more family members currently enrolled in an FSS related service program or on the waiting list for such a program. The IHA may limit the selection preference given to participants in and applicants for FSS related service programs to one or more eligible FSS related service programs. An IHA that chooses to exercise the selection preference option must include the following information in its Action Plan:

(1) The percentage of FSS slots, not to exceed 50 percent of the total number of FSS slots, for which it will give a selection preference;

(2) The FSS related service programs to which it will give a selection preference to the programs' participants and applicants; and

(3) The method of outreach to, and selection of, families with one or more members participating in the identified programs.

(b) *FSS selection without preference.* For those FSS slots for which the IHA chooses not to exercise the selection preference provided in paragraph (a) of this section, the FSS slots must be filled with eligible families in accordance with an objective selection system, such as a lottery, the length of time living in subsidized housing, or the date the family expressed an interest in participating in the FSS program. The objective system to be used by the IHA must be described in the IHA's Action Plan.

(c) *Motivation as a selection factor.* (1) *General.* An IHA may screen families for interest, and motivation to participate in the FSS program, provided that the factors utilized by the IHA are those which solely measure the family's interest, and motivation to participate in the FSS program.

(2) *Permissible motivational screening factors.* Permitted motivational factors include requiring attendance at FSS orientation sessions or preselection interviews, and assigning certain tasks which indicate the family's willingness to undertake the obligations which may be imposed by the FSS contract of participation (e.g., contacting job training or educational program

referrals). However, any tasks assigned shall be those which may be readily accomplishable by the family, based on the family members' educational level, and disabilities, if any. Reasonable accommodations must be made for individuals with mobility, manual, sensory, speech impairments, mental or developmental disabilities.

(3) *Prohibited motivational screening factors.* Prohibited motivational screening factors include the family's educational level, educational or standardized motivational test results, previous job history or job performance, credit rating, marital status, number of children, or other factors, such as sensory or manual skills, and any factors which may result in discriminatory practices or treatment toward individuals with disabilities or minority or non-minority groups.

§ 950.3014 On-site facilities.

Each IHA may, subject to the approval of HUD, make available and utilize common areas or unoccupied units in Indian housing projects to provide supportive services under an FSS program.

§ 950.3020 Program implementation.

(a) *Program implementation deadline.* (1) *Program start-up.* Full delivery of the supportive services to be provided to the total number of families required to be served under the program need not occur within 12 months, but must occur by the deadline set forth in paragraph (a)(2) of this section.

(2) *Full enrollment and delivery of services.* Except as provided in paragraph (a)(3) of this section, the IHA must have completed enrollment of the total number of families to be served under the FSS program and must have begun delivery of the supportive services within two years from the date of notification of approval of the application for new Indian housing units.

(3) *Extension of program deadlines for good cause.* HUD may extend the deadline set forth in either paragraph (a)(1) or paragraph (a)(2) of this section if the IHA requests an extension, and the HUD Field Office determines that, despite best efforts on the part of the IHA, the development of new Indian housing units will not occur within the deadlines set forth in this paragraph (a), the commitment by public or private resources to deliver supportive services has been withdrawn, the delivery of such services has been delayed, or other local circumstances which the HUD Field Office determines warrants an extension of the deadlines set forth in paragraph (a) of this section.

(b) *Program administration.* An IHA may employ appropriate staff, including a service coordinator or program coordinator to administer its FSS program, and may contract with an appropriate organization to establish and administer the FSS program, including the FSS account, as provided by § 950.3025.

§ 950.3021 Administrative fees.

The performance funding system (PFS), provided under section 9(a) of the Act, shall provide for the inclusion of reasonable and administrative costs incurred by IHAs in carrying out the local FSS programs. These costs are subject to appropriations by the Congress.

§ 950.3022 Contract of participation.

(a) *General.* Each family that is selected to participate in an FSS program must enter into a contract of participation with the IHA that operates the FSS program in which the family will participate. The contract of participation shall be signed by the head of the FSS family.

(b) *Form and content of contract.* (1) *General.* The contract of participation, which incorporates the individual training and services plan, shall be in the form prescribed by HUD, and shall set forth the principal terms and conditions governing participation in the FSS program, including the rights and responsibilities of the FSS family and of the IHA, the services to be provided to, and the activities to be completed by, the head of the FSS family, and each adult member of the family who elects to participate in the program.

(2) *Interim goals.* The individual training and services plan, incorporated in the contract of participation, shall establish specific interim and final goals by which the IHA, and the family, may measure the family's progress toward fulfilling its obligations under the contract of participation, and becoming self-sufficient. For each participating FSS family that is a recipient of welfare assistance, the IHA must establish as an interim goal that the family become independent from welfare assistance and remain independent from welfare assistance for at least one year before expiration of the term of the contract of participation, including any extension thereof.

(3) *Compliance with lease terms.* The contract of participation shall provide that one of the obligations of the FSS family is to comply with the terms and conditions of the Indian housing lease.

(4) *Employment obligation.* (i) *Head of family's obligation.* The head of the FSS family shall be required under the contract of participation to seek and maintain suitable employment during the term of the contract and any extension thereof. Although other members of the FSS family may seek and maintain employment during the term of the contract, only the head of the FSS family is required to seek and maintain suitable employment.

(ii) *Seek employment.* The obligation to seek employment means that the head of the FSS family has applied for employment, attended job interviews, and has otherwise followed through on employment opportunities.

(iii) *Determination of suitable employment.* A determination of suitable employment shall be made by the IHA based on the skills, education, and job training of the individual that has been designated the head of the FSS family, and based on the available job opportunities within the jurisdiction served by the IHA.

(5) *Consequences of noncompliance with contract.* The contract of participation shall specify that if the FSS family fails to comply with the terms and conditions of the contract of participation, the IHA may:

(i) Withhold the supportive services; or

(ii) Terminate the family's participation in the FSS program.

(c) *Contract term.* The contract of participation shall provide that each FSS family will be required to fulfill those obligations to which the participating family has committed itself under the contract of participation no later than 5 years after the effective date of the contract.

(d) *Contract extension.* The IHA shall, in writing, extend the term of the contract of participation for a period not to exceed two years for any FSS family that requests, in writing, an extension of the contract, provided that the IHA finds that good cause exists for granting the extension. The family's written request for an extension must include a description of the need for the extension. As used in this paragraph (d) of this section, "good cause" means circumstances beyond the control of the FSS family, as determined by the IHA, such as a serious illness or involuntary loss of employment. Extension of the contract of participation will entitle the FSS family to continue to have amounts credited to the family's FSS account in accordance with § 950.3025.

(e) *Unavailability of supportive services.* (1) *Good faith effort to replace unavailable services.* If a social service agency fails to deliver the supportive services pledged under an FSS family member's individual training and

services plan, the IHA shall make a good faith effort to obtain these services from another agency.

(2) *Assessment of necessity of services.* If the IHA is unable to obtain the services from another agency, the IHA shall reassess the family member's needs, and determine whether other available services would achieve the same purpose. If other available services would not achieve the same purpose, the IHA shall determine whether the unavailable services are integral to the FSS family's advancement or progress toward self-sufficiency. If the unavailable services are:

(i) Determined not to be integral to the FSS family's advancement toward self-sufficiency, the IHA shall revise the individual training and services plan to delete these services, and modify the contract of participation to remove any obligation on the part of the FSS family to accept the unavailable services, in accordance with paragraph (f) of this section; or

(ii) Determined to be integral to the FSS family's advancement toward self-sufficiency (which may be the case if the affected family member is the head of the FSS family), the IHA shall declare the contract of participation null and void.

(f) *Modification.* The IHA and the FSS family may mutually agree to modify the contract of participation. The contract of participation may be modified in writing with respect to the individual training and services plan, the contract term in accordance with paragraph (d) of this section, and designation of the head of the family.

(g) *Completion of the contract.* The contract of participation is considered to be completed, and a family's participation in the FSS program is considered to be concluded when one of the following occurs:

(1) The FSS family has fulfilled all of its obligations under the contract of participation on or before the expiration of the contract term, including any extension thereof; or

(2) Thirty (30) percent of the monthly adjusted income of the FSS family equals or exceeds the published existing housing fair market rent for the size of the unit for which the FSS family qualifies based on the IHA's occupancy standards. The contract of participation will be considered completed and the family's participation in the FSS program concluded on this basis even though the contract term, including any extension thereof, has not expired, and the family members who have individual training and services plans, have not completed all the activities set forth in their plans.

(h) *Termination of the contract.* The contract of participation may be terminated before the expiration of the contract term, and any extension thereof, by:

(1) Mutual consent of the parties;

(2) The failure of the FSS family to meet its obligations under the contract of participation without good cause;

(3) The family's withdrawal from the FSS program;

(4) Such other act as is deemed inconsistent with the purpose of the FSS program; or

(5) By operation of law.

(i) *Transitional supportive service assistance.* An IHA may continue to offer to a former FSS family who has completed its contract of participation and whose head of the family is employed, appropriate FSS supportive services in becoming self-sufficient (if the family still resides in Indian housing), or in remaining self-sufficient (if the family no longer resides in Indian or other assisted housing).

§ 950.3024 Total tenant payment and increases in family income.

(a) *Calculation of total tenant payment.* Total tenant payment for a family participating in the FSS program is determined in accordance with the regulations set forth in §§ 950.315 through 950.325.

(b) *Increases in FSS family income.* Any increase in the earned income of an FSS family during its participation in an FSS program may not be considered as income or a resource for purposes of eligibility of the FSS family for other benefits, or amount of benefits payable to the FSS family, under any other program administered by HUD, unless the income of the FSS family equals or exceeds 80 percent of the median income of the area (as determined by HUD, with adjustments for smaller and larger families).

§ 950.3025 FSS account.

(a) *Establishment of FSS account.* (1) *General.* The IHA shall deposit the FSS account funds of all families participating in the IHA's FSS program into a single depository account. The IHA must deposit the FSS account funds in one or more of the HUD-approved investments.

(2) *Accounting for FSS account funds.* (i) *Accounting records.* The total of the FSS account funds will be supported in the IHA accounting records by a subsidiary ledger showing the balance applicable to each FSS family. During the term of the contract of participation, the IHA shall credit monthly, to each family's FSS account, the amount of the FSS credit determined in accordance with paragraph (b) of this section.

(ii) *Proration of investment income.* The investment income for funds in the FSS account will be prorated and credited to each family's FSS account based on the balance in each family's FSS account at the end of the period for which the investment income is credited.

(iii) *Reduction of amounts due by FSS family.* If the FSS family has not paid the family contribution towards rent, or other amounts, if any, due under the Indian housing lease, the balance in the family's FSS account shall be reduced by that amount before prorating the interest income. If the FSS family has fraudulently under-reported income, the amount credited to the FSS account will be based on the income amounts originally reported by the FSS family.

(3) *Reporting on FSS account.* Each IHA will be required to make a report, at least once annually, to each FSS family on the status of the family's FSS account. At a minimum, the report will include:

(i) The balance at the beginning of the reporting period;

(ii) The amount of the family's rent payment that was credited to the FSS account, during the reporting period;

(iii) Any deductions made from the account for amounts due the IHA before interest is distributed;

(iv) The amount of interest earned on the account during the year; and

(v) The total in the account at the end of the reporting period.

(b) *FSS credit.* (1) *Computation of amount.* For purposes of determining the FSS credit, "family rent" is the total tenant payment as defined in this part 950. The FSS credit shall be computed as follows:

(i) For FSS families who are very low-income families, the FSS credit shall be the amount which is the lesser of:

(A) Thirty (30) percent of the family's current monthly adjusted income less the family rent, which is obtained by disregarding any increase in earned income (as defined in § 950.3003) from the effective date of the contract of participation; or

(B) The current family rent less the family rent at the time of the effective date of the contract of participation.

(ii) For FSS families who are low-income families but not very low-income families, the FSS credit shall be the amount determined according to paragraph (b)(1)(i) of this section, but which shall not exceed the amount computed for 50 percent of median income.

(2) *Ineligibility for FSS credit.* FSS families who are not low-income families shall not be entitled to any FSS credit.

(3) *Cessation of FSS credit.* The IHA shall not make any additional credits to the FSS family's FSS account when the FSS family has completed the contract of participation, as defined in § 950.3022(g), or when the contract of participation is terminated or otherwise nullified.

(c) *Disbursement of FSS account funds.* (1) *General.* The amount in an FSS account, in excess of any amount owed to the IHA by the FSS family, as provided in paragraph (a)(3)(iii) of this section, shall be paid to the head of the FSS family when the contract of participation has been completed as provided in § 950.3022(g), and if, at the time of contract completion, the head of FSS family submits to the IHA a certification, as defined in § 950.3003, that, to the best of his or her knowledge and belief, no member of the FSS family is a recipient of welfare assistance.

(2) *Disbursement before expiration of contract term.* (i) If the IHA determines that the FSS family has fulfilled its obligations under the contract of participation before the expiration of the contract term, and the head of the FSS family submits a certification that, to the best of his or her knowledge, no member of the FSS family is a recipient of welfare assistance, the amount in the family's FSS account, in excess of any amount owed to the IHA by the FSS family as provided in paragraph (a)(3)(iii) of this section, shall be paid to the head of the FSS family.

(ii) If the IHA determines that the FSS family has fulfilled certain interim goals established in the contract of participation and needs a portion of the FSS account funds for purposes consistent with the contract of participation, such as completion of higher education (i.e., college, graduate school), or job training, or to meet start-up expenses involved in creation of a small business, the IHA may, at the IHA's sole option, disburse a portion of the funds from the family's FSS account to assist the family meet those expenses.

(3) *Verification of family certification.* Before disbursement of the FSS account funds to the family, the IHA may verify that the FSS family is no longer a recipient of welfare assistance by requesting copies of any documents which may indicate whether the family is receiving any welfare assistance, and contacting welfare agencies.

(d) *Succession to FSS account.* If the head of the FSS family ceases to reside with other family members in the Indian housing unit, the remaining members of the FSS family, after consultation with the IHA, shall have the right to designate another family member to receive the funds in accordance with paragraph (d) (1) or (2) of this section.

(e) *Use of FSS account funds for homeownership.* An FSS family may use its FSS account funds for the purchase of a home, including the purchase of a home under one of HUD's homeownership programs, or other Federal, State, or local homeownership programs, unless such use is prohibited by the statute or regulations governing the particular homeownership program.

(f) *Forfeiture of FSS account funds.* (1) *Conditions for forfeiture.* Amounts in the FSS account shall be forfeited upon the occurrence of the following:

(i) The contract of participation is terminated, as provided in §§ 950.3022(e) or 950.3022(h); or

(ii) The contract of participation is completed by the family, as provided in § 950.3022(g), but the FSS family is receiving welfare assistance at the time of expiration of the term of the contract of participation, including any extension thereof.

(2) *Treatment of forfeited FSS account funds.* FSS account funds forfeited by the FSS family will be credited to the IHA's operating reserves and counted as other income in the calculation of the PFS operating subsidy eligibility for the next budget year.

§ 950.3030 Reporting.

Each IHA that carries out an FSS program under this subpart shall submit to HUD, in the form prescribed by HUD, a report regarding its FSS program. The report shall include the following information:

(a) A description of the activities carried out under the program;

(b) A description of the effectiveness of the program in assisting families to achieve economic independence and self-sufficiency;

(c) A description of the effectiveness of the program in coordinating resources of communities to assist families to achieve economic independence and self-sufficiency; and

(d) Any recommendations by the IHA or the appropriate local program coordinating committee for legislative or administrative action that would improve the FSS program and ensure the effectiveness of the program.

Dated: July 18, 1994

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

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Part IV

Department of Education

Demonstration Projects for the Integration of Vocational and Academic Learning Program; Notice Inviting Applications for New Awards for FY 1994

DEPARTMENT OF EDUCATION

[CFDA No.: 84.248]

Demonstration Projects for the Integration of Vocational and Academic Learning Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 1995

Note to Applicants: This notice is a complete application package. Together with the statute authorizing the program and applicable regulations governing the program, including the Education Department General Administrative Regulations (EDGAR), the notice contains all of the information, application forms, and instructions needed to apply for a grant under this competition.

Purpose of Program: The Demonstration Projects for the Integration of Vocational and Academic Learning Program provides financial assistance to projects that develop, implement, and operate programs using different models of curricula that integrate vocational and academic learning. The Secretary wishes to highlight for potential applicants that this program can help to further the National Education Goals. Specifically, the integration of vocational and academic learning directly supports the National Education Goal that, by the year 2000, every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

Eligible Applicants: Institutions of higher education, area vocational educational schools, secondary schools funded by the Bureau of Indian Affairs, State boards of vocational education, public or private nonprofit organizations, local educational agencies, and consortia composed of these entities.

Deadline for Transmittal of Applications: September 16, 1994.

Deadline for Intergovernmental Review: November 15, 1994.

Available Funds: $6,000,000 to $7,000,000 for the first 12 months. Funding for the second, third, and fourth years is subject to the availability of funds and to a grantee meeting the requirements in 34 CFR 75.253.

Estimated Range of Awards: $300,000–$500,000 (funding for the first 12 months).

Estimated Average Size of Awards: $365,000 (funding for the first 12 months).

Estimated Number of Awards: 15–19.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 48 months (four 12-month grant cycles).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR 74 (Administration of Grants to Institutions of Higher Education, Hospitals and Nonprofit Organizations).

(2) 34 CFR Part 75 (Direct Grant Programs).

(3) 34 CFR Part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(6) 34 CFR Part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR Part 82 (New Restrictions on Lobbying).

(8) 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(9) 34 CFR Part 86 (Drug-Free Schools and Campuses).

(b) The regulations for this program in 34 CFR Parts 400 and 425.

Invitational Priorities

Under 34 CFR 75.105(c)(1), the Secretary is particularly interested in applications that focus primarily on one or more of the following areas. However, an application that meets these invitational priorities does not receive competitive or absolute preference over the applications.

(a) Demonstrating strong ties with the State's school-to-work activities through the integration of academic and vocational skills at work-based learning sites.

(b) Demonstrating strong ties with the business and industry skill standards projects funded by the Departments of Education and Labor through the identification and use of concrete world-of-work examples to teach abstract concepts and principles.

(c) Including both vocational and academic faculty and employers in the design of integrated curricula and courses that are targeted at the secondary and postsecondary levels of instruction.

(d) Involving the education community and employers in providing inservice training for teachers of vocational education students and administrators in the planning, implementation, and operation of integrated curricula or programs.

(e) Disseminating information and materials regarding effective strategies for integrating vocational and academic learning to national audiences.

(f) Evaluating programs that integrate vocational and academic learning through the use of experimental and control group samples.

Selection Criteria

The Secretary uses the following selection criteria to evaluate applications for new grants under this competition. The maximum score for all of these criteria is 100 points. The maximum score for each criterion is indicated in parentheses. For this competition, the Secretary assigns the fifteen points, reserved in 34 CFR 425.20(b), as follows:

Program factors (34 CFR 425.21(a). Five points are added to this criterion for a possible total of 15 points.

Educational significance (34 CFR 425.21(b)). Ten points are added to this criterion for a possible total of 20 points.

(a) *Program factors* (15 points) The Secretary reviews each application to assess the quality of the proposed project, including—

(1) The extent to which the project involves creative or innovative methods for integrating vocational and academic learning; and

(2) The quality of the services that the project will provide to—

(i) Individuals who are members of special populations;

(ii) Vocational students in secondary schools and at postsecondary institutions;

(iii) Individuals enrolled in adult programs; or

(iv) Single parents, displaced homemakers, and single pregnant women.

(b) *Educational significance* (20 points) The Secretary reviews each application to determine the extent to which the applicant—

(1) Bases the proposed project on successful model vocational education programs that include components similar to the components required by this program, as evidenced by empirical data from those programs in such factors as—

(i) Student performance and achievement;

(ii) High school graduation;

(iii) Placement of students in jobs, including military service; and

(iv) Successful transfer of students to a variety of postsecondary education programs;

(2) Proposes project objectives that contribute to the improvement of education; and

(3) Proposes to use unique and innovative techniques that address the

need to integrate vocational and academic learning, and produce benefits that are of national significance.

(c) *Plan of operation* (15 points) The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) The quality of the project design, especially the establishment of measureable objectives for the project that are based on the project's overall goals;

(2) The extent to which the plan of management is effective and ensures proper and efficient administration of the project over the award period;

(3) How well the objectives of the project relate to the purpose of the program;

(4) The quality of the applicant's plan to use its resources and personnel to achieve each objective; and

(5) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or disability.

(d) *Evaluation plan* (15 points) The Secretary reviews each application to determine the quality of the project's evaluation plan, including the extent to which the plan—

(1) Carries out the requirements in 34 CFR 425.30;

(2) Is clearly explained and is appropriate to the project;

(3) To the extent possible, is objective and will produce data that are quantifiable;

(4) Includes quality measures to assess the effectiveness of the curricular developed by the project;

(5) Identifies expected outcomes of the participants and how those outcomes will be measured;

(6) Includes activities during the formative stages of the project to help guide and improve the project, as well as a summative evaluation that includes recommendations for replicating project activities and results;

(7) Will provide a comparison between intended and observed results, and lead to the demonstration of a clear link between the observed results and the specific treatment of project participants; and

(8) Will yield results that can be summarized and submitted to the Secretary for review by the Department's Program Effectiveness Panel, as defined in 34 CFR 400.4(b). NOTE: The Program Effectiveness Panel (PEP) is a mechanism the Department has developed for validating the effectiveness of educational programs developed by schools, universities, and other agencies. The PEP is composed of experts in the evaluation of educational programs and in other areas of education, at least two-thirds of whom are non-Federal employees who are appointed by the Secretary. Regulations governing the PEP are codified in 34 CFR Parts 785–789. Specific criteria for PEP review are found in 34 CFR 786.12 or 787.121.

(e) *Demonstration and dissemination.* (10 points) The Secretary reviews each application for information to determine the effectiveness and efficiency of the plan for demonstrating and disseminating information about project activities and results throughout the project period, including—

(1) High quality in the design of the dissemination plan and procedures for evaluating the effectiveness of the dissemination plan;

(2) Identification of the audience to which the project activities will be disseminated and provisions for publicizing the project at the local, State, and national levels by conducting, or delivering presentations at, conferences, workshops, and other professional meetings and by preparing materials for journal articles, newsletters, and brochures;

(3) Provisions for demonstrating the methods and techniques used by the project to others interested in replicating these methods and techniques, such as by inviting them to observe project activities;

(4) A description of the types of materials the applicant plans to make available to help others replicate project activities and the methods for making the materials available; and

(5) Provisions for assisting others to adopt and successfully implement the methods, approaches, and techniques developed by the project.

(f) *Key personnel.* (10 points)

(1) The Secretary reviews each application to determine the quality of key personnel the applicant plans to use on the project, including—

(i) The qualifications, in relation to project requirements, of the project director;

(ii) The qualifications, in relation to project requirements, of each of the other key personnel to be used in the project;

(iii) The appropriateness of the time that each person referred to in paragraphs (f)(1) (i) and (ii) will commit to the project; and

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability.

(2) To determine personnel qualifications under paragraphs (f)(1) (i) and (ii), the Secretary considers—

(i) The experience and training of key personnel in project management and in fields related to the objectives of the project; and

(ii) Any other qualifications of key personnel that pertain to the quality of the project.

(g) *Budget and cost effectiveness.* (10 points) The Secretary reviews each application to determine the extent to which the budget—

(1) Is cost effective and adequate to support the project activities;

(2) Contains costs that are reasonable and necessary in relation to the objectives of the project; and

(3) Proposes using non-Federal resources available from appropriate employment, training, and education agencies in the State to provide services and activities and to acquire project equipment and facilities, to ensure that funds awarded under this part are used to provide instructional services.

(h) *Adequacy of resources and commitment. (5 points)*

(1) The Secretary reviews each application to determine the extent to which the applicant plans to devote adequate resources to the project. The Secretary considers the extent to which—

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(2) The Secretary reviews each application to determine the commitment to the project, including whether the—

(i) Uses of non-Federal resources are adequate to provide project services and activities, especially resources of community organizations and State and local educational agencies; and

(ii) Applicant has the capacity to continue, expand, and build upon the project when Federal assistance under 34 CFR part 425 ends.

Additional Factors

(a) After evaluating the applications according to the selection criteria, the Secretary determines whether the most highly rated applications—

(1) Are equitably distributed throughout the Nation;

(2) Offer significantly different approaches to integrating vocational and academic curricula; and

(3) Serve—

(i) Individuals who are members of special populations;

(ii) Vocational students in secondary schools;

(iii) Vocational students at postsecondary institutions;

(iv) Individuals enrolled in adult programs; or

(v) Single parents, displaced homemakers, and single pregnant women.

(b) The Secretary may select other applications for funding if doing so would improve the geographical distribution of, diversity of approaches in, or the diversity of populations to be served by projects funded under this program.

Intergovernmental Review of Federal Programs

This program is subject to the requirements of Executive Order 12372 (Intergovernmental Review of Federal Programs) and the regulations in 34 CFR Part 79.

The objective of the Executive order is to foster an intergovernmental partnership and to strengthen federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance.

Applicants must contact the appropriate State Single Point of Contact to find out about, and to comply with, the State's process under Executive Order 12372. Applicants proposing to perform activities in more than one State should immediately contact the Single Point of Contact for each of those States and follow the procedure established in each State under the Executive order. If you want to know the name and address of any State Single Point of Contact, see the list published in the **Federal Register** on May 3, 1994 (59 FR 22904–22905). In States that have not established a process or chosen a program for review, State, areawide, regional, and local entities may submit comments directly to the Department.

Any State Process Recommendation and other comments submitted by a State Single Point of Contact and any comments from State, areawide, regional, and local entities must be mailed or hand-delivered by the date indicated in this notice to the following address: The Secretary, E.O. 12372—CFDA# 84.248, U.S. Department of Education, Room 4181, 400 Maryland Avenue SW., Washington, DC 20202–0125.

Proof of mailing will be determined on the same basis as applications (see 34 CFR 75.102). Recommendations or comments may be hand-delivered until 4:30 p.m. (Washington, DC time) on the date indicated in this notice.

PLEASE NOTE THAT THE ABOVE ADDRESS IS NOT THE SAME ADDRESS AS THE ONE TO WHICH THE APPLICANT SUBMITS ITS COMPLETED APPLICATION. *DO NOT SEND APPLICATIONS TO THE ABOVE ADDRESS.*

Instructions for Transmittal of Applications

(a) If an applicant wants to apply for a grant, the applicant shall—

(1) Mail the original and six copies of the application on or before the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA# 84.248), Washington, DC 20202–4725, or

(2) Hand deliver the original and six copies of the application by 4:30 p.m. (Washington, DC time) on the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA# 84.248), Room #3633, Regional Office Building #3, 7th and D Streets SW., Washington, DC.

(b) An applicant must show one of the following as proof of mailing:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(c) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Notes: (1) The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

(2) The Application Control Center will mail a Grant Application Receipt Acknowledgement to each applicant. If an applicant fails to receive the notification of application receipt within 15 days from the date of mailing the application, the applicant should call the U.S. Department of Education Application Control Center at (202) 708–9494.

(3) The applicant *must* indicate on the envelope and—if not provided by the Department—in Item 10 of the Application for Federal Assistance (Standard Form 424) the CFDA number—and suffix letter, if any—of the competition under which the application is being submitted.

Application Instructions and Forms

To apply for an award under this program competition, your application must be organized in the following order and include the following five parts:

Application for Federal Assistance (Standard Form 424 (Rev. 4–88)).

Budget Information (ED Form No. 524).

Budget Narrative.

Program Narrative.

Additional Assurances and Certifications:

a. Assurances—Non-Construction Programs (Standard Form 424B).

b. Certification regarding Lobbying; Debarment, Suspension, and Other Responsibility Matters; and Drug-Free Workplace Requirements (ED 80–0013) and Instructions.

c. Certification regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion: Lower Tier Covered Transactions (ED 80–0014, 9/90) and Instructions.

(**Note:** ED 80–0014 is intended for the use of grantees and should not be transmitted to the Department.)

d. Disclosure of Lobbying Activities (Standard Form LLL) (if applicable) and Instructions, and Disclosure of Lobbying Activities Continuation Sheet (Standard Form LLL–A).

All forms and instructions are included as Appendix A of this notice. Questions and answers pertaining to this program are included, as Appendix B, to assist potential applicants.

An applicant may submit information on a photostatic copy of the forms in Appendix A. However, each of the pertinent documents must include an original ink signature. All applicants must submit ONE *original signed application*, including ink signatures on all forms and assurances and SIX *copies of the application*. Please mark each application as original or copy. Local or State agencies may choose to submit two copies with the original. No grant may be awarded unless a *complete* application form has been received.

FOR FURTHER INFORMATION CONTACT: Pariece M. Wilkins, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 4512—MES), Washington, D.C. 20202–7242. Telephone (202) 205–9673. Individuals who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Information about the Department's funding opportunities, including copies of application notices for discretionary grant competitions, can be viewed on the Department's electronic bulletin board (ED Board), telephone (202) 260–9950; or on the Internet Gopher Server at GOPHER.ED.GOV (under Announcements, Bulletins, and Press Releases). However, the official application notice for a discretionary grant competition is the notice published in the **Federal Register**.

Program authority: 20 U.S.C. 2420.

Dated: May 18, 1994.

Augusta S. Kappner,

Assistant Secretary, Office of Vocational and Adult Education.

Appendix A

BILLING CODE 4000–01–M

OMB Approval No. 0348-0043

APPLICATION FOR FEDERAL ASSISTANCE

2. DATE SUBMITTED	Applicant Identifier
3. DATE RECEIVED BY STATE	State Application Identifier
4. DATE RECEIVED BY FEDERAL AGENCY	Federal Identifier

1. TYPE OF SUBMISSION:

Application	Preapplication
☐ Construction	☐ Construction
☒ Non-Construction	☐ Non-Construction

5. APPLICANT INFORMATION

Legal Name:

Organizational Unit:

Address (give city, county, state, and zip code):

Name and telephone number of the person to be contacted on matters involving this application (give area code)

6. EMPLOYER IDENTIFICATION NUMBER (EIN):

7. TYPE OF APPLICANT: (enter appropriate letter in box) ☐

A. State
B. County
C. Municipal
D. Township
E. Interstate
F. Intermunicipal
G. Special District
H. Independent School Dist.
I. State Controlled Institution of Higher Learning
J. Private University
K. Indian Tribe
L. Individual
M. Profit Organization
N. Other (Specify) _____

8. TYPE OF APPLICATION:

☒ New ☐ Continuation ☐ Revision

If Revision, enter appropriate letter(s) in box(es): ☐ ☐

A. Increase Award B. Decrease Award C. Increase Duration
D. Decrease Duration Other (specify):

9. NAME OF FEDERAL AGENCY:

U.S. Department of Education

10. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: 84.248

TITLE: Demonstration Projects for the Integration of Vocational and Academic Learning

11. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:

12. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.):

13. PROPOSED PROJECT:

Start Date	Ending Date

14. CONGRESSIONAL DISTRICTS OF:

a. Applicant b. Project

15. ESTIMATED FUNDING:

a. Federal	$	.00
b. Applicant	$	.00
c. State	$	.00
d. Local	$	.00
e. Other	$	.00
f. Program Income	$	.00
g. TOTAL	$	.00

16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?

a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON

DATE _____

b. NO. ☐ PROGRAM IS NOT COVERED BY E.O. 12372

☐ OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW

17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?

☐ Yes If "Yes," attach an explanation. ☐ No

18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN DULY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED

a. Typed Name of Authorized Representative	b. Title	c. Telephone number
d. Signature of Authorized Representative		e. Date Signed

Previous Editions Not Usable

Standard Form 424 (REV 4-88)
Prescribed by OMB Circular A-102

Authorized for Local Reproduction

INSTRUCTIONS FOR THE SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

Item: Entry:

1. Self-explanatory.

2. Date application submitted to Federal agency (or State if applicable) & applicant's control number (if applicable).

3. State use only (if applicable).

4. If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.

5. Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.

6. Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.

7. Enter the appropriate letter in the space provided.

8. Check appropriate box and enter appropriate letter(s) in the space(s) provided:
   - "New" means a new assistance award.
   - "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.
   - "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation.

9. Name of Federal agency from which assistance is being requested with this application.

10. Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.

11. Enter a brief descriptive title of the project. if more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.

Item: Entry:

12. List only the largest political entities affected (e.g., State, counties, cities).

13. Self-explanatory.

14. List the applicant's Congressional District and any District(s) affected by the program or project.

15. Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate *only* the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15.

16. Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process.

17. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.

18. To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)

U.S. DEPARTMENT OF EDUCATION

BUDGET INFORMATION

NON-CONSTRUCTION PROGRAMS

OMB Control No. 1875-0102

Expiration Date: 9/30/95

Name of Institution/Organization

Applicants requesting funding for only one year should complete the column under "Project Year 1." Applicants requesting funding for multi-year grants should complete all applicable columns. Please read all instructions before completing form.

SECTION A - BUDGET SUMMARY
U.S. DEPARTMENT OF EDUCATION FUNDS

Budget Categories	Project Year 1 (a)	Project Year 2 (b)	Project Year 3 (c)	Project Year 4 (d)	Project Year 5 (e)	Total (f)
1. Personnel						
2. Fringe Benefits						
3. Travel						
4. Equipment						
5. Supplies						
6. Contractual						
7. Construction						
8. Other						
9. Total Direct Costs (lines 1-8)						
10. Indirect Costs						
11. Training Stipends						
12. Total Costs (lines 9-11)						

ED FORM NO. 524

Name of Institution/Organization	Applicants requesting funding for only one year should complete the column under "Project Year 1." Applicants requesting funding for multi-year grants should complete all applicable columns. Please read all instructions before completing form.

SECTION B - BUDGET SUMMARY
NON-FEDERAL FUNDS

Budget Categories	Project Year 1 (a)	Project Year 2 (b)	Project Year 3 (c)	Project Year 4 (d)	Project Year 5 (e)	Total (f)
1. Personnel						
2. Fringe Benefits						
3. Travel						
4. Equipment						
5. Supplies						
6. Contractual						
7. Construction						
8. Other						
9. Total Direct Costs (lines 1-8)						
10. Indirect Costs						
11. Training Stipends						
12. Total Costs (lines 9-11)						

SECTION C - OTHER BUDGET INFORMATION (see instructions)

ED FORM NO. 524

BILLING CODE 4000-01-C

Public reporting burden for this collection of information is estimated to vary from 13 to 22 hours per response, with an average of 17.5 hours, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Education, Information Management and Compliance Division, Washington, D.C. 20202–4651; and the Office of Management and Budget, Paperwork Reduction Project 1875–0102, Washington, D.C. 20503

Instructions for ED Form No. 524

General Instructions

This form is used to apply to individual U.S. Department of Education discretionary grants programs. Unless directed otherwise, provide the same budget information for each year of the multi-year funding request. Pay attention to applicable program specific instructions, if attached.

Section A—Budget Summary U.S. Department of Education Funds

All applicants must complete Section A and provide a breakdown by the applicable budget categories shown in lines 1–11.

Lines 1–11, columns (a)–(e):
For each project year for which funding is requested, show the total amount requested for each applicable budget category.

Lines 1–11, column (f):
Show the multi-year total for each budget category. If funding is requested for only one project year, leave this column blank.

Lines 12, columns (a)–(e):
Show the total budget request for each project year for which funding is requested.

Lines 12, column (f):
Show the total amount requested for all project years. If funding is requested for only one year, leave this space blank.

Section B—Budget Summary, Non-Federal Funds

If you are required to provide or volunteer to provide matching funds or other non-Federal resources to the project, these should be shown for each applicable budget category on lines 1–11 of Section B.

Lines 1–11, columns (a)–(e):
For each project year for which matching funds or other contributions are provided, show the total contribution for each applicable budget category.

Lines 1–11, column (f):
Show the multi-year total for each budget category. If non-Federal contributions are provided for only one year, leave this column blank.

Lines 12, columns (a)–(e):
Show that total matching or other contribution for each project year.

Lines 12, column (f):
Show the total amount to be contributed for all years of the multi-year project. If non-Federal contributions are provided for only one year, leave this space blank.

Section C—Other Budget Information

Pay attention to applicable program specific instructions, if attached.

1. Provide an itemized budget breakdown, by project year, for each budget category listed in Sections A and B.
2. If applicable to this program, enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period. In addition, enter the estimated amount of the base to which the rate is applied, and the total indirect expense.
3. If applicable to this program, provide the rate and base on which fringe benefits are calculated.
4. Provide other explanations or comments you deem necessary

Instructions for Budget Categories

1. *Personnel:* Show salaries to be paid to project personnel.
2. *Fringe Benefits:* Indicate the rate and amount of fringe benefits.
3. *Travel:* Indicate the amount requested for both inter- and intra-State travel of project staff. Include funds for at least one trip for two people to attend a project director's meeting in Washington, D.C.
4. *Equipment:* Indicate the cost of non-expendable personnel property that has a useful life of more than one year and a cost of $300 or more per unit ($5,000 or more if State, Local, or Tribal Government).
5. *Supplies:* Include the cost of consumable supplies and materials to be used during the project.
6. *Contractual:* Show the amount to be used for (1) procurement contracts (except those which belong on other lines such as supplies and equipment); and (2) subcontracts.
7. *Construction:* Not allowable.
8. *Other:* Indicate all direct costs not clearly covered by lines 1 through 6 above, including consultants.
9. *Total, Direct Cost:* Show the total for lines 1 through 7.
10. *Indirect Costs:* Indicate the rate and amount of indirect costs. NOTE: For training grants, the indirect cost rate cannot exceed 8%.
11. *Training/Stipend Cost:* (if allowable)

Instructions for Budget Narrative

Prepare a detailed Budget Narrative for all four years of the project that justifies, and/or clarifies the budget figures shown in the budget summary. The Budget Narrative should explain, justify, and, if needed, clarify your budget summary. For each line item (personnel, fringe benefits, travel, etc.) in your budget explain:

1. How personnel costs are calculated—provide yearly and/or hourly rates; for other than full-time staff, provide hours per day, week, month, and year.
2. The basis used to estimate certain costs (professional personnel, consultants, travel, indirect costs) and any other cost that may appear usual;
3. How the major cost items relate to the proposed project activities (refer to application page);
4. The costs of the project's evaluation component;
5. What matching occurs in each budget category.

Please limit this section to no more than five pages. Be sure that each page of your application is numbered consecutively.

Instructions for Program Narrative

The program narrative will comprise the largest portion of your application. This part is where you spell out the who, what, when, where, why, and how of your proposed project.

Although you will not have a form to fill out for your narrative, there is a format. This format is the *selection criteria*. Because your application will be reviewed and rated by a review panel on the basis of the section criteria, your narrative should follow the order and format of the criteria.

Before preparing your application, you should carefully read the legislation and regulations of the program, eligibility requirements, information on any priority set by the Secretary, and the selection criteria for this competition.

Your program narrative should be clear, concise, and to the point. Begin the narrative with a one page abstract or summary of your proposed project. Then describe the project in detail, addressing each selection criterion in order.

The Secretary strongly requests you limit the program narrative to no more than 30 double-spaced, typed pages (on one side only), although the Secretary will consider your application if it is longer. Be sure to number consecutively *ALL* pages in your application.

You may include supporting documentation as appendices. Be sure that this material is concise and pertinent to this program competition.

You are advised that:

(a) The Department considers only information contained in the application in ranking applications for funding consideration. Letters of support sent separately from the formal application package are not considered in the review by the technical review panels. (EGAR Sec. 75.217)

(b) The technical review panel evaluates each application solely on the basis of the established technical review criteria. Letters of support contained in the application will strengthen the application only insofar as they contain commitments which pertain to the established technical review criteria, such as commitment and resources.

Estimated Public Reporting Burden

Under terms of the Paperwork Reduction Act of 1980, as amended, and the regulations implementing that Act, the Department of Education invites comment on the public reporting burden in this collection of information. Public reporting burden for this collection of information is estimated to average 90 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. You may send comments regarding this

burden to the U.S. Department of Education, Information Management and Compliance Division, Washington, D.C. 20202–4651; and to the Office of Management and Budget, Paperwork Reduction Project, OMB 1830–0013, Washington, D.C. 20503. (Information collection approved under OMB control number 1830–0013. Expiration date: 2/28/95.)

BILLING CODE 4000–01–M

OMB Approval No. 0348-0040

ASSURANCES — NON-CONSTRUCTION PROGRAMS

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C.§§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. §§ 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333), regarding labor standards for federally assisted construction subagreements.

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10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program andto purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).

14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. 2131 et seq.) pertaining to the care, handling and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.

18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
APPLICANT ORGANIZATION	DATE SUBMITTED

SF 424B (4-88) Back

CERTIFICATIONS REGARDING LOBBYING; DEBARMENT, SUSPENSION AND OTHER RESPONSIBILITY MATTERS; AND DRUG-FREE WORKPLACE REQUIREMENTS

Applicants should refer to the regulations cited below to determine the certification to which they are required to attest. Applicants should also review the instructions for certification included in the regulations before completing this form. Signature of this form provides for compliance with certification requirements under 34 CFR Part 82, "New Restrictions on Lobbying," and 34 CFR Part 85, "Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirements for Drug-Free Workplace (Grants)." The certifications shall be treated as a material representation of fact upon which reliance will be placed when the Department of Education determines to award the covered transaction, grant, or cooperative agreement.

1. LOBBYING

As required by Section 1352, Title 31 of the U.S. Code, and implemented at 34 CFR Part 82, for persons entering into a grant or cooperative agreement over $100,000, as defined at 34 CFR Part 82, Sections 82.105 and 82.110, the applicant certifies that:

(a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any Federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal grant or cooperative agreement;

(b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form - LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions;

(c) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, contracts under grants and cooperative agreements, and subcontracts) and that all subrecipients shall certify and disclose accordingly.

2. DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS

As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions, as defined at 34 CFR Part 85, Sections 85.105 and 85.110 —

A. The applicant certifies that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default; and

B. Where the applicant is unable to certify to any of the statements in this certification, he or she shall attach an explanation to this application.

3. DRUG-FREE WORKPLACE (GRANTEES OTHER THAN INDIVIDUALS)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610 —

A. The applicant certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an on-going drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency, in writing, within 10 calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3),

Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

_____

_____

_____

Check ☐ if there are workplaces on file that are not identified here.

DRUG-FREE WORKPLACE (GRANTEES WHO ARE INDIVIDUALS)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610 —

A. As a condition of the grant, I certify that I will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant; and

B. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, I will report the conviction, in writing, within 10 calendar days of the conviction, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-4571. Notice shall include the identification number(s) of each affected grant.

As the duly authorized representative of the applicant, I hereby certify that the applicant will comply with the above certifications.

NAME OF APPLICANT	PR/AWARD NUMBER AND/OR PROJECT NAME
PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE	
SIGNATURE	DATE

ED 80-0013, 6/90 (Replaces ED 80-0008, 12/89; ED Form GCS-008, (REV. 12/88); ED 80-0010, 5/90; and ED 80-0011, 5/90, which are obsolete)

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion – Lower Tier Covered Transactions

This certification is required by the Department of Education regulations implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, for all lower tier transactions meeting the threshold and tier requirements stated at Section 85.110.

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the departme it or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

NAME OF APPLICANT	PR/AWARD NUMBER AND/OR PROJECT NAME
PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE	
SIGNATURE	DATE

ED 80-0014, 9/90 (Replaces GCS-009 (REV. 12/88), which is obsolete)

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB 0346-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:
☐ a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐ a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐ a. initial filing
b. material change
For Material Change Only:
year _____ quarter _____
date of last report _____

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier _____, *if known*:

Congressional District, *if known*:

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:

Congressional District, *if known*:

6. Federal Department/Agency:

7. Federal Program Name/Description:

CFDA Number, *if applicable*: _____

8. Federal Action Number, *if known*:

9. Award Amount, *if known*:
$

10. a. Name and Address of Lobbying Entity *(if individual, last name, first name, MI)*:

b. Individuals Performing Services *(including address if different from No. 10a) (last name, first name, MI)*:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply)*:
$ _____ ☐ actual ☐ planned

12. Form of Payment *(check all that apply)*:
☐ a. cash
☐ b. in-kind; specify: nature _____
value _____

13. Type of Payment *(check all that apply)*:
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: _____

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be [illegible]ed to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: _____
Print Name: _____
Title: _____
Telephone No.: _____ **Date:** _____

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Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.

6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."

9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.

10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).

11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.

12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.

13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.

14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.

15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.

16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ Page _____ of _____

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Standard Form - LLL-A

Appendix B

Potential applicants frequently direct questions to officials of the Department regarding application notices and programmatic and administrative regulations governing various direct grant programs. To assist potential applicants the Department has assembled the following most commonly asked questions.

Q. Can we get an extension of the deadline?

A. No. A closing date may be changed only under extraordinary circumstances. Any change must be announced in the **Federal Register** and apply to all applications. Waivers for individual applications cannot be granted regardless of the circumstances.

Q. How many copies of the application should I submit and must they be bound?

A. Our new policy calls for an original and six copies to be submitted. The binding of applications is optional.

Q. We just missed the deadline for the XXX competition. May we submit under another competition?

A. Yes, however, the likelihood of success is not good. A properly prepared application must meet the requirements of the competition to which it is submitted.

Q. I'm not sure which competition is most appropriate for my project. What should I do?

A. We are happy to discuss any questions with you and provide clarification on the unique elements of the various competitions.

Q. Will you help us prepare our application?

A. We are happy to provide general program information. Clearly, it would not be appropriate for staff to participate in the actual writing of an application, but we can respond to specific questions about application requirements, evaluation criteria, and the priorities. Applicants should understand that this previous preapplication consultation is not required, nor will it in any way influence the success of an application.

Q. When will I find out if I'm going to be funded?

A. You can expect to receive notification within 3 to 4 months of the application closing date, depending on the number of applications received and the number of competitions with closing dates at about the same time.

Q. Once my application has been reviewed by the review panel, can you tell me the outcome?

A. No. Every year we are called by a number of applicants who have legitimate reasons for needing to know the outcome of the review prior to official notification. Some applicants need to make job decisions, some need to notify a local school district, etc. Regardless of the reason, because final funding decisions have not been made at that point, we cannot share information about the review with anyone.

Q. Will my application be returned if I am not funded?

A. We no longer return unsuccessful applications. Thus, applicants should retain at least one copy of the application.

Q. Can I obtain copies of reviewers' comments?

A. Upon written request, reviewers' comments will be mailed to unsuccessful applicants.

Q. Is travel allowed under these projects?

A. Travel associated with carrying out the project is allowed. Because we will request the project directors and evaluators of funded projects to attend an annual project directors meeting, you should include annual trips for each to Washington, D.C., in the travel budget. Travel to conferences is sometimes allowed when it is for purposes of dissemination.

Q. If my application receives high scores from the reviewers, does that mean that I will receive funding?

A. Not necessarily. It is often the case that the number of applications scored highly by the reviewers exceeds the dollars available for funding projects under a particular competition. The order of selection, which is based on the scores of all the applications and other relevant factors, determines the applications that can be funded.

Q. What happens during negotiations?

A. During negotiations technical and budget issues may be raised. These are issues that have been identified during the panel and staff reviews that require clarification. Sometimes issues are stated as "conditions." These are issues that have been identified as so critical that the award cannot be made unless those conditions are met. Questions may also be raised about the proposed budget. Generally, these issues are raised because there is inadequate justification or explanation of a particular budget item, or because the budget item seems unimportant to the successful completion of the project. If you are asked to make changes that you feel could seriously affect the project's success, you may provide reasons for not making the changes or provide alternative suggestions. Similarly, if proposed budget reductions will, in your opinion, seriously affect the project activities, you may explain why and provide additional justification for the proposed expenses. An award cannot be made until all negotiation issues have been resolved.

Q. How do I provide an assurance?

A. Except for SF–424B, "Assurances—Non-Construction Programs," simply state in writing that you are meeting a proscribed requirement.

Q. Where can copies of the **Federal Register**, program regulations, and Federal statutes be obtained?

A. Copies of these materials can usually be found at your local library. If not, they can be obtained from the Government Printing Office by writing to: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Telephone: (202) 783–3238. When requesting copies of regulations or statutes, it is helpful to use the specific name, public law number, or part number. The material referenced in this notice should be referred to as follows:

(1) Carl D. Perkins Vocational and Applied Technology Education Act (Perkins Act) (Public Law 101–392, 104 Stat. 753 (1990)).

(2) State Vocational and Applied Technology Education Programs and National Discretionary Programs of Vocational Education Final Regulations 34 CFR Parts 400 and 425.

(3) Education Department General Administrative Regulations, 34 CFR Parts 74, 75, 77, 79, 80, 81, 82, 85, and 86.

Q. What are the Department of Education's Program Effectiveness Panel and National Diffusion Network?

A. The Program Effectiveness Panel (PEP) is the Department of Education's primary mechanism for validating the effectiveness of educational programs developed by schools, universities, and other agencies. The National Diffusion Network (NDN) is a Federally funded dissemination system that helps public and private schools, colleges, and other educational institutions improve by sharing successful education programs, products, and processes.

Regulations governing PEP and NDN are codified at 34 CFR Parts 785–789. For information about PEP, prospective applicants may wish to read *Making the Case: Evidence of Effectiveness in Schools and Classrooms*, which contains criteria and guidelines for submitting project results to PEP. This publication, as well as information about NDN, is available from RMC Research Corporation, 1000 Market Street, Portsmouth, New Hampshire 03801. Telephone 1–800–258–0802. RMC Research Corporation can also provide information about consultants who have conducted evaluations that have been approved by PEP.

[FR Doc. 94–18474 Filed 7–29–94; 8:45 am]

BILLING CODE 4000–01–M

federal register

Monday
August 1, 1994

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Part 1
Use of Public Aircraft; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 1

[Docket No. 27836]

Use of Public Aircraft

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of reconsideration of legal interpretation and invitation for comments.

SUMMARY: The Federal Aviation Administration (FAA) is reconsidering a previously issued legal interpretation of the term "commercial purposes" used in the definition of "public aircraft" that appears in the Federal Aviation Act of 1958, as amended. The reason for this action is to assess whether the interpretation is appropriate, and if it is not, to issue an appropriate interpretation.

DATES: Comments must be received on or before August 31, 1994.

ADDRESSES: Send comments in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, ATTN: Rules Docket (AGC–200), Docket No. 27836, 800 Independence Avenue SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: John Walsh (AGC–100), (202) 376–6406, 701 Pennsylvania Avenue NW., Suite 925, Washington, DC 20004.

SUPPLEMENTARY INFORMATION: Under the Federal Aviation Act of 1958 (Act), as amended, aircraft fall into one of two major categories, "civil" or "public". Civil aircraft are regulated in every aspect of their construction, maintenance, and operation by the Federal Aviation Administration (FAA). Public aircraft are free from such regulation except with regard to air traffic rules.

The two classes of aircraft are defined in the Act as follows:

"Civil aircraft" means any aircraft other than a public aircraft.

"Public aircraft" means any aircraft used exclusively in the service of any government or of any political subdivision thereof including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes. For purposes of this paragraph, "used exclusively in the service of" means, for other than the Federal Government, an aircraft which is owned and operated by a governmental entity for other than commercial purposes or which is exclusively leased by such governmental entity for not less than 90 continuous days.

Act, Section 101 (17), (36); 49 U.S.C. App. 1301 (17), (36).

In April, 1993, in response to an inquiry from a private sector operator, I issued an interpretation of the term "used for commercial purposes" as that term appears in the definition of "public aircraft" in the Act. Under the interpretation, a government-owned aircraft must be operated under the Federal Aviation Regulations (FAR) applicable to civil aircraft when compensation is received for operating the aircraft on behalf of another state or local government. The interpretation was not new in its analytical approach. It only restated, in the context of a novel question, the FAA's previous interpretations that receipt of any compensation for the operation of one's aircraft constitutes operating the aircraft for "commercial purposes" within the meaning of the statutory definition. When a county sheriff whose operation was the subject of the interpretation became aware of the interpretation, he asked for the opportunity to submit information and argument on the subject. I agreed to reconsider the interpretation, and the sheriff submitted information. In the meantime, others who became aware of the reconsideration process submitted information, also. After consideration of all the submitted information found relevant to the legal question, I confirmed the interpretation in a letter to the sheriff's county attorney, dated December 1993.

That letter has apparently been widely disseminated among private and public sector operators that have an interest in the issue. Since its issuance, the FAA has been advised by local government agencies, by Federal government agencies, and by Congressional sources, that the interpretation is having an unintended effect that they view as detrimental to public safety. These sources advise that certain public agencies' wildfire suppression capabilities are reduced by the unavailability of aircraft that do not comply with the FAR, but which previously had been considered by those public agencies to be available for those uses. The FAA has been advised that this shortage creates an imminent danger to life and property from wildfires.

Some of those same sources have also urged that the FAA reconsider whether reimbursement by one government entity to another for the use of the latter's aircraft to carry out a governmental duty of the reimbursing agency constitutes "commercial purposes" within the Act. In support of their request, they have provided a legal analysis of the Act that is different from the FAA analysis and that warrants consideration.

In further support of reconsideration, the sources point to what they consider an anomalous result when the law is applied as interpreted. That is, a government entity can use its aircraft in fire suppression activities on its own land without complying with the FAR, but must comply with the FAR when operating on behalf of another jurisdiction, only because the economics of government require reimbursement in the latter case. This circumstance, they urge, indicates that the FAA is making decisions based on economic factors rather than on safety considerations. Finally, the same sources urge expedited treatment of the request for reconsideration in view of the emergency circumstances they perceive to be extant in regard to wildfires in the western forests.

At the same time, other interested parties have urged that there are sufficient private sector resources available to support wildfire suppression activities. Those parties claim to be disadvantaged in their efforts to obtain contracts to perform that work by the fact that public sector aircraft do not have to bear the cost of compliance with the FAR. These parties also urge that their operations are, by virtue of their compliance with the FAR, inherently safer than public aircraft operations.

In view of the public safety situation that has been reported to the FAA; the apparently anomalous situations permitted by the Act as currently interpreted, and the possible merits of a different legal interpretation of the Act that has been provided to the FAA, it is appropriate to reconsider whether reimbursement by one government for the use of another government's aircraft to carry out a governmental duty means the resulting operation is for a commercial purpose. The arguments advanced in support of such review suggest some uncertainty in the statutory definition, as applied to intergovernmental reimbursement, and it is possible that, upon reconsideration, a different interpretation might be reached. The parties to whom the previous interpretation was issued, as well as other parties who have recently written the agency expressing concern, are being advised by mailed copies of this notice that the matter is again under review.

This reconsideration should be completed within 90 days. Interested persons are invited to submit any arguments, views, or information they consider relevant. All material received

30 days after publication date will be considered in coming to a final interpretation. Later received material may be considered as time allows. All material submitted will be available for review and copying by interested persons in the FAA Rules Docket No. 27836 at the address given above. All material relied upon in the interpretative process to date is available in the docket as of the date of this announcement.

Issued in Washington, DC on July 26, 1994.

John H. Cassady,

Deputy Chief Counsel.

[FR Doc. 94–18546 Filed 7–29–94; 8:45 am]

BILLING CODE 4910–13–M

federal register

Monday
August 1, 1994

Part VI

Department of Education

Missouri Department of Elementary and Secondary Education; Notice of Intent To Award Grantback Funds

DEPARTMENT OF EDUCATION

Intent to Repay to the Missouri Department of Elementary and Secondary Education Funds Recovered as a Result of a Final Audit Determination

AGENCY: Department of Education.

ACTION: Notice of intent to award grantback funds.

SUMMARY: Notice is given that under section 456 of the General Education Provisions Act (GEPA), 20 U.S.C. 1234e (1982), the U.S. Secretary of Education (Secretary) intends to repay to the Missouri Department of Elementary and Secondary Education, the State educational agency (SEA or Missouri), an amount nearly equal to 75 percent of the principal amount of funds recovered by the U.S. Department of Education (Department) as a result of a final audit determination. This notice describes the SEA's plan for the use of the repaid funds and the terms and conditions under which the Secretary intends to make those funds available. The notice invites comments on the proposed grantback.

DATES: All comments must be received on or before August 31, 1994.

ADDRESSES: Comments concerning the grantback should be addressed to William D. Tyrrell, Sr., U.S. Department of Education, 400 Maryland Avenue, S.W., room 3609, Switzer Building, Washington, D.C. 20202–6132.

FOR FURTHER INFORMATION CONTACT: William D. Tyrrell, Sr., U.S. Department of Education, 400 Maryland Avenue, S.W., room 3609, Switzer Building, Washington, D.C. 20202–6132, telephone: (202) 205–8825. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

A. Background

This notice is based on the Department's recovery of funds following an audit report prepared by the United States Department of Education's Office of Inspector General, Office of Audit, Region VII, issued on May 29, 1984, of the Special School District of St. Louis County's (SSD) administration of its Part B of the Education of the Handicapped Act [1] (Part B) grant award for the funding period of July 1, 1977 through June 30, 1983. (Audit Control Number: 07–30032). Among the objectives of that audit was to determine whether SSD complied with Part B's non-supplanting requirement. Under that requirement, a local educational agency (LEA) receiving Part B funds must, in any particular fiscal year, spend as much State and local funds on special education and related services, on either an aggregate or per capita basis, as it did in the prior fiscal year. This part of the non-supplanting requirement is referred to as the "aggregate expenditure" test. (*See* 20 U.S.C. 1414(a)(2)(B)(ii) and (f) (1982) and 34 CFR § 300.230 (1982)). 34 CFR 300.230 also prohibited, during the period at issue, the use of Part B funds to pay for specific costs that had been previously paid for with State and local funds. This part of the non-supplanting requirement is referred to as the "particular cost" test. *Id.*[2]

On April 17, 1986, the Assistant Secretary for Special Education and Rehabilitative Services (Assistant Secretary) issued a final letter of determination (FLD) to the SEA that adopted the finding of the audit report and disallowed $1,374,880 of fiscal year 1980, 1981, and 1983 Part B funds expended in violation of the non-supplanting requirement.[3] Most of these funds, $929,746, were disallowed because of SSD's failure to comply with the aggregate expenditure test. The FLD, however, also disallowed $445,116 because of SSD's failure to comply with the particular cost test.

On May 16, 1986, Missouri filed an application for review of the FLD with the Education Appeal Board (EAB).[4] The SEA's application for review and the petition to intervene in the proceedings filed by SSD were accepted by the EAB. During the course of proceedings before the EAB, the Assistant Secretary, on the basis of documentation presented by SSD, reduced the claim made in the FLD for funds spent in violation of the non-supplanting requirement to $911,153. The EAB's *Initial Decision*, which was issued on August 9, 1989, held that Missouri must refund $463,729 to the Department.

The SEA, SSD, and the Secretary of Education entered into a settlement agreement that resolved the issues in the appeal on May 22, 1991. On June 17, 1991, pursuant to the terms of that agreement, SSD returned $223,500 to the Department. The EAB, on the basis of a *Joint Motion* filed by all the parties, dismissed the appeal with prejudice. All terms of the settlement agreement have been satisfied.

B. Authority for Awarding a Grantback

Section 456(a) of GEPA, 20 U.S.C. 1234e(a)(1982), provides that whenever the Secretary has recovered funds following a final audit determination with respect to an applicable program, the Secretary may consider those funds to be additional funds available for the program and may arrange to repay to the SEA or LEA affected by the determination an amount not to exceed 75 percent of the recovered funds. The Secretary may enter into this "grantback" arrangement if the Secretary determines that the—

(a) Practices and procedures of the SEA or LEA that resulted in the audit determination have been corrected, and the SEA or LEA is, in all other respects, in compliance with the requirements of the applicable program;

(b) The SEA has submitted to the Secretary a plan for the use of the funds to be awarded under the grantback arrangement that meets the requirements of the program and, to the extent possible, benefits the population that was affected by the failure to comply or by the misexpenditures that resulted in the audit exception; and

(c) Use of funds to be awarded under the grantback arrangement in accordance with the SEA's plan would serve to achieve the purposes of the program under which the funds were originally granted.

C. Plan for Use of Funds Awarded Under a Grantback Arrangement

Pursuant to section 456(a)(2) of GEPA, the SEA has applied for a grantback totaling $167,585, which is slightly less than 75 percent of the principal amount of the recovered funds, and has submitted a plan for use of the grantback funds to meet the special education needs of children with disabilities. Under section 456(c) of

[1] In 1990, the name of this Act was changed by Congress to Part B of the Individuals with Disabilities Education Act. *See* Pub. L. 101–476.

[2] The particular cost requirement was removed from the Part B regulations in 1992. *See* 57 F.R. 37652 (August 19, 1992).

[3] Under Part B, the SEA is responsible for assuring that the funds it receives and awards to its school districts will be spent in accordance with, among other things, the Act's non-supplanting requirement. (*See* 20 U.S.C. 1413(a)(1) (1982). *See also* 20 U.S.C. 1412(6) (1982)). Thus, although SSD violated the non-supplanting requirement, the Department sought recovery of the misexpended funds from the SEA.

The FLD also disallowed $107,969 of fiscal year 1983 funds because of erroneous reporting and improper charges to the Part B program. This claim was subsequently withdrawn on the basis of evidence presented by SSD to the Assistant Secretary after the FLD was issued.

[4] The procedures for appealing FLDs issued by officials of the Department of Education were changed by Pub. L. 100–297 (April 28, 1988). 20 U.S.C. §§ 1234 and 1234a (1988). The Department's Office of Administrative Law Judges now performs the duties related to the adjudication of appeals of FLDs that were previously assigned to the EAB.

GEPA, 20 U.S.C. 1234e(c)(1982), these funds are available for expenditure until September 30, 1994. The SSD's plan, which has been submitted by the SEA, is to train its personnel in a transdisciplinary team approach to serving children with disabilities. The training has five major components: (1) initial training on the transdisciplinary team approach of providing services to students with disabilities; (2) concept support training, including Project RIDE (Responding to Individual Differences in Education), the nationally recognized program for at-risk students aimed at helping students who have difficulty functioning successfully in the regular classroom; (3) monthly site-based meetings; (4) consultation with recognized experts and trainers; and (5) evaluation to continue modification of the process as appropriate and planning to continue implementation district-wide. The training will be provided to 18 teams on the concept of transdisciplinary service and the process of working as a team. Each team will be composed of one general education teacher, one general education counselor, two special education teachers, one speech/language pathologist, and one special education area coordinator. Approximately ten occupational/physical therapists, serving multiple teams, will also be included. These teams will benefit from the initial two-day training workshop which focuses on the transdisciplinary approach. In addition, there will be supplemental training: follow-up sessions, one mid-way in the project and one near the end of the project period. The teams will also be participating in the monthly meeting guided by the local Project Leader.

D. The Secretary's Determinations

The Secretary has carefully reviewed the plan submitted by the SEA. Based upon that review, the Secretary has determined that the conditions under section 456 of GEPA have been met.

These determinations are based upon the best information available to the Secretary at the present time. If this information is not accurate or complete, the Secretary is not precluded from taking appropriate administrative action. In finding that the conditions of section 456 of GEPA have been met, the Secretary makes no determination concerning any pending audit recommendations or final audit determinations.

E. Notice of the Secretary's Intent To Enter Into a Grantback Arrangement

Section 456(d) of GEPA requires that, at least 30 days before entering into an arrangement to award funds under a grantback, the Secretary must publish in the **Federal Register** a notice of intent to do so, and the terms and conditions under which the payment will be made.

In accordance with section 456(d) of GEPA, notice is hereby given that the Secretary intends to make funds available to Missouri under a grantback arrangement. The grantback award would be in the amount of $167,585, which is approximately 75 percent—the maximum percentage authorized by statute—of the principal amount recovered as a result of the audit.

F. Terms and Conditions Under Which Payments Under a Grantback Arrangement Would Be Made

The SEA agrees to comply with the following terms and conditions under which payments under a grantback arrangement would be made:

(a) The funds awarded under the grantback must be spent in accordance with—

(1) All applicable statutory and regulatory requirements;

(2) The plan that the SEA submitted and any amendments to the plan that are approved in advance by the Secretary; and

(3) The budget that was submitted with the plan and any amendments to the budget that are approved in advance by the Secretary.

(b) All funds received under the grantback arrangement must be obligated by September 30, 1994, in accordance with section 456(c) of GEPA;

(c) The SEA will, not later than January 1, 1995, submit a report to the Secretary that—

(1) Indicates that the funds awarded under the grantback have been spent in accordance with the proposed plan and approved; and

(2) Describes the results and effectiveness of the project for which the funds were spent.

(d) Separate accounting records must be maintained documenting the expenditures of funds awarded under the grantback arrangement.

(e) Before funds will be repaid pursuant to this notice, the SEA must repay to the Department any debts that become overdue, or enter into a repayment agreement for those debts.

Dated: July 26, 1994.

Judith E. Heumann,

Assistant Secretary for Special Education and Rehabilitative Services.

(Catalog of Federal Domestic Assistance Number 84.027, Handicapped State Grants)

[FR Doc. 94–18616 Filed 7–29–94; 8:45 am]

BILLING CODE 4000–01–P

federal register

Monday
August 1, 1994

Part VII

Department of Education

Office of Education and Research and Improvement

Notice of Public Meetings; Invitation To Comment

DEPARTMENT OF EDUCATION

Office of Education Research and Improvement (OERI)

Notice of Public Meetings

AGENCY: Department of Education.

ACTION: Notice of Public Meetings—Invitation to Comment.

SUMMARY: This notice provides the schedule for a series of three public meetings. The Office of Educational Research and Improvement (OERI) is sponsoring these meetings in cooperation with the Secretary's Regional Representative for each of the designated sites to seek public comment on issues regarding the recompetition of the regional educational laboratories. Written comment may be submitted at the time of the public meetings or may be submitted by mail, FAX, or electronic mail to the number or addresses listed below in the **ADDRESSES** section.

DATE, TIME, AND LOCATION: Meetings will be held in three metropolitan areas, starting at 9:00 a.m. and ending at 4:00 p.m.

The dates and locations of the meetings are as follows:

- August 22, 1994—Oakland, CA—Edward R. Roybal Auditorium, Third Floor, Oakland Federal Building, 1301 Clay Street, *Contact:* Loni Hancock, 415–556–4920
- August 23, 1994—Denver, CO—U.S. Forest Service Auditorium, 740 Simms Street, *Contact:* Lynn Simons, 303–844–3544
- August 25, 1994—Boston, MA—The Walsh Theater of Suffolk University, Suffolk University, 55 Temple Street, *Contact:* Ed O'Connell 617–223–9317.

DEADLINE FOR WRITTEN COMMENT: Written comments must be received on or before September 30, 1994.

ADDRESSES: All comments and questions concerning this notice, as well as requests for a supplementary reference package which includes the legislation [Part D, Section 941(h) of the Educational Research, Development, Dissemination, and Improvement Act of 1994]; a list of names and addresses of the regional educational laboratories, and a Discussion Paper on regional educational laboratory issues should be forwarded by:

- Mail to Adria White, U.S. Department of Education, 555 New Jersey Avenue, NW, Room 500–m, Washington, DC 20208–5644.
- Fax to 202–219–2106.
- Internet electronic mail:

—send comments only to: Lab_Comments@inet.ed.gov

—send questions only to: Lab_Questions@inet.ed.gov

—to request the supplementary reference package, and from the e-mail address where you wish to receive the material, send e-mail to almanac@inet.ed.gov and in the body of the message type "send LabPackage" (without the quotes); leave the Subject line blank and avoid the use of any signature block.

FOR FURTHER INFORMATION CONTACT: Individual coordinators for meetings, whose telephone numbers are listed in the DATE, TIME, AND LOCATION section, or U.S. Department of Education staff at Lab_Questions@inet.ed.gov via Internet electronic mail.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On March 31, 1994, President Clinton signed Public Law 103–227. Title IX of that legislation, known as the Educational Research, Development, Dissemination, and Improvement Act of 1994, includes new authorizing legislation for the Regional Educational Laboratory Program [Part D, Section 941(h)]. The U.S. Department of Education is seeking public comment on aspects of this recently enacted legislation for the Regional Educational Laboratory Program which will be implemented through the recompetition of the regional educational laboratories. The competitions will be announced in the fall of 1994 and carried out during the winter, spring and summer of 1995, with new five-year awards effective December 1, 1995. To help prepare for this competition, the U.S. Department of Education is holding a series of 3 public meetings from August 22 through August 25, 1994.

The agenda for each meeting will be as follows:

9:00–9:30—Registration

9:30–10:00—Briefing on Background of Meeting

10:00–12:00, 1:00–4:00—Presentations/Comments

Purposes of the Public Meetings and Opportunity for Written Comment

The regional educational laboratories are intended to complement the work of other educational agencies (including State departments of education, school districts, colleges and universities, private firms, and other organizations) to improve the quality of educational policy and practice. Laboratories apply the best available knowledge from research, development and effective practice to identify and help meet educational needs in specified geographical areas of the country. Each laboratory operates under the guidance of a regionally representative governing board.

The funding cycle for the ten regional educational laboratories is scheduled to end November 30, 1995, and the Congress has instructed OERI to conduct an open competition for future laboratory support. The Assistant Secretary wishes to hear from as many people as possible regarding OERI's efforts to improve education through the work of the regional educational laboratories. Following the meetings, OERI will review written comments, and this information will be taken into consideration as final guidelines for the competition are developed.

The following are specific issues on which comment is sought:

Laboratory Regions

There are now 10 regions served by regional educational laboratories. The laboratory regions and the States or insular areas assigned to each region are listed below.

- Appalachian Region (KY, TN, VA, WV)
- Central Region (CO, KS, MO, NE, ND, SD, WY)
- Mid-Atlantic Region (DC, DE, MD, NJ, PA)
- Midwestern Region (IA, IL, IN, MI, MN, OH, WI)
- Northeastern Region (CT, MA, ME, NH, NY, PR, RI, VI, VT)
- Northwestern Region (AK, ID, MT, OR, WA)
- Pacific Region (American Samoa, Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Guam, Hawaii, Republic of the Marshall Islands, Republic of Palau)
- Southeastern Region (AL, FL, GA, MS, NC, SC)
- Southwestern Region (AR, LA, NM, OK, TX)
- Western Region (AZ, CA, NV, UT)

Current laboratory regions vary in the number of assigned States, with regions having as few as four and up to as many as nine States or insular areas. Existing laboratory regions also vary in the number of elementary and secondary school-age students in the region.

The new authorizing legislation permits the Secretary of Education to establish up to two additional laboratory regions with a minimum of four contiguous States if approved by key educators in the States that would be included in a new region.

1. How adequate are the current laboratory regions?

2. What is the advisability of creating one or two new laboratory regions?

3. Based on the requirements of the new legislation, are there specific adjustments in regional boundaries that you would suggest?

Laboratory Mission and Functions

The new legislation requires that each regional educational laboratory promote the implementation of broad-based systemic school improvement strategies. The legislation also specifies numerous functions such as needs assessment, applied research, development, dissemination, technical assistance services, and training. An extensive list of required laboratory duties is specified in OERI's reauthorization legislation, [Part D, Sec. 941(h)(3), (4) and (5)].

4. What are the most important needs, issues, activities, and client groups on which the laboratory in your region should focus its resources over the next several years?

5. What is an appropriate distribution of laboratory effort among these functions based on the needs in your region and what should be emphasized the most?

Regional Educational Laboratories as a National Resource

The new legislation requires the governing boards of the regional educational laboratories to establish and maintain a network to work on joint activities to meet the needs of multiple regions and to serve national as well as regional needs.

6. What crosscutting themes are most important for the laboratories to address as a network?

7. What portion of the laboratory work should address national needs?

Additional Issues

Comments also are invited on the following questions:

8. In what specific ways should the laboratories and the Department work together to address national priorities such as systemic, standards-based reform?

9. What should be the relationship between the laboratories and other agencies within the region that are involved in research, development, dissemination, or technical assistance?

Invitation to Comment

OERI invites interested persons to make an oral presentation on the meeting dates scheduled. To make an oral presentation, contact, in advance the coordinator for the meeting you wish to attend. Interested persons wishing to make an oral presentation who do not contact the appropriate coordinator in advance, may schedule an oral presentation in person on the day of the meeting, if slots are available—speakers will be scheduled on a first-come, first-served basis. Presentations may not exceed ten minutes. Oral testimony should be accompanied by a written statement to be included in the meeting record.

The Assistant Secretary encourages persons unable to participate in a meeting to send their comments to the Office of Educational Research and Improvement at the addresses listed in the **ADDRESSES** section. Written comments will become part of the official record of these meetings if they are submitted no later than September 30, 1994.

Dated: July 26, 1994.

Sharon P. Robinson,

Assistant Secretary for Educational Research and Improvement.

[FR Doc. 94–18618 Filed 7–27–94; 1:58 pm]

BILLING CODE 4000–01–P

federal register

Monday
August 1, 1994

Part VIII

Department of Justice

Office of Juvenile Justice and Delinquency Prevention

Delinquency Prevent Program Guideline; Notice

DEPARTMENT OF JUSTICE

Office of Juvenile Justice and Delinquency Prevention

Delinquency Prevention Program Guideline

AGENCY: Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

ACTION: Notice of final guideline for the Office of Juvenile Justice and Delinquency Prevention's Title V Delinquency Prevention Program.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) published a proposed guideline for the Title V Delinquency Prevention Program on February 11, 1994, and solicited public comments. Based on the analysis of those public comments, OJJDP is issuing this final guideline. This Program is of interest to all Federal, State, local, and private organizations involved with prevention planning and services for children, youth and families.

DATES: This final guideline is effective on August 1, 1994.

ADDRESSES: Office of Juvenile Justice and Delinquency Prevention, Room 742, 633 Indiana Avenue, N.W., Washington, DC 20531

FOR FURTHER INFORMATION CONTACT: Paul E. Steiner, Social Science Program Specialist, State Relations and Assistance Division, Office of Juvenile Justice and Delinquency Prevention, at the above address. Telephone (202) 307–5924.

SUPPLEMENTAL INFORMATION: Section 504(1) of the JJDP Act directs OJJDP to issue "such rules as are appropriate and necessary to carry out" the Title V—Incentive Grants for Local Delinquency Prevention Programs.

Changes to Proposed Guideline

The following changes are made to the proposed guideline. New language is italicized.

Throughout the guideline, references to "units of local government" are changed to "units of *general* local government."

The following sentence is added to the last paragraph under "Local Subgrantee Qualifications": *State Advisory Groups may not arbitrarily exclude an eligible unit of general local government from competing for Title V funds.*

Under "Application Requirements for State Agencies," the first sentence is amended as follows: State agencies must provide evidence of the State Advisory Group's authority to approve the award of Title V subgrants *or, where a separate supervisory board is vested with such authority, to review and recommend approval to the board. No Title V subgrants can be made to a unit of general local government absent the approval or recommendation of the State Advisory Group.*

Under "Application Requirements for State Agencies," the following paragraph is inserted after the fifth paragraph of that section: *The application must include a time-task plan providing a description of the major tasks which the State will employ to implement the Title V program, and the timeframes for completing each of those tasks.*

Under "Application Requirements for State Agencies" the fourth paragraph is amended as follows: 2. To monitor and *assure* the audit of subgrants for performance, outcome, and fiscal integrity, including cash and in-kind match, *as specified in the current edition of the Office of Justice Programs Guideline Manual M–7100, "Financial and Administrative Guide for Grants."*

The first sentence under "Process for Subgrant Award and Administration" is amended to read: State agency grantees shall use essentially the same process for making Title V subawards as that used for the Formula Grant awards, with the State Advisory Group *establishing applicant eligibility criteria to target specific types of communities, if needed, and making or recommending* the final decision on funding *individual applications.*

Under "Application Process for Units of general local government," subsection 3. "Local Three-Year Delinquency Prevention Plan," the following sentence is inserted between the second and third sentence of the second paragraph of the subsection: *The applicant should also assure that the PPB, to the extent possible, contains one or more members under the age of twenty-one, one or more parents or guardians with children who have had contact or are at risk of having contact with the juvenile justice system, and an overall membership that generally reflects the racial, ethnic, and cultural composition of the community's youth population.*

Under the section titled "Application Process for Units of General Local Government," subsection 3. "Local Three Year Delinquency Prevention Plan," the eleventh paragraph (paragraph j.) is amended to read: A description of how the PPB will *provide general oversight for developing the plan, approve the plan prior to submission to the State, and* make recommendations to the responsible local agency for the distribution of funds and evaluation of funded activities.

Under the section titled "Duration of Grants and Continuation Funding," the following changes are made: (1) The following sentence is stricken: Grants may be awarded for project periods of 12 to 36 months, with initial awards of up to one year. The following two sentences replace the stricken sentence: *OJJDP will award grants to States for a project period beginning on the date of award and ending on September 30, 1996. States will award grants to units of general local government in annual increments covering not more than 12 months each, with overall project periods of 12 to 36 months;* and (2) in the second sentence the word "continuation" is stricken and replaced with *Subsequent years'.* At the end of that sentence, "subsequent fiscal years" is stricken.

Background

A new program was authorized in the 1992 amendments to the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, (hereafter "the Act" or "the JJDP Act") in Title V, Sections 501–506, "Incentive Grants for Local Delinquency Prevention Programs Act." For Fiscal Year 1994, Congress appropriated $13 million for initial implementation of Title V.

Prevention has been one of the primary goals of the Act since its enactment in 1974. The premise is that preventing delinquent behavior is a much more cost-effective means of reducing juvenile crime than attempting to rehabilitate adjudicated delinquents. Prevention is also a much more cost-effective way to deal with juvenile delinquency. In addition to reducing the human and financial losses caused by crime, effective delinquency prevention also reduces the need for costly juvenile justice system processing and adjudication. Each year, juvenile courts handle approximately 1.4 million delinquency and status offense cases, resulting in nearly 130,000 out-of-home placements. On any given day, approximately 90,000 juveniles are held in juvenile detention, correctional and shelter facilities. Nationally, nearly $2 billion a year is spent operating these facilities. The average annual cost of confining a juvenile in a training school exceeds $45,000 in many States. The cost for intensive, private residential treatment for a serious juvenile offender can run as high as $100,000 per year. The cost for construction of secure facilities for juveniles is currently about $100,000 per bed.

In order to be eligible to fully participate in the Formula Grants Program of the JJDP Act, States must develop and adhere to policies, practices, and laws which deinstitutionalize status offenders and nonoffenders, separate adults and juveniles held in secure institutions, and eliminate the practice of detaining or confining juveniles in adult jails and lockups. In addition, States must address efforts to reduce the disproportionate representation of minority juveniles in secure facilities, where such condition exists. These four goals (deinstitutionalization of status offenders, separation, jail removal, and disproportionate minority confinement) are commonly called the Formula Grants Program "mandates," and are a major focus of States' Federally funded efforts under the Act. In order to meet statutory requirements for compliance, approximately 70% of the States at one time or another have devoted 100% of all available formula grant funds toward meeting the mandates. Thus, many States have been limited in the amount of JJDP Act funds that could be devoted to prevention.

Title V of the JJDP Act is designed to provide a dedicated fund source for States to award grants for delinquency prevention and early intervention programs for local communities, provided that the applicant unit of general local government, or combination thereof, is in compliance with the JJDP Act mandates.

Congress has structured the Title V Delinquency Prevention Program to support such units that have formulated a community-wide strategy to address the prevention of delinquency. A community will be required to have a prevention strategy based on assessment of risk factors associated with the development of delinquent behavior in the community's children.

Title V authorizes the Administrator of OJJDP to make grants to a State, to be transmitted through the State Advisory Group, to units of general local government for delinquency prevention programming. The State agency which administers the JJDP Act Formula Grant in each State will be eligible to apply for funding and receive an amount determined by a formula based on the State's population of youth under the maximum age of original juvenile court delinquency jurisdiction, with a minimum allocation of $75,000 per State and $25,000 per Territory.

States will invite units of general local government that meet the statutorily mandated eligibility requirements, and as further limited by the State Advisory Group, to apply for funding. In order to be eligible, local applicants must: (1) Be certified by the State Advisory Group to be in compliance with the JJDP Act Formula Grants mandates; (2) designate or convene a local Prevention Policy Board; and (3) develop a local, comprehensive delinquency prevention plan.

Approach

Many past delinquency prevention planning and programming efforts, while well intentioned, have been unsuccessful because of their negative focus on attempting to prevent juveniles from misbehaving. Another weakness of past delinquency prevention efforts is their narrow scope, generally focussing on only one or two aspects of a child's life such as individual behaviors or family problems. Successful delinquency prevention strategies must be positive in their orientation and comprehensive in their scope.

Positive approaches that emphasize opportunities for healthy social, physical and mental development and take into account individual, family, peer group, school, and community influences on a child's development have been shown to have a much greater likelihood of success.

Risk-focused delinquency prevention is a comprehensive approach based on the premise that in order to prevent a problem from occurring, the factors that contribute to the development of that problem must be identified and addressed.

Research conducted over the past half century has clearly documented five categories of risk factors for juvenile delinquency: (1) Individual characteristics such as alienation, rebelliousness and lack of bonding to society; (2) family influences such as parental conflict, child abuse, poor family management practices, and family history of problem behavior (substance abuse, criminality, teen pregnancy, and school dropouts); (3) school experiences such as early academic failure and lack of commitment to school; (4) peer group influences such as friends who engage in problem behavior (minor criminality, drugs, gangs and violence); and (5) neighborhood and community factors such as economic deprivation, high rates of substance abuse and crime, and neighborhood disorganization.

To counter these risk factors, protective factors must be introduced. Protective factors are qualities or conditions that moderate a juvenile's exposure to risk. Research indicates that protective factors fall into three basic categories: (1) Individual characteristics such as a resilient temperament and a positive social orientation; (2) bonding with pro-social family members, teachers, adults, and friends; and (3) healthy beliefs and clear standards for behavior. While individual characteristics are difficult to change, bonding and clear standards for behavior work together and can be changed. To increase bonding, children must be provided with: (1) Opportunities to contribute to their family, school, peer group and community; (2) skills to take advantage of opportunities; and (3) recognition for efforts to contribute.

At the same time, parents, teachers and communities need to set clear standards regarding pro-social behavior.

A risk-focused delinquency prevention approach calls on communities to identify the risk factors to which their children are exposed. Risked-focused delinquency prevention provides communities with a conceptual framework for prioritizing the risk factors in their community, assessing how their current resources are being used, identifying resources which are needed, and choosing specific programs and strategies that directly address those risk factors through the enhancement of protective factors.

This approach requires a commitment by and participation of the entire community in developing and implementing a comprehensive strategy. While the roles of governmental agencies in this strategy will vary, it is essential that the citizens of the community create a diverse and representative coalition in which public officials and agencies are equal members with private citizens and agencies. It is this coalition which leads the community's prevention strategy in addressing the needs of children and their families at risk.

Another key component of this approach is the coordination and use of existing programs and resources. A community-wide prevention strategy must inventory available State, local, private, and Federal resources, and develop vehicles for making these resources and programs readily accessible to children and families in need. Thus, applicants for Title V funds are encouraged to coordinate this prevention effort with other Federally funded efforts.

Target Population

The Title V Delinquency Prevention Program is based on a program design which addresses those risk factors which are known to be associated with delinquent behavior. The program seeks to address these factors at the earliest appropriate stage in each child's

development. The target population is all at-risk children in a given community. Funds awarded under this program will be used to address delinquency risk-factors in communities, and as such may be used to fund ameliorative services for at-risk children.

Funding Structure

Title V, Section 505 of the Act, authorizes the Administrator of OJJDP to make grants to a State, to be transmitted through the State Advisory Group, to units of general local government.

Technical Assistance

Because the Title V Delinquency Prevention Program is based on a risk-focused program structure, OJJDP will make training and technical assistance on risk-focused prevention available to representatives of units of general local government through the State agency administering the program.

Program Goal

The goal of this program is to reduce delinquency and youth violence by supporting communities in providing their children, families, neighborhoods, and institutions with the knowledge, skills, and opportunities necessary to foster a healthy and nurturing environment which supports the growth and development of productive and responsible citizens.

Program Objectives

The objectives of the program are:

1. To form coalitions within communities to mobilize the community and direct delinquency prevention efforts;
2. To identify those known delinquency risk factors which are present in communities;
3. To identify protective factors which will counteract identified risk factors, and develop local comprehensive, delinquency prevention plans to strengthen these protective factors;
4. To develop local comprehensive, delinquency prevention strategies which use and coordinate Federal, State, local and private resources for establishing a client-centered continuum of services for at-risk children and their families;
5. To implement the delinquency prevention strategies, monitor their progress, and modify the plans as needed.

Basic Program Design

The program will be implemented in two phases: the pre-award planning phase and the implementation phase. Applicant units of general local government may modify or enhance existing prevention planning boards, plans and strategies to meet the requirements for Title V funding.

Planning Phase

The planning phase for each local applicant will occur prior to the award of funds and consist of the designation or formation of a local policy board to direct the project, and the development of a three-year delinquency prevention plan. OJJDP is making training and technical assistance available through the State agency to interested potential local applicants during this phase. Eligible State agencies may apply for and receive Title V awards from OJJDP based on this final Title V Guideline.

Implementation Phase

The implementation phase will begin with the award of subgrants to units of general local government. Technical assistance will continue to be available to grantees.

Funding Structure and Grantee Qualifications

Title V authorizes the Administrator of OJJDP to make grants to States to be transmitted through the State Advisory Groups to qualified units of general local government or combinations thereof. The State Advisory Group is the board appointed by the chief executive officer of the State, as provided by Section 223(a)(3) of the Act (Section 503). A unit of general local government means any city, county, town, borough, parish, village, or other general purpose political subdivision of a State, and any Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior. . . (Section 103(8)).

OJJDP will award grants to States based on a formula determined by each State's relative population of youth below the maximum age limit for original juvenile court delinquency jurisdiction. The States will subgrant the funds to qualified units of general local government based on a competitive process. Jurisdictions that do not have discrete units of general local government may award funds directly to governmental agencies or private nonprofit organizations to implement projects in furtherance of the jurisdiction's own comprehensive prevention strategy.

All Title V funds must be matched by recipient units of general local government or by the State with 50% of the amount of the grant. This match may be provided in cash or the value of in-kind contributions or services. States are encouraged to supplement Title V funds with Formula Grant funds. However, Formula Grant funds cannot be used as match for Title V funds.

State Grantee Qualifications

Each State, as defined in Section 103(7) of the Act, is eligible to apply for Title V funds, provided that it has a State agency designated by the chief executive under Section 299(c) of the Act, and a State Advisory Group appointed pursuant to Section 223(a)(3) of the Act. The applicant State agency must provide an assurance that the State Advisory Group has or will have the sole authority, consistent with State law or policy, to approve or recommend approval of Title V subgrants to units of general local government, pursuant to the provisions of this program guideline.

Local Subgrantee Qualifications

In order for a unit of general local government to be eligible to apply for Title V funds, such unit, or each unit applying in combination, must be certified by the State Advisory Group as in compliance with Sections 223(a)(12)(A), 223(a)(13), 223(a)(14), and 233(a)(23) of the JJDP Act. If a State is not currently in full compliance with any of the first three of these mandates, i.e. the quantifiable mandates, or is in full compliance with *de minimis* exceptions, only those units of general local government which are within the de minimis parameters provided in 28 CFR 31.303(f)(6)(i) and (f)(6)(iii)(A), based on the locality's most current census data, may be deemed in compliance with the mandates of Sections 223(a)(12)(A), (13), and (14).

In order to be in compliance with Section 223(a)(23), the State Advisory Group must certify that the unit of general local government is cooperating in data gathering and analysis to determine if disproportionate minority confinement exists, or if it is known to exist within the boundaries or jurisdiction of the unit of general local government, the unit has made or is making an adequate effort toward addressing, or assisting the State to address, this issue.

The State Advisory Group will competitively award, or recommend for award, Title V grants to units of general local government based on how well competing units meet the competitive criteria set forth below under *Priority Consideration for Funding*. State Advisory Groups may not arbitrarily exclude an eligible unit of general local government from competing for Title V funds.

Application Process—Eligible State Agencies

All State agencies designated by the chief executive under Section 299(c) of the Act are eligible to apply for Title V funds. A list of these agencies and the allocations of funds to the State for a particular fiscal year may be obtained from OJJDP.

Application Requirements for State Agencies

State agencies must provide evidence of the State Advisory Group's authority to approve the award of Title V subgrants or, where a separate supervisory board is vested with such authority, to review and recommend approval to the board. No Title V subgrants can be made to a unit of general local government absent the approval or recommendation of the State Advisory Group. Examples of such authority would be an executive order, a statute, a formal resolution of the State Advisory Group, a formal resolution of the supervisory board which the State Advisory Group advises, or a written agreement between the State agency and the State Advisory Group.

The application must also include an assurance that the State Advisory Group and the State agency will establish written subgrantee eligibility criteria, described above under *Local Subgrantee Qualifications*, and competitive criteria based on the criteria described below under *Priority Consideration for Funding*. The State may issue additional criteria, including criteria designed to focus delinquency prevention efforts toward those areas of the State displaying the greatest need of comprehensive delinquency prevention planning and programs.

Furthermore, the application must provide the following administrative assurances:

1. To report on all subgrant awards, within thirty days of award, on the OJJDP form, "Individual Project Report, Part I: Initial Report of Funding";

2. To monitor and assure the audit of subgrants for performance, outcome and fiscal integrity, including cash and in-kind match, as specified in the current edition of the Office of Justice Programs Guideline Manual M–7100, "Financial and Administrative Guide for Grants";

3. To collect quarterly progress and data reports, and forward semi-annual summary reports to OJJDP.

The application must include a time-task plan providing a description of the major tasks which the State will employ to implement the Title V program, and the timeframes for completing each of those tasks.

All awards will be conditioned with additional requirements which are standard for recipients of Federal grants.

State agencies which demonstrate a need to do so in their applications to OJJDP, may use up to 5% of the State's Title V allocation for the costs of administering the Title V subgrants and support for State Advisory Group activities related to Title V. A budget narrative must explain how the administrative funds will be spent, including provision of the required match by the State.

State Application Deadline

State applications are due to OJJDP not later than 60 days after the effective date of this guideline.

Technical Assistance Role of State Agency and State Advisory Group: In their capacities as the primary planning vehicles for juvenile justice and delinquency prevention programs within the State, the State agency and the State Advisory Group are encouraged to assume a role as a technical assistance resource for local subgrantees, as well as serving as a resource and information clearinghouse for all prevention activities in the State. The data and strategies developed on the local level should be incorporated in the State Advisory Group's and State agency's statewide, comprehensive planning efforts, as required by Section 223 of the Act. To this end, State agencies and State Advisory Groups are strongly encouraged to participate in risk-focused prevention training and technical assistance made available by OJJDP.

Process for Subgrant Award and Administration

State agency grantees shall use essentially the same process for making Title V subawards as that used for Formula Grant awards, with the State Advisory Group establishing applicant eligibility criteria to target specific types of communities, if needed, and making or recommending the final decision on funding of individual applications. This includes the Request for Proposals, competitive review of applications, and award of subgrants. Likewise, State agencies will monitor Title V subgrants in a similar manner as the Formula Grant subgrants, including the collection and reporting of data required by this program guideline.

In considering applications for awards, State Advisory Groups should be sensitive to the unique needs of rural areas and Native American tribes, including provision of special consideration in the competitive process.

All subgrants should be awarded within 180 days after receipt of the award from OJJDP.

Application Process for Units of General Local Government

1. Pre-application Certification of JJDP Act Compliance

Units of general local government must obtain a certification of compliance from the State Advisory Group prior to applying for an award of funds.

2. Delinquency Prevention Training

OJJDP is making training in risk-focused prevention available to 45 sites across the nation during fiscal year 1994. The only cost associated with this training for participants will be transportation and lodging, if necessary. Facilities for the training will be provided by the States or localities. Training is designed to assist communities in preparing the three year plans required for Title V funding. The initial training will consist of a one day introduction to the theories and strategies of risk-focused prevention planning. Units of general local government considering applying for Title V funding are strongly urged to take advantage of this training opportunity and send key community leaders to the initial training. A subsequent three day workshop will be held for planning teams from local Prevention Policy Boards to complete a risk and resource assessment. OJJDP has advised the State agencies on the process for units of general local government to participate in this training.

3. Local Three-Year Delinquency Prevention Plan

Each unit of general local government's application to the State agency must include a three-year plan describing the extent of risk factors identified in the community and how these risk factors will be addressed. A written explanation of the risk factors and protective factors can be obtained from the State agency grantee. The plan must, at a minimum, contain the following elements:

a. The designation or formation of a local Prevention Policy Board (PPB) consisting of no fewer than 15 and no more than 21 members from the community, representing a balance of public agencies, private nonprofit organizations serving children, youth, and families, and business and industry. Such agencies and organizations may include education, health and mental health, juvenile justice, child welfare,

employment, parent, family, and youth associations, law enforcement, religion, recreation, child protective services, public defenders, prosecutors, and private manufacturing and service sectors. The applicant should also assure that the PPB, to the extent possible, contains one or more members under the age of twenty-one, one or more parents or guardians with children who have had contact or are at risk of having contact with the juvenile justice system, and an overall membership that generally reflects the racial, ethnic, and cultural composition of the community's youth population. A specific local agency or entity must have responsibility for support of the PPB;

b. Evidence of commitment of key community leaders to supporting a comprehensive, delinquency prevention effort. Key leaders may include public and private individuals in key leadership and policy positions who are instrumental in effecting policy changes, controlling resources, and mobilizing the community;

c. Definition of the boundaries of the program's neighborhood or community;

d. An assessment of the readiness of the community or neighborhood to adopt a comprehensive delinquency prevention strategy;

e. An assessment of the prevalence of specific, identified delinquency risk factors in the community, including the establishment of baseline data for the risk factors. The assessment of risk factors must result in a list of priority risk factors to be addressed, as determined and approved by the PPB;

f. Identification of available resources and promising approaches, including Federal, State, local, and private, and a description of how they address identified risk factors, and an assessment of gaps in needed resources and a description of how to address them;

g. A strategy, including goals, objectives, and a timetable, for mobilizing the community to assume responsibility for delinquency prevention. This should include ways of involving the private nonprofit and business sectors in delinquency prevention activities;

h. A strategy, including goals, objectives, and a timetable, for obtaining and coordinating identified resources which will implement the promising approaches that address the priority risk factors. This strategy must include a plan for the coordination of services for at-risk youth and their families;

i. A description of how awarded funds and matching resources will be used to accomplish stated goals and objectives by purchasing of services and goods and leveraging other resources. This should include a budget which lists planned expenditures;

j. A description of how the PPB will provide general oversight for developing the plan, approve the plan prior to submission to the State, and make recommendations to the responsible local agency for the distribution of funds and evaluation of funded activities;

k. A plan for collecting data for the measurement of performance and outcome of project activities.

Priority Consideration for Funding

Only local government applicants certified by the State Advisory Group as in compliance with the mandates of the Act, that have convened a PPB, and have submitted a three year plan will be eligible for funding. In considering applications for funding, State Advisory Groups will give priority to eligible applicants which:

a. Provide a thorough assessment of risk factors and resources, including the quantified measurement of the risk factors which will serve as the baseline for determining project performance and outcome;

b. Identify key community leaders and members of the PPB, describe their roles in the comprehensive delinquency prevention strategy, and provide evidence of key community leaders support;

c. Clearly define the boundaries of the program's neighborhood or community;

d. Provide a realistic assessment, including evidence, of the readiness of the community or neighborhood to adopt a comprehensive delinquency prevention strategy;

e. Provide a coherent plan, including realistic goals and objectives, to mobilize the community and implement a strategy that will address priority risk factors, including innovative ways of involving the private nonprofit and business sectors in delinquency prevention activities;

f. Provide specific strategies for service and agency coordination, including collocation of services at sites readily accessible to children and families in need;

g. Provide a strategy for or evidence of collaborating with other units of local of government and State agencies to develop or enhance a statewide subsidy program to local governments that is dedicated to early intervention and delinquency prevention;

h. Provide a budget outlining the planned expenditures of grant funds and matching resources, including a budget narrative justifying these expenditures;

i. Provide a sound plan for collecting data for measuring performance and outcome;

j. Provide written statements of commitment from State or local public agencies to match in cash or kind, at least 50% of the funds awarded.

Local Application Deadline

The State Advisory Group will determine the application deadline. However, all local subgrant awards should be made within 180 days after the date that the State agency was awarded Title V funds.

Local Grant Administrative Requirements

After receipt of the award, local grantees will provide all required reports and data to the State agency, describing implementation of the program. Technical assistance for program implementation will be available upon request through the State agency.

Evaluation

OJJDP will collect and analyze data collected by each grantee for the purpose of developing national summary reports on the performance and outcome of the local prevention efforts. This evaluation will examine performance in meeting stated objectives as well as the outcome of the project's activities. In order for this evaluation to be meaningful, it is essential that, to the greatest extent possible, the local three year comprehensive delinquency prevention plans contain quantified objectives and baseline measurements of the identified risk factors.

Allocation of Title V Funds to States

The Title V Delinquency Prevention Program has a F.Y. 1994 appropriation of $13 million available for awards to States to support programs of units of general local government. Allocations are available to States based on the number of juveniles in the State who are subject to original juvenile court delinquency jurisdiction based on State law, with a minimum allocation of $75,000 for States and the District of Columbia and $25,000 for Territories and Possessions. A list of the allocations for States is available from OJJDP. The allocations for States not participating in this program in F.Y. 1994, or subsequent years, will be withheld for use in F.Y. 1995, or subsequent years, pursuant to the Title V Delinquency Prevention Program guidelines issued for that year.

Size of Awards to Units of General Local Government

The size of the award to each unit of general local government, or combination thereof, and the total number of awards will be determined by the State Advisory Group, based upon the amount of funds allocated to the State and the quality of the local three-year prevention plans.

Duration of Grants and Continuation Funding

OJJDP will award grants to States for a project period beginning on the date of award and ending on September 30, 1996. States will award grants to units of general local government in annual increments covering not more than 12 months each, with overall project periods of 12 to 36 months. Subsequent years' funding will be contingent upon satisfactory performance and the availability of funds. Future funding is dependent upon Congressional action.

Restrictions on Uses of Funds: Title V funds cannot be used for construction, land acquisition, or supplantation of Federal, State, or local funds supporting existing programs or activities.

Responses to Public Comments

Twenty-seven comments to the proposed guideline were received. A summary of the comments and OJJDP's responses follow. In many instances, the summary comments listed below incorporate specific comments from more than one respondent.

Comment. The guideline appears to focus on risk factors and reducing delinquency without providing adequate emphasis to protective factors and positive youth outcomes. A prevention approach which is protection focused or risk and protection focused seems more in line with OJJDP's strategy.

Response. The structure of the Title V program is based on identifying risk factors that can lead to the development of delinquency and violence in children and youth, and developing strategies to eliminate or ameliorate the risk factors. A key component of this strategy is to provide the protective factors which serve to buffer children and youth from the damaging effects of risk factors.

To better express this strategy, the Title V program will be referred to as a risk and protection focused strategy.

Comment. The guideline should refer to children and youth, and emphasis should go to youth eleven years and older, since this population most often lacks positive alternatives in their communities.

What age is the program targeting? Would programs for parenting skills and early infant bonding be appropriate? The program needs to place more emphasis on parental responsibility and skills training.

Response. The guideline states that "the program seeks to address these (risk) factors at the earliest appropriate stage in each child's development." The Title V program is structured to accommodate what each individual community has identified as the best strategy to reduce risk factors and increase protective factors. For some communities this may require emphasizing the ages of zero to three, for others it may mean eleven years and older, and in others it may require a focus on adolescents.

Comment. The clear thrust of the proposed guideline is toward primary prevention. Given the increasing emphasis on primary and secondary prevention in funding proposals now before Congress, OJJDP should make clear in the final guideline that in communities where the greatest need is for tertiary program, those communities are also encouraged to apply for these funds.

Response. OJJDP formulated the Title V program based on a risk and protection focused strategy. This decision was based on OJJDP's research and demonstration program experience, as well as the provisions of Title V. While the risk and protection focused strategy stresses secondary prevention, the comprehensive planning process employed by communities may also yield tertiary and primary prevention programs.

The three levels of prevention (primary, secondary, and tertiary) usually overlap to some degree, especially in a risk and protection focused strategy such as that employed in the Title V program. The risk and protection focus of the strategy analyzes and addresses the root causes of problem behavior and violence which can affect all children (primary prevention), including those who have been identified as at-risk (secondary prevention), and those who have committed offenses and have been referred to the juvenile justice system (tertiary prevention).

Section 505(a) under Title V states that grants may be used for "delinquency prevention programs and activities for youth who have had or are likely to have contact with the juvenile justice system, including the provision to children, youth and families of: (1) Recreation services; (2) tutoring and remedial education; (3) assistance in the development of work skills; (4) child and adolescent health and mental health services; (5) alcohol and substance abuse prevention services; (6) leadership development activities; and (7) the teaching that people are and should be held accountable for their actions." Information and technical assistance on these and other prevention programs and strategies are available from OJJDP.

Comment. Gender-specific services should be part of every community's comprehensive strategy.

Response. Through the risk and resource assessment, each community will have an opportunity to analyze service gaps and address those gaps with programs and strategies which have had positive or promising results. OJJDP is making technical assistance and training available to States and localities who would like to enhance their assessment skills in analyzing service gaps.

Comment. The guideline should list attention deficit disorder and lack of support for parents with children with disabilities as risk factors.

Response. The risk factors cited in the training that OJJDP is providing for potential Title V applicants includes three school related factors: Early and Persistent Antisocial Behavior, Academic Failure in Elementary School, and Lack of Commitment to School. Learning disabilities can be related to each of these risk factors.

Comment. A sixth program objective should be added which focuses on methodology. This would provide a basis for improving professional practice within and among the organizations working with youth.

Response. Although the guideline does not require a specific methodology for planning or programming, it does provide general guidance on methodology along the lines of a risk and protection focused strategy. The training and technical assistance that is available through OJJDP provides a means of improving professional practice.

Comment. Will private non-profit agencies have difficulty in being subgranted funds if a local unit of government does not wish to apply but does wish to participate?

Response. Section 505(a) under Title V of the Juvenile Justice and Delinquency Prevention Act (JJDP Act) authorizes the Administrator to "make grants to a State, to be transmitted through the State Advisory Group, to units of general local government * * *" The only means by which private non-profit organizations can receive Title V funds would be through service contracts with units of general local government.

Comment. Are school districts eligible to apply for Title V funds?

Response. Section 503 of the JJDP Act provides for only units of general local government to be the applicants for Title V funds. A school district is not a unit of general local government.

The proposed guideline did not consistently use the term "unit of general local government." The final guideline is amended to use this term consistently.

Comment. The guideline appears to grant sole authority to award grants to the State Advisory Group. How will the awards be made if State statute does not grant the State Advisory Group such authority? If the Governor signs the grant, must the State Advisory Group approve the award?

Response. The guideline, under "State Grantee Qualifications," has been revised to require the State agency applicant to provide an assurance that the State Advisory Group has the sole authority, consistent with State law or policy, to approve or recommend the award of Title V subgrants.

Comment. Can private not-for-profit organizations participate in public-private partnerships with operational prevention coalitions?

Response. Under the Title V program, a unit of general local government could vest a public-private organization with significant responsibility for implementation of the program. However, the local government would still be responsible to the State for administering any Title V funds.

Comment. Municipalities with populations in excess of 3 million should be eligible to receive grants directly from OJJDP.

Response. Section 505 of the JJDP Act authorizes the Administrator to "make grants to a State, to be transmitted through the State Advisory Group to units of general local government."

Comment. The formula for allocating funds to States should be amended to include all youth up to 18 years of age, regardless of the maximum age of original juvenile court delinquency jurisdiction.

Response. Because a community can only prevent delinquency in a juvenile who is subject to a juvenile court's delinquency jurisdiction, the most logical and appropriate means for allocating Title V funds is to use a formula determined by each State's relative population of youth below the age limit for original juvenile court delinquency jurisdiction.

Comment. Regional plans for Title V should be permitted.

Response. The guideline allows for combinations of units of general local government to apply for Title V funds. However, the regional plan which is the product by such a regional collaboration must define the boundaries of the target neighborhoods or communities.

Comment. States will be implementing the Title V program using varying timetables and strategies. OJJDP should require the States' applications to include a time-task plan.

Response. This requirement has been added Under "Application Requirements for State Agencies," in the guideline.

Comment. Four respondents indicated that the match requirement was too onerous for small communities and private nonprofit organizations. The respondents recommended that a reduced level of match be allowed.

Response. Title V requires that "the unit or State has agreed to provide a 50% match of the amount of the grant, including the value of in-kind contributions, to fund the activity." (Section 505(b)(7)).

This provision provides some flexibility in the match requirement. First, the match, which is 50 cents on the dollar, has to be made for every dollar granted to the local level. However, the State can provide a portion of the funding through State program dollars. Second, the match can be made in cash or in-kind. In-kind match is discussed in a separate response.

It should be noted that the Title V provision does not require a match from any agency other than the State or the unit of general local government. It is the responsibility of the unit of general local government to provide the match, not nonprofit service providers.

Comment. Two respondents recommended that in certain instances, the match requirement should exclude in-kind match and require a cash match only.

Response. Congress intended the in-kind match provision to allow flexibility in providing local resources. Although the in-kind match provision may require more diligence on the part of the State in assuring that the match requirement is met, the State cannot restrict the match to cash because this is a benefit provided to local recipients by statute.

Comment. The guideline should require that local applications provide formal interagency agreements which promote "contractual" agreements vs. "intentional" agreements.

Response. The guideline allows for statements of commitment in order to give the State flexibility in determining what form those statements of commitment should take. Given the timeframes for the planning process in the guideline, it may not be possible for a locality to obtain formal interagency agreements prior to submission of the plan.

Comment. Can the State Advisory Group limit the availability of funds to a specific local government or a specific set of risk factors?

Response. The State Advisory Group and State agency may issue funding guidelines which focus available funds on areas with the greatest need. If a State chooses this approach, the award of funds is to still be determined through a competitive process that solicits proposals from areas which meet criteria established by the State Advisory Group. It is possible that these criteria may result in a limited number of units of general local government being eligible to apply.

In targeting communities with particular needs for purposes of soliciting proposals, the State Advisory Group may include specific risk factors in the targeting criteria. However, applicants must still analyze the incidence of all risk factors in their local comprehensive plans.

The State Advisory Group and the State agency may not limit the competition based solely on criteria which are not related to juvenile crime or other indications of need. For example, the State Advisory Group may not limit competition to particular communities based solely on population size. To do so would result in the arbitrary exclusion of communities from competition in the Title V program. The guideline is revised under "Local Subgrantee Qualifications" to reflect this requirement.

Comment. The timeframes allowed in the guideline for the development of local comprehensive plans are too restrictive, especially if a locality does not have any available planning resources. What happens if a local applicant cannot meet the 180 day deadline? OJJDP should allow States to award the first and second year of Title V funds through one RFP process after the new Federal fiscal year.

Response. The guideline states that "all subgrant awards should be made within 180 days after receipt of the award from OJJDP." OJJDP intends this 180 day timeframe to serve as a target date, particularly in States where localities are developing their Title V prevention plans on a base previously established through other risk-focused prevention planning efforts. OJJDP recognizes that some States and localities are new to prevention planning, and more time will be required to develop comprehensive three year plans. OJJDP is providing

technical assistance and training to States and localities to enhance their ability to implement the Title V program in the most expeditious manner possible without sacrificing quality.

Comment. The guideline suggests that Title V funds should be used in conjunction with the JJDP Act Formula Grant funds. The time frame for these two planning cycles do not coincide.

Response. Title V requires three year local plans and the Formula Grant requires three year State plans. OJJDP encourages the State Advisory Groups and State agencies to develop a mechanism whereby the local plans can be integrated in the State plan.

The proposed guideline, under "Duration of Grants and Continuation Funding" has been revised to more accurately describe the grant award process by providing that "OJJDP will award grants to States for a project period beginning on the date of award and ending on September 30, 1996. States will award grants to units of general local government in annual increments covering not more than 12 months each, with overall project periods of 12 to 36 months."

Comment. Will Title V funds be available in to States in future years?

Response. OJJDP will make future years' Title V funds available to States and localities through the process described in the guideline, pending satisfactory performance and availability of funds. OJJDP will determine satisfactory performance of State grantees and the States will determine satisfactory performance of local grantees.

Comment. The Title V program should be coordinated with other similar Federal programs, such as the Family Preservation Act.

The guideline should require local applicants to document collaboration with other Federal programs.

Response. OJJDP strongly encourages coordination with other Federal, State and local programs. OJJDP is working with the U.S. Department of Health and Human Services to establish mechanisms to facilitate coordination with the Family Preservation and Support Services provision and other programs which use a community coalition planning approach to prevention. In addition, OJJDP will provide technical assistance and training to States and localities on accessing and collaborating with other Federal programs.

The guideline indicates that a "key component of the prevention approach is the coordination and use of existing resources." The guideline encourages applicants to coordinate this effort with other Federally funded programs.

Comment. Who signs the local application? The highest elected local official?

Response. The local application may be signed by any official authorized to do so by the applicant unit of general local government.

Comment. Can a county, and municipalities within a county, both be eligible to apply?

Response. Yes, provided that funding is contingent upon coordination of the respective plans.

Comment. Can Title II, Part B Formula Grant funds be used to help localities develop local plans?

Response. Yes. The use of Formula Grant program funds for the development of local delinquency prevention plans is a permissible expenditure of these funds.

Comment. What if a local plan is missing one of the required elements?

Response. The local plan must contain all the required elements listed in the guideline before the locality can receive Title V funds.

Comment. It is not clear whether the funds can be used for service delivery or planning.

Response. Title V funds are used for service delivery.

Comment. The guideline refers to the "Communities that Care" model of risk-focused prevention. Can grant recipients employ other risk-focused prevention models?

Response. Yes. Localities may base their three year plan and strategy on other delinquency prevention models, provided that they are based on a risk and protection focused model that uses: (1) The analysis of risk factors which are grounded in sound theory and positive research results, and (2) protective factors which have a sound theoretical basis and positive or promising research results.

OJJDP is offering training and TA on risk and protection focused prevention which permits States and localities to use any risk and protection focused model.

Comment. We interpret the Title V audit requirements to be different than that of an A–128 audit.

Response. The provisions of OMB Circulars A–128 and A–133 apply to Title V funds.

Comment. The guideline indicates project periods for local grants of 12 to 36 months. It may be beneficial to allow for up to a 60 month project period to facilitate the measurement of outcomes of the projects.

Response. Title V is designed as a long term program. Based on the experience of communities that are implementing prevention programs of similar design, we anticipate that three to five years is not an unreasonable time to expect a community coalition, such as the Title V Prevention Policy Board, to establish itself as a viable organization with the influence necessary to help effect system change.

In the proposed guideline, OJJDP has provided a 12–36 month timeframe to provide flexibility for accommodating a wide range of community planning and coalition building experience by local Title V grant recipients. Some communities may only need a one year period to augment on-going risk focused prevention activities. For other communities, this may be their first attempt at this type of comprehensive prevention planning and programs. In addition, this timeframe will facilitate integrating the planning for Title V with that of the Formula Grants program.

In general, the use of Title V funds is intended to provide an incentive to plan and implement delinquency prevention programs at the local level. States may wish to provide competitive Title II funding for local prevention programs following Title V funding, and local grantees can seek funds for expansion from a range of State, Federal, and foundation sources.

The guideline requires the collection of performance and outcome data. OJJDP encourages States and local grantees to continue collecting this data for their prevention programs to measure outcomes beyond the period of Title V funding. OJJDP is also planning to continue collecting and analyzing data for selected jurisdictions through an on-going national evaluation of Title V.

Comment. Funding formulas have favored urban over suburban communities. The opportunity for equal programming throughout the State would be most desirable or at least a funding formula created that allows suburban communities to compete with like communities.

Response. Under the guideline, States have the discretion to target those communities in the State with the greatest need. The judgment the State Advisory Group can best determine whether to limit the competition for the grants to specific, targeted communities or to conduct a statewide competition. Given the limited amount of Title V funds available to each State and the local competition requirements, distribution of funds based on a population formula would not be feasible. The State Advisory Group and State agency could, however, conduct competitions among applicants of

specific types of geographic areas (urban, suburban, rural).

Comment. The guidelines should specifically prohibit or discourage the withdrawal of community funds from agencies to provide the match for Title V programs, especially in cases where collaborative efforts between agencies and government would serve the same purpose and clients.

Response. The guideline prohibits using Title V funds to supplant Federal, State, or local funds supporting existing programs. The guideline encourages collaboration of agencies and services. The planning process for Title V is designed to produce a more effective, efficient and responsive service system for children, youth and families. The locality can best determine how to design, coordinate, and fund programs to achieve this outcome, provided that the Title V funds are not used to replace funds for existing programs.

Comment. The guideline requires a great deal of local planning before localities can become eligible for funding. This provides little incentive for many units of general local government to engage in such efforts without a strong probability of being funded.

In order to reduce the burden on the local communities, a process for awards should be employed wherein communities first apply to the State Advisory Group, and then develop their plans after there is a much greater chance of being funded.

Another option would be for OJJDP to mandate that localities should build upon existing plans, where they exist.

Response. During the initial implementation of the Title V program, some localities will have the experience to initiate and develop a three year plan in a short timeframe. In order to establish effectively operating programs during this first year, State Advisory Groups may want to consider giving priority to applicant communities that have the capacity to develop strong plans. For instance, a State Advisory Group may target communities that already have planning boards involved in broad-based prevention planning.

OJJDP encourages localities to build upon existing prevention plans which are based on a risk and protection factor approach.

Comment. OJJDP should encourage or mandate that whenever possible, localities must designate existing coalitions or boards, with prevention responsibilities similar to those required by Title V, as the Prevention Policy Board.

It may be difficult to convene a representative Prevention Policy Board of not more than 21 members. Can the Prevention Policy Board exceed 21 members?

Response. The guideline requires the local applicants to designate or form a Prevention Policy Board. OJJDP encourages the use of existing similar boards to meet the Title V requirements. This would facilitate coordination of funding sources and collaboration among agencies and governments.

Title V expressly requires that the board membership consist of not less than 15 and not more than 21 members. Localities may convene boards of more than 21 members for broad-based prevention planning, but recommendations and other actions regarding the Title V three year plan and funds can only be made by a specified board (or committee of a larger board) comprised of 15 to 21 members.

Comment. Six respondents indicated that specified groups of people need to be represented on Prevention Policy Boards including youth, families with or parents of children in the system or at risk (consumers of prevention services), and members that reflect the racial, ethnic and gender composition of the community's youth population.

Response. The additional representation described by these six respondents furthers the goal of having representative local boards. However, overly prescriptive Board requirements reduce local flexibility, particularly in the use of existing planning bodies. Therefore, OJJDP has modified the guideline to encourage the inclusion of these interests on the Prevention Policy Boards, to the maximum extent possible.

Comment. Youth development organizations should be included in the planning process and considered as a primary existing resource for prevention services—they have extensive experience in primary prevention programs.

Response. All human services agencies that in any way deal with children, youth, and families, including youth development organizations, should be involved in the planning process and considered as resources to assist in implementation of the local prevention plan. Technical assistance to States and localities is available through OJJDP to help in identifying and accessing prevention resources, including youth development organizations.

Comment. Can a Prevention Policy Board consisting of a private nonprofit organization and a local government apply for grant funds? If allowable, must the local government administer the funds?

Response. Prevention Policy Boards are not eligible to apply for a Title V grants from the States. Only units of general local government are eligible.

A private nonprofit organization and a unit of general local government could enter into a partnership to implement the Title V program, provided that the unit of general local government is the applicant and all Federal fund administrative requirements are met.

Comment. The exact duties of the Prevention Policy Board are not clear. The Board should be charged with the development of the local prevention plan.

Response. One purpose of the Board is to provide a vehicle for community commitment to and involvement in making the community a healthy place for the development of children and youth. Involving the Board in the development of the plan is one way of gaining that commitment and involvement.

The guideline has been amended to require a description of how the Prevention Policy Board will provide general oversight for developing the plan, approve the plan prior to submission to the State, and make recommendations to the responsible local agency for the distribution of funds and evaluation of funded activities.

Each Prevention Policy Board is encouraged to develop by-laws in concert with the responsible local agency to define its duties and how it will operate. Technical assistance is available through OJJDP for Board development.

Comment. The Prevention Policy Board should be charged with the mission of producing positive outcomes for youth, not just delinquency prevention.

Response. OJJDP is promoting risk and protection focused delinquency prevention as a promising strategy for the Prevention Policy Board to use in addressing the complex and varied sources of delinquent behavior in children and producing positive outcomes for youth.

Comment. Will OJJDP provide application kits for States?

Response. A sample State application is available from OJJDP.

Comment. The training on risk focused prevention is an excellent idea. However, given the limited resources available to localities to travel to the training, the training should be targeted on the localities which have been selected to receive grants. Also, a training for trainers would develop in-state capacity to deliver training in a more cost-effective manner. The use of

teleconference training should also be considered.

Response. The purpose of the training is to introduce key community leaders to risk and protection focused prevention, and enhance the localities knowledge and skills in prevention planning. Planning must occur before grants are awarded.

OJJDP hopes to provide training for State training teams in fiscal year 1995. OJJDP is also examining the use of teleconferencing as a vehicle for the more efficient delivery of training.

Comment. OJJDP should take an aggressive stance on the delivery of technical assistance.

Response. OJJDP is developing a capacity, through its Part B technical assistance contract, to provide technical assistance to every community which is developing or implementing a delinquency prevention plan.

Comment. What is the role of the State Advisory Groups in implementing the Title V program?

Response. The role of the State Advisory Group is to establish program eligibility criteria, establish procedures for submission and review of local applications, and approve or recommend approval of Title V subgrant awards.

Comment. OJJDP should provide examples of prevention plans which meet the OJJDP requirements.

Response. OJJDP is making resource material on prevention, including sample plans, available through the Juvenile Justice Clearinghouse, 1600 Research Boulevard, Rockville, MD 20850, Telephone (800) 638–8736.

Comment. If a prevention project serves a specific service catchment area within the boundaries of a unit of general local government, is the compliance certification limited only to the catchment area or the entire area within the boundaries of the unit of general local government? Is certification limited to only those facilities operated by the local government, exclusive of facilities located within the boundaries of the local government but operated by other governments?

Response. In order to be eligible to receive Title V funds, a unit of general local government must be certified by the State Advisory Group as in compliance with the JJDP Act mandates. The compliance certification applies to all facilities operated or contracted by the unit of general local government. The certification is not limited to a specific catchment area within the boundaries of the unit of general local government. Likewise, the certification must also include any facilities that the unit of general local government operates, contracts for, or uses inside or outside its boundaries. However, the certification does not apply to facilities operated or controlled by other governmental units within the local governmental boundaries that are not used by the local government.

Comment. Compliance with the Disproportionate Minority Confinement mandate is difficult to assess since it is just beginning to unfold in many jurisdictions.

The guidelines need to specify how the State Advisory Group's should certify unit of general local government compliance with the Disproportionate Minority Confinement where the Phase II Study has yet to be completed.

Response. The inclusion in Title V of the provision requiring local compliance with the mandates reflects an intent to use Title V funds as an inducement to bring localities into compliance. The State Advisory Groups and the State agencies should use this provision to gain the cooperation and commitment of units of general local government to assess and address disproportionate minority confinement. To certify a unit of general local government on disproportionate minority confinement compliance, the State Advisory Group must determine that the level of cooperation and commitment is satisfactory to support efforts to achieve the goals of the disproportionate minority confinement provision.

Comment. The certification of compliance with the mandates should occur at the time the subgrantee application is submitted.

Response. The guideline requires that units of general local government must obtain a certification prior to applying for an award of funds. This requirement is intended to eliminate a local government developing a three year comprehensive plan as the basis for an application for a grant which the locality is ineligible to receive.

Comment. In States where the compliance monitoring data is generated by county-wide reporting, the State Advisory Groups should be allowed to certify a city's compliance based on the overall compliance status of the county.

Response. Section 505 of the JJDP Act requires that in order for a unit of general local government to be eligible to receive a grant of Title V funds, the unit must be "in compliance with the requirements of part B of Title II." OJJDP has interpreted this to mean that the unit of general local government which is seeking eligibility to apply for an award of Title V funds must be in compliance with the four "mandates" of part B of Title II. Thus, a city's eligibility must be determined by the compliance data relevant to that city.

Comment. The language under the heading "Local Subgrantee Qualifications" is unclear. It appears to say that all units of general local government must be certified by the State Advisory Group to be in compliance with the mandates of the JJDP Act.

Response. The guideline does not require the State Advisory Group to certify all units of general local government, only those that wish to apply for Title V funds.

Comment. Is it up to each State to define "at-risk?"

Response. The guideline states that "the target population is all at-risk children in a given community." The Title V program is based on analyzing and addressing research-based risk factors which are identified in target communities. All children and youth who are exposed to these identified risk factors are the target population. In many cases, this would mean all children and youth in a target community would be considered at-risk.

Comment. Define in-kind match, and identify what type of in-kind match is allowed.

Response. In-kind match is determined by the value of goods and services received and used in the program that do not have a money cost to the grantee. In-kind match may be provided by the grantee or donated by a third party, such as a volunteer or a public or private agency. For example, the value of the time donated by a recreational counselor who is not an employee of the grantee could be counted as in-kind match. Likewise, the value of office space or equipment donated by a private corporation could also be counted as in-kind match. Note that the value of the time of an employee of the grantee who is not being compensated by grant funds, but is providing service to the project funded by the grant, would be counted as cash match.

John J. Wilson,

Acting Administrator, Office of Juvenile Justice and Delinquency Prevention.

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August 1, 1994

Part IX

Department of the Interior

Office of the Secretary
43 CFR Part 39

Bureau of Land Management
43 CFR Part 2820

National Park Service
36 CFR Part 14

Fish and Wildlife Service
50 CFR Part 29

Revised Statute 2477, Rights-of-Way; Proposed Rules

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 39

RIN 1090–AA44

Revised Statute 2477 Rights-of-Way

AGENCIES: Bureau of Land Management, National Park Service, Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement the Secretary of the Interior's June 1, 1993, recommendation to Congress that the Department of the Interior (Department) promulgate regulations addressing rights-of-way pursuant to Revised Statute (R.S.) 2477 across lands now administered by the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service. R.S. 2477—a provision adopted by Congress in 1866 that granted a right-of-way for the construction of highways across public land not reserved for public uses—was repealed in 1976, but valid existing rights-of-way were not terminated.

There is not currently in place any formal administrative process by which those who claim R.S. 2477 rights-of-way can have the Department make binding determinations of their existence and validity. Furthermore, inconsistent court interpretations and incomplete guidance from the Department over the years have done little to elucidate the nature of the rights acquired. This proposed rule is intended to clarify the meaning of the statute and provide a workable administrative process and standards for recognizing valid claims.

DATES: Comments must be submitted in writing by September 30, 1994. Comments received after this date may not be considered in the decision-making process on the issuance of the final rule.

ADDRESSES: Comments on these proposed regulations should be sent to: U.S. Department of the Interior, Main Interior Building, 1849 C Street, N.W., room 5555, Washington, DC 20240. All comments received will be available for public review in room 5555 at the above address between the hours of 7:45 a.m. to 4:15 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management: Ron Montagna, (202) 452–7782, or Ted D. Stephenson, (801) 539–4100. National Park Service: Dennis Burnett, (202) 208–7675. U.S. Fish and Wildlife Service: Duncan Brown, (703) 358–1744.

SUPPLEMENTARY INFORMATION:

Background

R.S. 2477 states simply: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Originally, the grant was Section 8 of "An Act Granting Right of Way To Ditch and Canal Owners Over The Public Lands, and For Other Purposes," also known as the Mining Act of 1866. In 1873 Section 8 was codified as Section 2477 of the Revised Statutes, hence the reference as R.S. 2477. In 1938 the statute was recodified as 43 U.S.C. 932. On October 21, 1976, R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA). Public Law 94–579, Section 706(a), 90 Stat. 2744, 2793 (1976). FLPMA did not terminate valid rights-of-way existing on the date of its approval. Section 509(a), 90 Stat. 2781, 43 U.S.C. 1769; Section 701(a), 90 Stat. 2786, 43 U.S.C. 1701 note.

Although this more than a century-and-a-quarter-old provision was repealed nearly 18 years ago, interpreting it today remains important, because valid rights-of-way existing at repeal were not terminated. In recent years, there has been growing controversy, concentrated in two Western States, over whether specific claimed access routes ought to be considered "highways" that were "constructed" pursuant to R.S. 2477, and if so, the extent of the rights thus obtained. This controversy stems in large part from the lack of specificity in the statutory language, which has helped create unrealistic expectations in interested local and State governments, environmental and wilderness protection groups, and other Federal land users. In addition, the language of R.S. 2477 causes uncertainty and potential conflict for Federal land managers charged with managing and protecting Federal lands according to current environmental and land use laws.

For several years both Congress and the Department have given attention to the problems posed by R.S. 2477. Most recently, in the *Conference Report on the Fiscal Year 1993 Appropriations Bill for Interior and Related Agencies* (September 24, 1992), Congress directed the Department of the Interior to study the history, impacts, status, and alternatives to R.S. 2477 and to prepare a report that provided sound recommendations for assessing the validity of claims. On June 1, 1993, the Secretary of the Interior submitted to Congress the *United States Department of the Interior Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands (Report)*. In the *Report*, the Secretary informed Congress that the Department of the Interior (DOI) would promulgate regulations to address these ongoing concerns.

During preparation of the *Report*, the Department obtained public participation in two stages. Preliminary scoping meetings were held in December 1992 and January 1993 in eight western cities. Over 4,000 pages of public comments were received and reviewed. These comments were instrumental in preparing a March 1993 draft of the *Report*, which was circulated to approximately 4,000 interested parties. Seven additional public meetings were held to solicit comments on the draft. Approximately 1,000 pages of further comments were provided to the Department. All public input received in this process was considered in preparation of this proposed rule.

Need for the Regulations

Thousands of miles of highways have been constructed across the public domain, including many existing State and county highways in the Western United States, under the authorization of R.S. 2477 and similar provisions. Rights-of-way validly acquired pursuant to R.S. 2477 are historic and important means of access to and across Federal lands for local citizens, recreationists, and Federal land managers performing official duties.

Historically, these rights-of-way have not presented many problems to land managers, because in general their existence is obvious and unquestioned. However, in some locales in recent years, competing ideas about the purposes for which Federal lands should be managed have mirrored competing interpretations of what the R.S. 2477 statute granted. Some State and county governments, intent on maintaining a road infrastructure for their citizens and providing for economic development, have turned to R.S. 2477 as a guarantee of access across and to Federal lands, believing it to provide simpler and less restrictive access than other Federal laws. There are some proponents of unlimited and unregulated access to Federal lands who view R.S. 2477 as a mechanism on which they believe they can rely to circumvent the protective requirements of current environmental and land use law and to authorize the present expansion of footpaths and animal trails into highways. Some environmental groups view R.S. 2477 with alarm, believing it to have been resurrected so

long after its repeal as a weapon to defeat the designation of existing and potential wilderness areas (which are roadless by definition). These widely varying views have created controversy and exacerbated management problems for both holders of the rights-of-way and Federal land managers.

In the current situation, it is difficult for Federal land managers, local governments, and public land users to know which right-of-way claims are valid and where they lie. These proposed regulations are intended to clarify the provision in its historic context and to provide a formal administrative process—as an alternative to potentially expensive and lengthy judicial proceedings—by which validly acquired rights-of-way will be recognized and regulated.

R.S. 2477 has been the subject of inconsistent interpretations. The statutory terms "highway," "construction," and "public lands not reserved for public uses" have not been defined completely or consistently, resulting in uncertainty for all parties about the exact nature and extent of the grant. In the absence of uniform Federal guidance, court decisions—sometimes applying widely varying State laws—have also failed to provide consistent or complete interpretations. Some recent State laws, including some adopted after the repeal of R.S. 2477, employ overly broad definitions or are otherwise inconsistent with the statutory requirements.

Federal land managers need consistent, coherent guidance on how to apply this provision and how to manage its potential conflicts with other existing laws. State and local governments and public land users need greater certainty. This proposed rule would clarify the legal meaning of these terms so that validly acquired rights-of-way can be recognized and regulated consistently and fairly.

In most cases, records do not exist documenting the existence of rights-of-way. Highways constructed pursuant to R.S.2477 did not require any specific, formal approval from the Federal government, so they were not generally recorded on the public land records. A Federal regulation published in 1980 requested claim holders to notify the Bureau of Land Management (BLM) of the existence of claims, but it also expressly said that the filing or failing to file a claim would have no legal effect. 43 CFR 2802.5(b) (1980). The response elicited by this request was therefore incomplete.

This uncertainty can cloud the title of Federal, State, local, private, and Indian or Alaska Native lands with possible unrecorded restrictions and interfere with the ability of property owners and land managers to manage or plan for uses of the land. The uncertainty also leaves claimants with undefined and unrecorded rights and the potential for confusion in trying to use or enforce those rights.

The ability of Federal agencies to meet their statutory obligations is compromised if claims are not identified with finality. For example, land use planning to provide for orderly and responsible decisionmaking on Federal lands is adversely affected if previously unnoticed or unused R.S. 2477 rights-of-way can be claimed for an indefinite period. Federal land managing agencies are required by existing laws to prepare long-term land use planning documents that identify and analyze the condition of the land, current and future uses, current and future environmental protection measures, and other measures to establish an appropriate management scheme. Preparation of these land use plans, whether they are General Management Plans prepared for each unit of the National Park Service or Resource Management Plans prepared for BLM lands, is a lengthy, complex process designed to meet existing legal requirements, the needs of the public, and the resource.

This rule intends to establish a process to determine which claims to rights-of-way were validly acquired, by requiring the filing of a claim within specified time periods. Besides offering a way to have rights validated without pursuing court actions, finalizing claims within a set time period will give claimants more security, because as time passes it will become increasingly difficult to determine which rights-of-way were validly acquired. After the locations of claimed rights-of-way are known, Federal land managing agencies will be better able to plan for and manage the Federal lands.

R.S. 2477 and Other Means of Access to and Across Federal Lands

Although R.S. 2477 was repealed in 1976, other methods exist of obtaining access to or across Federal lands. There are, in fact, several provisions and means of obtaining access across Federal lands other than R.S. 2477. If a right-of-way under R.S. 2477 is determined not to exist, or to be limited in scope, access may still be obtained under, and consistent with, these other laws allowing access.

Most access across public lands is accomplished informally under the privilege of casual use (defined at 43 CFR part 2800), without the necessity of special permission. Refuge and park visitors or public land users travel under the terms of casual use or other implied rights that do not require a right-of-way permit or other authorization.

Reasonable access is generally made available to persons engaged in valid uses of the public lands such as mining claims, mineral leasing, livestock grazing, and others. Provisions of the Alaska National Interest Lands Conservation Act (ANILCA) provide for reasonable access across Federal lands to inholdings including those within National Forests and within blocks of public land managed by BLM.

Rights-of-way for roads or other access can be applied for under several other provisions of existing Federal law such as Title V of FLPMA. Access is sometimes obtained also through reciprocal road agreements between a Federal agency and parties seeking access across Federal land. This authority is found at 43 CFR 2801.1–2.

For rights-of-way in Alaska, Congress has provided certain special provisions. These include public easements across selected Native corporation lands pursuant to Section 17(b) of the Alaska Native Claims Settlement Act (ANCSA) and the Transportation and Utility Corridor system process under Title XI of ANILCA.

Regulation of Valid R.S. 2477 Rights-of-Way

Congress enacted R.S. 2477 during a period when the Federal Government was promoting settlement of the West. In the same era and in the same manner, Congress granted rights-of-way for numerous purposes, perhaps most commonly for the construction of railroads. R.S. 2477 was part of an Act that granted other types of rights-of-way and certain mining rights. Later recodified along with other rights-of-way provisions, this simple statute had a very specific purpose, limited by its own terms, to authorize the construction of highways across the public domain. There is no legislative history elaborating on Congress' intent in passing this provision.

With the passage of FLPMA, Congress determined that lands managed by the Bureau of Land Management should be retained in public ownership and managed according to the principles of multiple use and sustained yield, while preventing unnecessary or undue degradation of the lands. 43 U.S.C. 1732(a),(b). FLPMA also sets forth a process for areas to be reviewed and designated as Wilderness Study Areas (WSA) while Congress considers inclusion of these areas in the National

Wilderness Preservation System. Section 603(c) of FLPMA requires that these areas are to be managed under FLPMA and "other applicable law" in a manner that will preserve the suitability for designation as wilderness and to prevent unnecessary or undue degradation and to provide environmental protection. 43 U.S.C. 1732(c).

In addition to providing for new management standards, FLPMA repealed R.S. 2477 and numerous other similar provisions, and provided a new, consolidated process for the granting and management of rights-of-way over Bureau of Land Management lands (and National Forest lands). Public Law 94–579, Section 706(a), 90 Stat. 2744, 2793 (1976); FLPMA, Title V, 43 U.S.C. 1761–1771. FLPMA neither terminated existing rights-of-way, nor exempted them from regulation under its standards. Public Law 94–579, Section 701(a), 90 Stat. 2786, 43 U.S.C. 1701 note. See also, *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1086–1088 (10th Cir. 1988) (valid existing R.S. 2477 right-of-way can be regulated by BLM to prevent unnecessary and undue degradation).

Similarly, when Congress passed laws creating the National Park System and the National Wildlife Refuge System, it imposed new, more protective management standards on these categories of Federal land and directed the Department to uphold these standards. When most parks or refuges were created, pre-existing rights including rights-of-way usually were not terminated, but became subject to the new management regime. For example, the courts have interpreted the authority of the National Park Service to include regulation of pre-existing R.S. 2477 rights-of-way across National Parks. *United States* v. *Vogler*, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).

R.S. 2477 must be read against these requirements. While existing rights pursuant to R.S. 2477 were not terminated, their preservation did not provide prospective, unrestricted authority to create or improve highways without regard for the purposes of these land management systems, or other environmental and resource protection laws. That is, rights-of-way validly acquired pursuant to R.S. 2477 remain subject to regulation under the Federal laws that govern the underlying and adjacent Federal lands. An Advance Notice of Proposed Rulemaking, published separately today, announces that the Department is considering whether and how to promulgate specific regulations to address the management of R.S. 2477 rights-of-way.

Role of State and Federal Law

The relationship between State and Federal law is important both for determining whether a right-of-way was validly acquired and for determining the scope of a right-of-way. The proposed rule states that Federal law controls interpretation of the offer made by R.S. 2477, but that claimants are required also to comply with State law, which therefore may further condition the acceptance of a right-of-way or define its scope. A claimant cannot, however, accept under State law something that was not offered by Federal law.

The interplay between State and Federal law has created some confusion, which this proposed rule is intended to eliminate. The rule would continue to recognize the role of State law, to the extent that State law is consistent with the baseline requirements of Federal law. The Department is authorized to recognize only those interests in the Federal lands that have been established in accordance with the directions of Congress. It cannot recognize highways purported to be established under State laws that do not meet the minimal Federal statutory requirements, written into R.S. 2477, for construction of a highway over unreserved public lands.

This position was articulated as early as 1898. Secretary C.N. Bliss reviewed an Order of the Board of County Commissioners of Douglas County, Washington, which declared that with respect to R.S. 2477, all section lines in the county would be the center lines or side lines of highways that would be hereby declared to be 60 feet in width. Observing that the county's order "embodies the manifestation of a marked and novel liberality on the part of the county authorities in dealing with the public land," the Secretary affirmed the decision of the General Land Office that such State action could not validly accept the R.S. 2477 grant. The Secretary's decision provides guidance on the appropriate interpretation of these issues still before the Department nearly one hundred years later:

> There is no showing of either a present or a future necessity for these roads or that any of them have been actually constructed, or that their construction and maintenance is practicable. Whatever may be scope of the statute under consideration it certainly was not intended to grant a right of way over public lands in advance of an apparent necessity therefor, or on the mere suggestion that at some future time such roads may be needed.

26 I.D. 446, at 447 (1898).

As this decision illustrates, R.S. 2477 was intended to convey a right-of-way for highway purposes upon actual construction, and not merely upon the suggestion that a State or local government might need a highway in a suggested location at a later time.

The Department has referred to State law to fill in gaps in the terms of R.S. 2477. See 43 CFR 244.55 (1939); BLM Manual, Rel. 2–229. This is consistent with the approach taken by Federal courts, which have recognized that while the scope of a grant of Federal lands is a question of Federal law, and that any doubt as to the scope of the grant under R.S. 2477 must be resolved in favor of the Government, the Department may properly look to State law to determine the scope of a right-of-way. See, e.g., *United States* v. *Gates of the Mountains Lakeshore Homes*, 732 F.2d 1411, 1413 (9th Cir. 1984); *Sierra Club* v. *Hodel*, 848 F.2d 1068 (10th Cir. 1988).

When R.S. 2477 was repealed, the ability to acquire new rights under its auspices was also revoked. Therefore, provisions of State laws that authorize the "establishing" of highways without the requirements that there be actual construction of a highway over unreserved public lands, or provisions that authorize expansion of the scope of a right-of-way vested as of the repeal of the statute (or the reservation of the land, whichever was earlier) conflict with Federal law and may not be utilized.

When the Department makes a determination concerning the acquisition or scope of a right-of-way under these regulations, it will refer to State law as appropriate. The pertinent State law is that which was in effect at the time of the repeal of R.S. 2477 or at the time of the reservation of the land, whichever came first. All rights that could have been acquired must have been acquired prior to that date. Subsequent revisions of State law cannot expand these rights.

While this proposed rule was in preparation, a panel of the Ninth Circuit Court of Appeals issued a decision in the case of *Schultz* v. *Department of the Army*, 92–35197, 92–35580, 1993 U.S. App. Lexis 31037, (9th Cir., Nov. 30, 1993). The panel decision took a somewhat more lenient view of the criteria for establishing a valid R.S. 2477 right-of-way than does this proposed rule. The Federal Government believes the panel decision is not consistent with congressional intent or practice under the statute, and the United States is seeking a rehearing of the panel's decision before the full Ninth Circuit Court of Appeals. The Department will, of course, take any final decision in the case into account in moving forward with a final rule.

The Department specifically requests comments on the foregoing interpretation of the relationship between State and Federal law as applied to R.S. 2477.

Structure and Objective of the Proposed Rule

This proposed regulation is the first of two proposed parts. This part outlines a process for determining which rights-of-way were validly acquired. The second part, published separately today as an Advance Notice of Proposed Rulemaking, will outline options the Department is considering for determining how validly acquired rights-of-way will be managed on Department of the Interior lands.

This proposed rule aims to: define key terms of the statute, provide a process for assertion of claims for rights-of-ways, establish an administrative procedure for the orderly and timely processing of claims, establish a process for input from the public prior to the administrative determination of a claim, and provide an appeal process for any adversely affected party. The proposed regulations that will implement these objectives are proposed jointly by the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service in this rulemaking action and will be codified at 43 CFR part 39.

As indicated in an Advance Notice of Proposed Rulemaking, published separately today, the Department is also considering whether and how to manage rights-of-way determined to be validly acquired under these provisions. The Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service are each considering the need for regulations to govern the management of R.S. 2477 rights-of-way found to be validly acquired, consistent with the legal requirements that govern the adjacent and underlying Federal lands. Separate management regulations for each agency may be necessary because each has different statutory authority and management standards.

Applicability of the Regulations

These regulations would apply to all lands managed by the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service. Federal lands under the administrative jurisdiction of other bureaus in the Department of the Interior or other Federal agencies would not be affected by these regulations.

These regulations are intended to create a process by which R.S. 2477 right-of-way claims can be systematically filed and reviewed to determine whether the elements of the R.S. 2477 statute were met. In order for the Department to recognize that a right-of-way exists pursuant to R.S. 2477, a highway had to have been constructed when the public land it traverses was not reserved, or prior to the repeal of R.S. 2477, whichever was earlier.

The process provided in the proposed rule is not an application process for new rights-of-way, and the Department cannot grant new rights through these provisions. Rather, it is a process for formal recognition by the Department of rights-of-way that were validly acquired pursuant to R.S. 2477 prior to its repeal and the enactment of FLPMA. The Department's recognition that a right-of-way was validly acquired will improve manageability and convenience for the holder of the right-of-way and the Federal land manager.

The proposed rule would establish specific filing requirements and a specific process to facilitate efficient processing of claims. The implementing Federal officials will work with claimants to comply with these requirements. Failure to follow the process as outlined will delay processing and may result in an administrative denial of the claim. An administrative denial of a claim can be appealed to the Director of the appropriate agency, and if the desired relief is not received, to an appropriate Federal court.

R.S. 2477 rights-of-way that cross private or Indian or Alaska Native lands are not governed or affected by these regulations. The Department does not intend to make administrative determinations of claims for rights-of-way that cross lands that are now in State, private, Indian, or Alaska Native ownership or under the jurisdiction of another Federal agency.

Section by Section Analysis

Section 39.1 Purpose

This section would state the purposes of the rule.

Section 39.2 Authority

This section would provide citations to the general authorities of the Secretary of the Interior, and to the specific authorities of the National Park Service, Bureau of Land Management, and U.S. Fish and Wildlife Service to manage the Federal lands.

Section 39.3 Definitions

This section would define the statutory terms of R.S. 2477 and other key terms in these regulations.

Paragraph (a) Administrative Determination: The decision made by the authorized officer after consideration of the evidence would be called the administrative determination. It will include a finding of whether the right-of-way was validly acquired, and if so, describe its scope. If a claimant has received a judicial determination that a right-of-way was validly acquired, the administrative determination will describe any aspects of the right-of-way not decided by the court, including, if applicable, its scope.

Paragraph (b) Authorized Officer: Claimants would file their claims with an authorized officer. The authorized officer is the State Director of the Bureau of Land Management, or the Regional Director of the Fish and Wildlife Service, or the Regional Director of the National Park Service, who has jurisdiction over the Federal land over which a claim pursuant to R.S. 2477 lies. The rule proposes that State or Regional Directors be authorized to delegate this responsibility.

Paragraph (c) Claim: This term would be defined as the filing of documentation that asserts the existence and scope of a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior. Claims must contain information sufficient to allow the authorized officer to evaluate the validity of the claim and/or to describe its scope.

Paragraph (d) Claimant: The term claimant would be defined as any person or entity asserting the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior under these regulations or in any court action. The Department presumes that all claimants will be State or local government agencies with authority for public highway management. However, there may be rare cases in which a private citizen constructed and operates a highway (that meets all other requirements) in such a manner as to have validly acquired a right-of-way pursuant to R.S. 2477. The Department will consider such claims, unless they are precluded by State law, but will require that these same standards be met. The Department specifically requests comments on whether and how, in any case of a private claim, State or local agencies with jurisdiction over highways in the area should be notified, consulted, and involved in the determination of validity.

Paragraph (e) Construction: In interpreting R.S. 2477, ordinary rules of statutory construction dictate that every word in the statute be given effect. See Sutherland, *Statutory Construction,*

Fourth Edition, Section 46.01, (1984). Construction is an important term: it is the act required to be performed in order to complete the right-of-way grant. R.S. 2477 granted a right-of-way upon the construction of a highway, not the dedication or planning or designing of a highway. Prior to its repeal, new construction for highway purposes could complete acceptance of new or additional rights-of-way, so long as the land remained unreserved at the time of construction.

The definition in the proposed regulations would recognize that standards of highway construction technology changed between the time when R.S. 2477 was passed and when it was repealed. The definition also recognizes that Congress intended in R.S. 2477 to authorize a specific activity—the construction of highways—and did not intend, and would not have needed, to authorize less durable forms of access. The proposed rule, therefore, would require that intentional physical acts be performed with the achieved purpose of preparing a durable, observable, physical modification of land and that this modification be suitable for highway traffic.

Where a path or trail was created initially by the mere passage of vehicles, the construction requirement is met only if the path or trail has been subsequently maintained by acts that meet the requirements of construction, before the latest available date (defined below). Construction of a highway cannot be accomplished solely by any of the following activities: continual passage over a surface that has not previously been intentionally constructed, even if the continual passage eventually creates a defined route; clearing of vegetation; or removal of large rocks. The Department specifically requests comments on this definition, including the requirements to show intentional acts, durable and observable physical modifications of land, and a link to highway traffic.

Paragraph (f) Highway: R.S. 2477 authorized the construction of highways, not railroads or canals or other types of access. When R.S. 2477 was enacted, a highway was understood to mean an open public road that served public travel or commerce needs or connected places between which people or goods traveled. Congress presumably authorized the construction of highways to make it possible for vehicles, including wagons, to travel them. There is no legislative history to suggest that Congress meant to authorize the construction of highways for private uses, for foot traffic, or for a road that did not provide needed access from one public destination to another.

The Department specifically requests comments on this definition, including the requirements to show current use, vehicular use, public use, and the connection between places made possible by the construction of the highway. The Department also requests comments on whether any of these terms needs further definition. The Department is considering whether to require a more specific showing that a right-of-way that once existed, but is no longer used, has not been abandoned and requests comments on this issue.

This definition of highway would not rule out the later adoption of a private road by a public entity, prior to repeal of the statute (or reservation of the land if this was earlier) in order to establish the right-of-way under the authority of R.S. 2477. The Department does not intend to require that all rights-of-way run from city to city; as long as the route connects identifiable places to which the public travels, it may meet this requirement. The Department therefore interprets the term highway to mean a thoroughfare that is currently and was, prior to the latest available date, used by the public without discrimination against any individual or group for passage of vehicles carrying people or goods from place to place. State law that was in effect on the latest available date may place additional limits on what kind of thoroughfare can be considered a highway in that State—claimants are also required to comply with these limits.

Paragraph (g) Holder: The term holder means someone whose claim of a right-of-way pursuant to R.S. 2477 has been determined to be valid under these regulations or by a Federal court in an appropriate case (see definition of Judicial Determination).

Paragraph (h) Improvement: The proposal divides all maintenance or construction activities that might take place on a claimed right-of-way into two categories: improvements and routine maintenance (which is defined separately). Improvements are considered any of these activities that expand the scope of the right-of-way; routine maintenance activities are any activities within that scope. Improvements may include activities such as paving a dirt road, widening a right-of-way, clearing vegetation from outside the scope of the right-of-way, removing materials from adjacent Federal lands, realignment, or new occupation of Federal land for any purpose. The Department does not interpret the R.S. 2477 savings provision to authorize improvements that expand the scope of the right-of-way as it existed on the latest available date. The Department requests comments on these issues, including comments on how specific the regulations should be on these points.

Paragraph (i) Judicial Determination: The term judicial determination means a decision by a United States Federal court holding that someone validly acquired a right-of-way pursuant to R.S. 2477. The Department of the Interior will not give binding effect to State court determinations on the validity of rights-of-way pursuant to R.S. 2477 unless the United States was a party to those cases (which was rarely if ever the case). However, if a claimant has received a State court determination that a right-of-way was validly acquired pursuant to R.S. 2477, it is evidence that the authorized officer will consider in making his or her administrative determination.

Paragraph (j) Latest Available Date: This is the latest date on which a party could have acquired a right-of-way pursuant to R.S. 2477. The latest available date is the earliest of (1) the date of repeal of R.S. 2477 (October 21, 1976) in the case of public lands that were unreserved as of that date, or (2) the date the public lands were reserved for public uses (such as the date of reservation of the lands to create a National Park), because at that point the land was no longer "not reserved for public use."

Paragraph (k) Maintenance: Maintenance is defined in this section as recurring or periodic actions that repair and prevent damage to the right-of-way surface and keep the right-of-way surface suitable for travel by the intended vehicles. This term is included in order to provide descriptions of the usual, periodic kinds of activities that are conducted on public highways and must be read along with the terms "improvements" and "routine maintenance," both of which are defined separately. Maintenance activities may include: grading, planking, graveling, asphalting, surfacing, cuts and fills, preparation of drainage ditches, curbing, or installation of culverts. The Department requests comments on these issues.

Paragraph (l) Public Lands Not Reserved for Public Uses: This term is used in R.S. 2477 and means lands owned by the United States that were available and open to the public under various public land laws that provided for disposition to the public, but that had not been set aside, withdrawn, reserved, dedicated, settled, preempted, entered, appropriated, disposed of, located, or otherwise reserved. These

are now commonly referred to as "unreserved public lands." Lands can be reserved by an Act of Congress, Presidential Proclamation or Executive Order, Secretarial Order, or other classification action.

These proposed regulations would not apply to reserved Federal lands, acquired Federal lands, privately held lands, or lands held in fee by Indian tribes or by individual Indians or Alaska Natives.

Paragraph (m) Public Land Records: This term refers to the records of the Bureau of Land Management and the Bureau's predecessor agency, the General Land Office. These records are relevant even where the claimed R.S. 2477 right-of-way crosses lands managed by the National Park Service or the U.S. Fish and Wildlife Service. This is because the right-of-way must have been acquired prior to the land being withdrawn or reserved as a National Park or Wildlife Refuge, that is, when the lands were managed by the Bureau of Land Management or its predecessor agency.

Paragraph (n) Routine maintenance: This term would be defined as maintenance activities that are within the scope of the right-of-way as it existed on the latest available date. Activity that expands the scope is considered an "improvement." Routine maintenance may include activities such as grading, or repairing potholes or existing culverts, and other minor, necessary activities that do not alter the character of the right-of-way or affect Federal lands. Routine maintenance probably would not include activities such as paving a dirt road, widening the right-of-way, clearing vegetation outside the scope of the right-of-way, removing material from adjacent Federal lands, realignment, or new occupation of Federal land for any purposes. The Department requests comments on these issues.

Paragraph (o) Scope: Until the repeal of R.S. 2477 (or the reservation of the land, if earlier), claimants could acquire new rights-of-way or expand the scope of already acquired rights-of-way by constructing additional highways or by widening, realigning, or otherwise expanding an existing highway. After the latest available date, however, no new rights under R.S. 2477 could be acquired. New rights-of-way and new uses of Federal land require authorization under FLPMA or other statutory authorities. The scope of the right-of-way that the holder validly acquired is that which was actually in use for public highway purposes at the latest available date. Where State law, as of the latest available date, further limits the scope of a right-of-way, these limits also apply. The Department specifically requests comments on its interpretation of scope, including whether or when it is necessary or useful for the Department to provide, as part of its Administrative Determination, a written description of scope and, if so, what parameters should be used to describe it.

The authorized officer will generally look to the current condition of the right-of-way as evidence of the validly acquired scope. Any future expansions of scope or creation of new rights-of-way would need to be authorized under other available statutory provisions, such as Title V of FLPMA. Some expansion of scope may have occurred after the repeal of R.S. 2477 in 1976 (or reservation of the land if earlier) on some rights-of-way. Generally, the Department does not intend to treat these activities as trespass, unless neither the courts nor the Department approved the expansion and significant public values are threatened by the expansion. In some cases, Department officials and Federal courts authorized expansion of the scope of a particular right-of-way and these authorizations will be upheld.

Paragraph (p) Secretary: This term means the Secretary of the Interior.

Section 39.4 Recognition of a Validly Acquired Grant

This section would provide that the Department will recognize Federal court decisions, and decisions of the authorized officer under these regulations, that a right-of-way was validly acquired. All parties that already have obtained judicial determinations that they hold a right-of-way pursuant to R.S. 2477 must file a copy of the judicial determination with the authorized officer. This will allow the Department to maintain current, accurate records and to manage the right-of-way appropriately. Any issues that are not resolved in the judicial determination, including the scope of a right-of-way, will be determined by the authorized officer under these regulations.

This section further provides that the Department will recognize the scope of a right-of-way when it is described by either a Federal court or the authorized officer. Where a claimant has received a judicial determination of validity, but the court does not provide a specific description of its scope, the holder must file a claim to gain recognition of the scope.

Section 39.5 Interests Granted and Retained by the United States

This section would enumerate the limited interests that were granted and acquired under R.S. 2477. The Department is considering whether these regulations should authorize the U.S. to receive a conveyance of an R.S. 2477 right-of-way from a claimant or holder, consistent with applicable law and subject to appropriate terms and conditions. Such conveyances may be mutually beneficial in cases where a State or county does not want to retain the legal and financial liability for an R.S. 2477 right-of-way, but the right-of-way provides important public access to or across Federal lands. The Department specifically requests comments on this issue.

Section 39.6 Filing Process for Administrative Determination

Paragraph (a) Requirement to File a Claim. Claimants would be required to file a request for an administrative determination of the validity and/or scope of each R.S. 2477 claim within 2 years after the effective date of the final rule. By requiring claimants to file their claims by this date, the agency will then have a record of all potential rights-of-way, and will be able to consider this information in land use planning and other management decisions. The Department specifically requests comments on the length of the filing period.

The proposed regulations require claimants to file a claim for a right-of-way pursuant to R.S. 2477 in all cases, even if they previously filed a map with the Bureau of Land Management showing the location of highways constructed under the authority of R.S. 2477, as requested by 43 CFR 2802.5(b). That regulation specifically states that the submission of the maps is not conclusive evidence of the existence of the rights-of-way.

Paragraph (b) Determination of the Appropriate Office. If the claim crosses lands managed by only one agency, the claimant should file in the appropriate Regional or State office of that agency. However, where right-of-way claims cross lands managed by more than one agency, the proposed rule would direct the claimant to the office where the claim should be filed. For the convenience of claimants and the Department, claims for a single right-of-way should not be segmented by filing a claim for a portion of a right-of-way in a particular office, for any reason.

Paragraph (c) Information Required in the Claim. A claim would be required to include sufficient information to

demonstrate to the authorized officer that each element of R.S. 2477 and each requirement of these regulations has been met, and to determine the scope of a claimed or judicially determined right-of-way. By requiring that standard information be provided for all claims and allowing the authorized officer to determine the sufficiency of each point, the Department believes it is establishing a process that will be fair and consistent as well as flexible enough to allow for differences in record-keeping.

Claimants would be required to provide general historic and descriptive information and any additional documentation necessary to demonstrate that a claimed right-of-way was validly acquired, including proof of construction of a highway across public lands not reserved for public uses, as those terms are herein defined. In order to facilitate speedy processing, provide manageable standards for authorized officers, and to make documenting a claim easier for claimants, this section sets forth some specific types of proof, including numerous kinds of public records, that are most likely to make these demonstrations. Obvious claims will be easily documented and easily approved. Although some evidence of each point is required, the authorized officer will weigh the evidence produced as a whole in making the requisite determination. Less obvious claims can be documented using numerous kinds or combinations of evidence, and can be approved if the evidence shows that the elements of R.S. 2477 and these regulations are met.

If the authorized officer believes that more information is needed in order to make a fair and informed decision, the claimant may be asked to provide additional information. If a claimant has already received a judicial determination that an R.S. 2477 right-of-way has been validly acquired, the claim should include a copy of that determination, along with any other information necessary for an administrative determination of any issues not determined by the court.

The claimant is required to provide evidence of actual construction (see definition of Construction). The proposed regulations illustrate the kinds of information that are likely to meet the requirement. The claimant is also required to provide sufficient evidence that the claimed right-of-way meets the definition of highway and was constructed across public lands not reserved for public uses at the time of the construction.

The Department specifically requests comments on these requirements, whether they are sufficiently flexible, specific, and predictable, and on the amount of discretion provided to authorized officers.

Section 39.7 Effect of Failure to File a Claim

The rule would require claimants to file claims within 2 years after the effective date of the final rule. The failure to file a claim by that date would be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. Any claims filed after that date would not be accepted or processed. A refusal to process a claim submitted after this date would be final agency action.

A filing deadline is necessary to enable the land managing agencies to approach land use planning and other management issues with complete information, and to provide certainty to public land users and those whose title may be affected by such claims. Earlier requests for this information not accompanied by a filing deadline did not elicit significant responses. Anyone who fails to file a claim within this period, but who wishes to assert the existence of a right-of-way, can seek authorization for the use of the right-of-way under other existing statutory authority, such as Title V of FLPMA, 43 U.S.C. 1761–1771.

The process in the proposed rule would provide claimants with a reasonable method of obtaining an administrative determination of their claims without undertaking the expense and time of litigation. Some claimants may find the existing procedures under the Title V of FLPMA, or other statutory authorities, to be a more familiar and speedy process for resolving their right-of-way claims.

This section also provides that these regulations, from their effective date, shall serve as notice for purposes of the Quiet Title Act that the United States asserts an adverse interest in all purported R.S. 2477 rights-of-way that cross Federal lands. This will start the clock running on the applicable twelve year statute of limitations period for filing a quiet title action in Federal court. This provision is not intended to provide any additional time to a claimant if any prior notice has already been given of an adverse Federal claim, or otherwise affect any prior notice that might have been given of an adverse Federal claim.

The net effect of the proposal is that claimants will have two years from the date of final regulations to file claims with the Department for administrative determinations of the claims and twelve years from the date of final regulations to file suit in Federal court to establish their rights. After these two periods lapse, all unfiled claims would be extinguished.

The Department specifically requests comments on these provisions, including on its legal authority to require claimants to follow this administrative process.

Section 39.8 Processing of the R.S. 2477 Claim

Paragraph (a) Additional Information. This section would set out the procedure that the authorized officer will follow in processing the claim. The authorized officer will review the information submitted with the claim to determine its sufficiency. Where the authorized officer determines that additional information is necessary, the claimant will be notified in writing and afforded an opportunity to furnish the information. The Department is considering whether to require that such additional information be supplied within a specific amount of time, such as 60 days, and specifically requests comments on this issue.

Failure of a claimant to make reasonable and timely efforts to respond to a request for additional information would be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. The Department's decision not to process an incomplete claim will constitute final agency action.

Paragraph (b) Consultation with other Federal agencies. If the claimed right-of-way also crosses lands that are under the jurisdiction of other Federal agencies (including agencies that are not within the Interior Department, such as the U.S. Forest Service or the Department of Defense), the authorized officer will consult with the other agencies. In addition, if the claimed right-of-wav abuts lands managed by other agencies, the authorized officer will consult with these agencies. This consultation will allow the other agencies to offer input and information to the authorized officer.

Paragraph (c) Consultation with the Bureau of Indian Affairs. This proposed provision details the circumstances in which the authorized officer will consult with the appropriate office of the Bureau of Indian Affairs (BIA). The purpose of this consultation is to provide BIA with the opportunity to contact persons or Indian tribes affected by these claims. The Department specifically requests comments on whether this process provides sufficient notice to Indians and Alaska Natives about right-of-way claims that may affect their lands.

Paragraph (d) Public Notification of Filing of the Claim. The authorized officer will notify the public that a claim has been filed by publishing a notice in a newspaper once a week for three consecutive weeks. The notice will be published in a local newspaper that is distributed in the area of the claim. The paragraph specifies the information that will be included in the notice. The authorized officer will receive public comments for at least 30 days beginning after the last notice has appeared in the paper. The Department specifically requests comments on the sufficiency of this procedure and the utility and cost-effectiveness of other public notification procedures.

Paragraph (e) Disqualification of the Claim. There are some situations in which the authorized officer will not process the claim. If a Federal court or a Department of the Interior agency has previously made a determination that a right-of-way is not a valid right-of-way pursuant to R.S. 2477, then the authorized officer will not substitute his or her decision for the previous judgment of the court or decision by the agency. A claimant may not make multiple claims or shop for a different result in different offices. The Department specifically requests comments on whether other types of Congressional or administrative determinations, such as the designation of Wilderness Areas or Wilderness Study Areas, should automatically disqualify a claim from consideration in the Department's administrative process proposed by these regulations.

Paragraph (f) Review of the Claim. This paragraph directs the authorized officer to review the claim and determine whether the evidence is sufficient to establish that the claimed right-of-way was validly acquired. The authorized officer has some discretion to account for differences in record-keeping processes and to examine the overall claim for sufficiency. The Department specifically requests comments on the standards by which authorized officers will evaluate claims.

Paragraph (g) Administrative Determination: After review of the information submitted by the claimant, review of the Bureau of Land Management official public land records for the area in question, consultation with affected Federal agencies, and consideration of public comment, the authorized officer will prepare an administrative determination.

The administrative determination will not be final until the authorized officer obtains the concurrence of the authorized officers of the other Department of the Interior land managing agencies (the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service) that have jurisdiction over lands crossed by the claim. For example, if a claim of a right-of-way crosses both Park Service and Bureau of Land Management lands, the authorized officer is the Regional Director of the National Park Service or his or her designee. Before the Regional Director makes a final administrative determination of the claim that crosses Park Service and Bureau of Land Management lands, he or she will consult with and obtain the concurrence of the Bureau of Land Management authorized officer. Concurrence of other Federal agencies is not required. Having such "one stop shopping" should make the process simpler and faster for the claimants, and ensure that all appropriate information for a particular claim is available for the authorized officer's consideration.

The authorized officer will address issues raised during the public review and comment period, and determine whether to recognize an R.S. 2477 right-of-way and, if so, its scope. The Department requests comment on whether or when it is necessary or useful to provide, as part of an Administrative Determination, a written description of scope and, if so, what parameters should be used to describe it.

Paragraph (h) Public Notification of Administrative Determination. The authorized officer will publish a notice in a newspaper of general distribution in the vicinity of the claim and in the **Federal Register**. The notice will alert the public to the results of and reasons for the determination. A copy of the administrative determination will be sent to the claimant. The Department specifically requests comments on the sufficiency and utility of these procedures and the utility and cost-effectiveness of other public notification procedures.

Section 39.9 Appeals Procedure From Administrative Determinations

The proposed regulations allow any interested party, including the claimant, State or local governments, and other public land users to appeal the administrative determination to the Director of the Bureau or Service. This will allow for efficient processing of appeals and uniformity in the decisions. Appeals are required to be in writing and must be submitted to the Director within 30 days of the decision's publication. The decision of the authorized officer will take effect 30 days after its publication in the **Federal Register**, unless the decision is properly appealed to the Director during that time.

The Director of the appropriate Bureau or Service will consider the official files of the authorized officer and any evidence submitted to the authorized officer by any interested party. The Director may ask the parties or the authorized officer for additional information and may provide for a hearing. If the claim involves land managed by more than one Department of the Interior land managing agency, the Director will consult with and obtain the concurrence of the Director of the other agency or agencies before making a final decision on the appeal.

The Department specifically requests comments on whether a different type of appeals process should be considered; for example, whether a hearing should be required or allowed if requested, whether appeals should be sent to a hearing board or other bureau official rather than a bureau director, whether decisions should be effective immediately or await action on any administrative appeal, and whether appeals should be limited to parties that participate in the determination of a claim.

Section 39.10 Interim Activity

This section would provide guidance on the activities that claimants can engage in before a final administrative determination is issued or while any administrative appeal is pending. The Department will allow interim activities on all rights-of-way that are currently maintained by claimants, in accordance with these regulations, until final agency determinations are made. The Department specifically requests comments on whether these procedures will provide a workable framework for necessary activities of claimants while adequately protecting public resources.

The principal authors of this proposed rule are Ted D. Stephenson, Chief, Branch of Lands and Minerals Operations, Utah State Office, Ted G. Bingham, Deputy State Director for Operations, Arizona State Office, Sue A. Wolf, Chief, Branch of Lands, Alaska State Office, Bill Wiegand, Idaho State Office, and Ron Montagna, Realty Specialist, Division of Lands, Washington Office, assisted by the staff of the Division of Legislation and Regulatory Management, all of the BLM; Tony Sisto, Ranger, Ranger Activities Division of the National Park Service; Duncan Brown, Counselor to the Division of Refuges, U.S. Fish and Wildlife Service; and Karen Mouritsen, Barry Roth, Renee Stone, and Ruth Ann Storey from the Office of the Solicitor.

It is hereby determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment, and that no detailed statement pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(2)(C)) is required. The Bureau of Land Management has determined that this proposed rule would not create environmental impacts. No critical element of the human environment would be affected because the proposed rule would merely establish a process for determining whether claimed rights-of-way across Federal lands were validly acquired pursuant to R.S. 2477. No new rights-of-way would be authorized under the proposed rule. The Department would use these regulations to determine, in individual situations, whether valid existing rights-of-way exist under a law repealed eighteen years ago. If such rights are determined to exist under these regulations, they will be subject to regulation under other laws, and NEPA is applicable to these processes.

This rule has been reviewed under Executive Order 12866.

The Department has determined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the proposed rule will not have a significant economic impact on a substantial number of small entities. The rule principally affects governmental entities that own and operate public highway rights-of-way that cross Federal land.

The Department certifies that this proposed rule does not represent a governmental action capable of interference with constitutionally protected property rights. There would be no taking of private property by this rule. The entities principally affected by the rule are public in nature and the only proceedings authorized by the proposal are assessments of whether valid rights exist. Therefore, as required by Executive Order 12630, the Department of the Interior has determined that the proposed rule would not cause a taking of private property.

The Department has certified to the Office of Management and Budget that this proposed rule meets the applicable standards provided in section 1(a) and 2(b)(2) of Executive Order 12788.

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.* The collection of this information will not be required until it has been approved by the Office of Management and Budget. The information would be collected to permit the authorized officer to determine the validity and scope of rights-of-way claimed to have been acquired under R.S. 2477. The information would be used to make this determination.

Public reporting burden for this information is estimated to average _____ hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer (873), Bureau of Land Management, 1849 C Street, N.W., Washington, DC 20240, or the Service Information Collection Officer, U.S. Fish and Wildlife Service, MS–224 ARLSQ, 1849 C Street, N.W., Washington, D.C. 20240, or Chief, Management Analysis and Control Branch, Management Services Division, National Park Service, P.O. Box 37127, Washington, D.C. 20013–7127, and the Office of Management and Budget, Paperwork Reduction Project, 1004-xxxx, Washington, DC 20503.

List of Subjects in 43 CFR Part 39

Highways and roads, Public lands—rights-of-way, Reporting and record-keeping requirements.

For the reasons set forth in the preamble, and under the authorities stated below, subtitle A of title 43 is proposed to be amended by adding a new part 39 to read as follows:

PART 39—REVISED STATUTE 2477 RIGHTS-OF-WAY

Sec.
39.1 Purpose.
39.2 Applicability and authority.
39.3 Definitions.
39.4 Recognition of a validly acquired right-of-way.
39.5 Interests granted and retained by the United States.
39.6 Filing process for administrative determination.
39.7 Effect of failure to file a claim.
39.8 Processing of claims.
39.9 Appeals procedure from administrative determinations.
39.10 Interim activity.
39.11 Information collection. [Reserved]

Authority: 43 U.S.C. 1201, 1733 and 1740.

§ 39.1 Purpose.

The purposes of the regulations in this part are to:

(a) Establish procedures for the orderly and timely processing of claims for rights-of-way pursuant to R.S. 2477 over lands managed by the Bureau of Land Management, National Park Service, and U.S. Fish and Wildlife Service;

(b) Define key terms;

(c) Establish public notice and appeal processes of claims for rights-of-way pursuant to R.S. 2477; and

(d) Provide for the use of rights-of-way validly acquired pursuant to R.S. 2477, consistent with the management of adjacent and underlying Federal lands.

§ 39.2 Applicability and authority.

The regulations in this part apply to right-of-ways claimed pursuant to R.S. 2477 on Federal lands administered by the Bureau of Land Management, National Park Service, and U.S. Fish and Wildlife Service, all land managing agencies under the U.S. Department of the Interior. R.S. 2477, Section 8 of the Act of July 26, 1866, 43 U.S.C. 932, granted a right-of-way for the construction of highways on public lands not reserved for public uses. R.S. 2477 was repealed by Section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701–1784. Existing rights-of-way were not terminated. 43 U.S.C. 1769(a). FLPMA created a new process for the issuance of rights-of-way to provide access to and across Bureau of Land Management and U.S. Forest Service lands. 43 U.S.C. 1761–1771.

(a) *Department of the Interior.* The Secretary of the Interior has broad authority to promulgate regulations for the management of Department of the Interior lands pursuant to 43 U.S.C. 1201 and 1457.

(b) *Bureau of Land Management.* Sections 302(b) and 310 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1732(b) and 1740, authorize the Bureau of Land Management to promulgate regulations to prevent unnecessary or undue degradation of lands managed by the Bureau of Land Management and to implement the purposes of FLPMA and other public land laws. Section 603(c), 43 U.S.C. 1782(c), requires the Secretary of the Interior to manage wilderness study areas, by regulation or otherwise, to prevent unnecessary or undue degradation and to prevent impairment of wilderness characteristics.

(c) *U.S. Fish and Wildlife Service.* 16 U.S.C. 668dd authorizes the Secretary, acting through the Director of the U.S. Fish and Wildlife Service, to issue regulations relating to public use of any area within the National Wildlife Refuge System. In addition, 16 U.S.C. 460k–3 authorizes the Secretary to issue

regulations relating to public use of national wildlife refuges, game ranges, national fish hatcheries, and other conservation areas administered by the Department for fish and wildlife purposes. With respect to any unit of the National Refuge System located in Alaska, the Alaska National Interest Lands Conservation Act (ANILCA) requires the Secretary to prescribe regulations to ensure that activities carried out under any use or easement granted "under any authority" are compatible with the purposes for which the refuge was established. ANILCA, Section 304(b), Pub. L. 96–487, 94 Stat. 2371, 2395 (1980).

(d) *National Park Service.* The National Park Service Organic Act, 16 U.S.C. 1–4, provides that the purpose of the National Park Service is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. The Secretary has specific authority to make rules and regulations in furtherance of these purposes. 16 U.S.C. 3.

§ 39.3 Definitions.

The following definitions apply to this part:

(a) *Administrative determination* means the decision issued by an authorized officer under this part that determines the validity and/or scope of a claim of a right-of-way pursuant to R.S. 2477.

(b) *Authorized officer* means the State Director of the Bureau of Land Management, or the Regional Director of the U.S. Fish and Wildlife Service, or the Regional Director of the National Park Service, or their respective designee, with jurisdiction over the Federal land over which a claim pursuant to R.S. 2477 lies.

(c) *Claim* means the filing of appropriate documentation under this part asserting the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior. Claim also means the filing of appropriate documentation under this part showing that a judicial determination has been made of the existence of a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior and asserting any rights not expressly recognized in the judicial determination.

(d) *Claimant* means any person or governmental entity that asserts the existence of and a property interest in a right-of-way pursuant to R.S. 2477 across lands managed by the Department of the Interior under this part or in any Federal court action. Where State law, in effect on the latest available date, further limits the class of persons who may own or operate highways, these limits also apply.

(e) *Construction* means an intentional physical act or series of intentional physical acts that were intended to, and that accomplished, preparation of a durable, observable, physical modification of land for use by highway traffic. Where State law, in effect on the latest available date, further limits the definition of construction, these limits also apply.

(f) *Highway* means a thoroughfare that is currently and was prior to the latest available date used by the public, without discrimination against any individual or group, for the passage of vehicles carrying people or goods from place to place. Where State law, in effect on the latest available date, further limits the definition of highway, these limits also apply.

(g) *Holder* means a claimant who has received an administrative or judicial determination that its claim to a right-of-way pursuant to R.S. 2477 is valid.

(h) *Improvement* means any maintenance or construction activity that expands the scope of the right-of-way.

(i) *Judicial* determination means a decision by a United States District or Territorial court, or higher United States Federal court, that holds that a claimant holds a right-of-way pursuant to R.S. 2477.

(j) *Latest available date* means the latest date on which a right-of-way pursuant to R.S. 2477 could have been acquired, which shall be prior to:

(1) October 21, 1976, in the case of lands that were unreserved public lands as of that date; or

(2) The date the public lands were reserved for public uses (such as the date of withdrawal from entry or designation of public use by statute, Presidential Proclamation or Executive Order, Secretarial Order, or administrative decision) in the case of public lands reserved for public uses before October 21, 1976.

(k) *Maintenance* means recurring or periodic actions that repair or prevent damage to an existing right-of-way surface and keep an existing right-of-way surface suitable for travel by the intended vehicles.

(l) *Public Lands Not Reserved for Public Uses* or *Unreserved Public Lands* means lands owned by the United States that were available and open to the public under various public land laws that provided for disposition to the public, but that had not yet been set aside, dedicated, withdrawn, reserved, settled, preempted, entered, appropriated, disposed of, located, or otherwise reserved.

(1) The terms "public lands not reserved for public uses" and "unreserved public lands" do not include:

(i) Lands that were set aside, dedicated for specific purposes, withdrawn, or otherwise reserved from disposition under the public land laws by an Act of Congress, Presidential Proclamation or Executive Order, Secretarial Order, or classification actions authorized by statute that specified that the land would be used for a specific purpose or that prevented certain uses;

(ii) Lands that were settled, preempted, entered, appropriated, disposed of, located, or otherwise reserved to private parties or States under the public land laws or mining laws;

(iii) Lands that were owned by the United States, disposed of to a private party, and later reacquired by the United States (unless expressly re-opened prior to the latest available date);

(iv) Lands that were acquired by the United States from a party other than a foreign sovereign (unless expressly re-opened prior to the latest available date); or

(v) Other reserved lands.

(2) Lands are removed from the status of "public lands not reserved for public uses" on the date of the withdrawal or other reservation.

(3) If a settlement, claim, or entry does not proceed to patent, is declared invalid, is abandoned or relinquished, or the United States revokes the withdrawal or other reservation, the land may return to the status of "public lands not reserved for public uses," on the date on which the public land records so reflect that status.

(m) *Public land records* means the records of the Bureau of Land Management or its predecessor agency, the General Land Office.

(n) *Routine maintenance* means maintenance activities that are within the scope of the right-of-way.

(o) *Scope* means the width, surface treatment, and location actually in use for public highway purposes at the latest available date, unless otherwise determined by a United States Federal court. Where State law, in effect on the latest available date, further limits the scope of a right-of-way, these limits also apply.

(p) *Secretary* means the Secretary of the Interior.

§ 39.4 Recognition of a validly acquired right-of-way.

(a) The Department of the Interior will recognize that a right-of-way was validly acquired pursuant to R.S. 2477 only if that determination is made by one of the following:

(1) A United States District or Territorial court, or higher United States Federal court; or

(2) The authorized officer in accordance with this part.

(b) The Department of the Interior will recognize the scope of a right-of-way pursuant to R.S. 2477 only if it is described by one of the following:

(1) A United States District or Territorial court, or higher United States Federal court; or

(2) The authorized officer in accordance with this part.

§ 39.5 Interests granted and retained by the United States.

(a) *Interests validly acquired pursuant to R.S. 2477.* Upon valid acquisition, a claimant received a right-of-way for public access for highway purposes. The right to acquire new rights under R.S. 2477 was terminated as of the latest available date. A holder may perform routine maintenance. Routine maintenance, construction, improvement, use, and operation of the right-of-way shall be subject to regulation.

(b) *Interests retained by the United States.* R.S. 2477 granted a right-of-way upon the construction of a highway across public land not reserved for public uses. All other rights were retained by the United States, including all rights not actually acquired prior to the latest available date. These rights include but are not limited to continuing rights to regulate, enter, and authorize other uses of the right-of-way. The United States retains the authority to regulate routine maintenance, construction, improvement, use, and operation of the right-of-way.

§ 39.6 Filing process for administrative determination.

(a) *Requirement to file a claim.* All claimants shall file their claims with the appropriate office in the State or Region in which the claim lies, not later than [30 days plus 2 years after date of publication of final rule]. All holders of judicial determinations shall file a claim, including a copy of the judicial determination and any other necessary information, with the appropriate office in any State or Region in which the claim lies, not later than [30 days plus 2 years after date of publication of final rule]. Any aspects of a judicial determination not addressed by the court, including scope, will be determined under this part.

(b) *Determination of appropriate office.* The appropriate office is determined by the following:

(1) If any part of the claim crosses lands managed by the National Park Service, the appropriate office is the Regional Office of the National Park Service. Contact the nearest National Park for the address of the appropriate Regional Office.

(2) If any part of the claim crosses lands managed by the U.S. Fish and Wildlife Service, and does not cross lands managed by the National Park Service, the appropriate office is the Regional Office of the U.S. Fish and Wildlife Service. See 50 CFR 29.21–2(c) for the address of the appropriate Regional Office.

(3) For claims that cross lands managed by the Bureau of Land Management, but not the National Park Service or the U.S. Fish and Wildlife Service, the appropriate office will be the State Office of the Bureau of Land Management. See 43 CFR 1821.2–1 for the address of the appropriate State Office.

(c) *Information required in claim.* A claim shall contain sufficient information to demonstrate to the authorized officer that each element of R.S. 2477 and each requirement of this part have been met (unless the claimant already holds a judicial determination of validity), and any additional information necessary to determine the scope of the right-of-way. At a minimum the claim shall contain:

(1) The name and affiliation of the claimant;

(2) The address where service may be made on the claimant, including name(s) or agent(s) authorized to act for it, and the statute, resolution, ordinance, or other warrant authorizing such officer(s) or agent(s) to act on behalf of the claimant;

(3) A general description of the highway on which the claim is based, including at least the local name, State or county number, beginning and ending points, type of surface, width and other relevant information, and identification of the claim on maps in sufficient detail to allow location on the ground by a competent engineer or surveyor.

(4) A summary of the history of the construction and use of the right-of-way up to the present.

(5) A statement of whether any profiles, constructions, as-built or similar detail maps or diagrams of the right-of-way are available and, if so, where such material may be viewed or copies obtained;

(6) If the right-of-way has been the subject of a prior judicial or administrative determination, the case or file identification number, results of the last action taken, and the dates thereof.

(7) If applicable, a citation to relevant State law in effect on the latest available date;

(8) Evidence of construction, which shall include evidence of each part of the definition of construction, including:

(i) Intentional physical acts, which may be shown by evidence that the roadbed was prepared with the use of tools, either hand tools, power tools, or machinery; and

(ii) Preparation of a durable, observable, physical modification of land, which may be shown by records of expenditures for, or other records of, highway construction activities or maintenance after the initial construction at necessary and appropriate intervals so that the right-of-way was a relatively continuous route for travel;

(9) Evidence that the claimed right-of-way is a highway, which shall include evidence of each part of the definition of highway, including:

(i) Public use, which may be shown by records establishing that the right-of-way is currently and was prior to the latest available date officially acknowledged, funded, or maintained by a State or local government public highway management agency;

(ii) Vehicular use, which may be shown by historic evidence or records of use for commercial or personal purposes by vehicles appropriate to the time and terrain; and

(iii) The thoroughfare served as a connection between public destinations, which may be shown by describing the places that the right-of-way connects or provides access to; and

(10) Evidence that the land over which a claim of a right-of-way pursuant to R.S. 2477 lies was public land not reserved for public uses at the time of construction.

§ 39.7 Effect of failure to file a claim.

The failure to file a claim by *[30 days plus 2 years after date of publication of final rule]* shall be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. Claims received after that date will not be processed. A decision refusing to process a claim submitted after the above date will constitute final agency action. These regulations, from [the effective date of the final rule] shall serve as notice for purposes of the Quiet Title Act, 28 U.S.C. 2409a, that the

United States claims an adverse interest in any purported rights-of-way traversing Federal lands claimed pursuant to R.S. 2477; provided, however, that this provision will not interfere with or affect any prior notice that might have been given of an adverse Federal claim.

§ 39.8 Processing of claims.

(a) *Additional information.* The authorized officer will review the claim to determine whether it is complete and provides sufficient information to allow a review of the claim. Where the authorized officer determines that additional information is necessary, he or she will notify the claimant in writing of the deficiencies and afford a reasonable opportunity for the claimant to supply such information. Failure of a claimant to respond to a request for additional information shall be deemed to constitute a relinquishment of any rights purported to have been acquired under R.S. 2477. The authorized officer will not process claims if the claimant fails to respond to a request for additional information. A decision refusing to process incomplete claims will constitute final agency action.

(b) *Consultation with other Federal agencies.* The authorized officer will consult with any other Federal agencies that have management authority over lands crossed by the claim.

(c) *Consultation with the Bureau of Indian Affairs.* The authorized officer shall consult with the appropriate Area Office of the Bureau of Indian Affairs in any case in which a claim crosses land in any of the following categories:

(1) Land that is individually owned by Indians or Alaska Natives or any interest therein that is held in trust by the United States for the benefit of individual Indians or Alaska Natives and land or any interest therein held by individual Indians or Alaska Natives subject to Federal restrictions against alienation or encumbrance;

(2) Tribal land, which is land or any interest therein, title to which is held by the United States in trust for an Indian tribe, or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance, including such land reserved for Bureau of Indian Affairs administrative purposes. Also included in this category are lands held by the United States in trust for an Indian corporation chartered under Section 17 of the Act of June 18, 1934, 48 Stat. 988, 25 U.S.C. 477; or

(3) Government owned land, which is land owned by the United States and under the jurisdiction of the Secretary and that was acquired or set aside solely for the use and benefit of Indians or Alaska Natives; or land for which an allotment application is pending and that was not included in the lands set forth in paragraphs (c) (1) and (2) of this section; or land that has been selected by but not yet conveyed to corporations created pursuant to the Alaska Native Claims Settlement Act, Pub. L. 92–203, 7–8, 85 Stat. 688, 691–4 (1971).

(d) *Public notification of filing of a claim.* The authorized officer will publish in a newspaper of local distribution in the vicinity of the claim once a week for 3 consecutive weeks a notice of filing of the claim. The public comment period will begin the day after the last publication date and last for a minimum of 30 days. The notice of filing will include:

(1) The name and mailing address of the claimant;

(2) The name or number and location of the right-of-way claimed to have been validly acquired pursuant to R.S. 2477 as identified on the claimant's formal public highway records;

(3) The office in which the claim was filed;

(4) Notice of availability of the claim for public inspection and review;

(5) The address where public comments may be mailed; and

(6) The date after which public comments will not be considered.

(e) *Disqualification of the claim.* The authorized officer will not process a claim if the subject right-of-way has been previously judicially or administratively determined not to be a validly acquired right-of-way pursuant to R.S. 2477.

(f) *Review of the claim.* The authorized officer will review the claim and determine whether it contains sufficient evidence to prove that the right-of-way was validly acquired pursuant to R.S. 2477.

(g) *Administrative determination.*

(1) After review of the information submitted by the claimant, review of Bureau of Land Management official public land records, review of any applicable State law, consultation with affected Federal agencies, and consideration of public comment, if any, the authorized officer will prepare an administrative determination.

(2) The administrative determination will not be final until it is concurred in by the authorized officer of the Bureau of Land Management, U.S. Fish and Wildlife Service, and National Park Service that has jurisdiction over lands crossed by the claim.

(3) The administrative determination will include a finding of whether a right-of-way pursuant to R.S. 2477 on lands in the jurisdiction of the Bureau of Land Management, U.S. Fish and Wildlife Service, and National Park Service was validly acquired, and, if so, will describe the scope of the right-of-way.

(4) The final administrative determination will be sent to the claimant.

(h) *Public notification of administrative determination.* The authorized officer will publish a notice of the administrative determination in a newspaper of general distribution in the vicinity of the claim and in the **Federal Register**. A copy of the administrative determination will be sent to the claimant.

§ 39.9 Appeals procedure from administrative determinations.

(a) Administrative determinations of the authorized officer will be put into full force and effect 30 days after publication in the **Federal Register** unless an appeal under this section is filed during that time.

(b) Any person or entity adversely affected by an administrative determination under this part may appeal the administrative determination to the Director of the Bureau or Service of the authorized officer.

(1) The appeal shall be in writing and shall be filed with the Director within 30 days of the date of publication in the **Federal Register**. If the appellant is other than the claimant, the appellant shall send a copy of the appeal to the claimant at the same time.

(2) The appeal shall contain:

(i) The name, address, telephone number, and interest of the person filing the appeal;

(ii) A statement of the issue or issues being appealed; and

(iii) A concise statement explaining why the appellant believes that the authorized officer's administrative determination is factually or legally wrong.

(c) The official files of the authorized officer and any statements or documents submitted by the claimant or the public on which the decision of the authorized officer was based shall constitute the record on appeal. If the appellant is other than the claimant, the claimant shall be offered an opportunity to comment on the appellant's statements made under paragraph (b)(2) of this section.

(d) If the Director considers the record inadequate to support the decision on appeal, he or she may require the production of such additional evidence or information as deemed appropriate, and may provide for a hearing as deemed appropriate.

(e) The Director will promptly render a decision on the appeal. The decision

will not be effective until it is concurred in by the Director of each Department of the Interior land managing agency that has jurisdiction over lands crossed by the claim. The decision will be in writing and will set forth the reasons for the decision. The decision will be sent to the appellant, and if the appellant is other than the claimant, to the claimant.

(f) The decision of the Director will be the final agency action of the Department of the Interior.

§ 39.10 Interim activity.

(a) During the processing of a claim and any administrative appeal, a claimant may perform routine maintenance.

(b) A claimant performing routine maintenance shall notify the appropriate office at least 3 business days in advance of the date the work is to be performed. Routine maintenance is subject to the approval of the appropriate office. The appropriate office as it applies to this section is the area or district office of the Bureau of Land Management, the Superintendent of the National Park System Unit, or the Manager of the National Wildlife Refuge, that has jurisdiction over the lands crossed by the portion of the claim on which the routine maintenance will take place.

(c) Interim activity authorized under this section shall be limited to those rights-of-way currently maintained by the claimant and after [*30 days plus 2 years after date of publication of final rule*] only those routes actually claimed by a claimant.

§ 39.11 Information collection. [Reserved]

George T. Frampton Jr.,

Assistant Secretary of the Interior.

Nancy K. Hayes,

Acting Assistant Secretary of the Interior.

[FR Doc. 94–18622 Filed 7–29–94; 8:45 am]

BILLING CODE 4310–84–P, 4310–55–P, 4310–70–P

Bureau of Land Management

43 CFR Part 2820

[WO–260–4210–02–24 1A]

RIN 1004–AB00

National Park Service

36 CFR Part 14

RIN 1024–AC01

Fish and Wildlife Service

50 CFR Part 29

RIN 1018–AC45

Revised Statute 2477 Rights-of-Way

AGENCIES: Bureau of Land Management, National Park Service, Fish and Wildlife Service, Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This document announces that the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service—all agencies of the Department of the Interior (Department)—are currently considering whether to develop regulations or other administrative procedures to manage rights-of-way validly acquired pursuant to R.S. 2477, and if so, what kind of regulations to develop. If promulgated, such management regulations would apply solely to R.S. 2477 rights-of-way, and lands encumbered by such rights-of-way, across the respective jurisdictions of these three agencies, when those rights-of-way are determined to have been validly acquired in accordance with Departmental regulations (a proposal for these regulations is published separately today).

DATES: Comments must be submitted in writing by September 30, 1994.

ADDRESSES: Comments on this notice should be sent to: U.S. Department of the Interior, Main Interior Building, 1849 C Street, N.W., Room 5555, Washington, D.C. 20240. All comments received will be available for public review in Room 5555 at the above address between the hours of 7:45 a.m. and 4:15 p.m., Monday through Friday. Correspondents should specify whether their comments are directed generally or to the specific management programs of the National Park Service, U.S. Fish and Wildlife Service, or Bureau of Land Management.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management: Ron Montagna, (202) 452–782, or Ted D. Stephenson, (801) 539–4100. National Park Service: Russel J. Wilson, (202) 208–7675. U.S. Fish and Wildlife Service: Duncan Brown, (703) 358–1744.

SUPPLEMENTARY INFORMATION: R.S. 2477, enacted in 1866 and repealed in 1976, granted rights-of-way for the construction of highways across unreserved public lands. Rights-of-way in existence on the date of repeal were not terminated. A proposed rule, published separately today, would provide clarification of this provision and a system for processing claims for validation of rights-of-way across Federal lands pursuant to R.S. 2477. The courts have explicitly recognized the authority of the Department to regulate such rights-of-way.

This notice announces that the Department's land managing agencies—the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service—are considering whether to manage R.S. 2477 rights-of-way under existing legal authorities, to promulgate additional regulations (and if so what form of regulations), or to develop other administrative procedures to govern R.S. 2477 rights-of-way after they have been determined to have been validly acquired under Departmental regulations.

The Department solicits comments on how it should regulate validly acquired R.S. 2477 rights-of-way. Each agency has existing regulations dealing generally with rights-of-way (for the Bureau of Land Management, see 43 CFR part 2800; for the National Park Service, see 36 CFR part 14; for the U.S. Fish and Wildlife Service, see 50 CFR part 29). One option would be to administer R.S. 2477 rights-of-way under existing agency right-of-way regulations. This option might be workable for agencies and holders and would avoid creating a separate system for one narrow class of rights-of-way. The Department solicits comments specifically on whether existing right-of-way regulations would adequately protect public resources while providing a workable framework for holders of R.S. 2477 rights-of-way.

If commenters do not believe that existing right-of-way regulations could meet these goals if applied specifically to R.S. 2477 rights-of-way, the Department solicits specific comments on which provisions do and which provisions do not, as well as suggestions for alternative provisions, as they relate to R.S. 2477 rights-of-way.

The Department solicits comments specifically addressing whether there are valid reasons to establish separate regulations for R.S. 2477 rights-of-way.

If so, the Department requests comments both on the reasons for separate regulations and suggestions for their content.

Separate management regulations for each agency (the Bureau of Land Management, National Park Service, and U.S. Fish and Wildlife Service) may be necessary because each has different statutory mandates. The Department requests comments on the appropriateness and feasibility of applying different management standards to R.S. 2477 rights-of-way, depending on which agency has jurisdiction for the Federal land crossed by a right-of-way.

Another option under consideration is the use of cooperative agreements between holders of R.S. 2477 rights-of-way and Federal land managers that would govern maintenance and operation of such rights-of-way. The Department solicits comments on whether and under what circumstances such agreements might be an appropriate means of managing these rights-of-way, as well as comments on what kind of terms and conditions should be included in such agreements, if utilized.

Finally, the Department requests comments specifically on whether management standards, if developed, should be promulgated as regulations or developed by some other internal administrative means, such as an agency manual or instruction memorandum.

Dated: July 18, 1994.

George T. Frampton, Jr.,

Assistant Secretary of the Interior.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 94–18623 Filed 7–29–94; 8:45 am]

BILLING CODE 4310–84–P, 4310–55–P, 4310–70–P

federal register

Monday
August 1, 1994

Part X

Department of Education

Research in Education of Individuals With Disabilities Program; Notice

DEPARTMENT OF EDUCATION

Research in Education of Individuals With Disabilities Program; Early Education Program for Children With Disabilities; Technology, Educational Media, and Materials for Individuals With Disabilities Program; Special Studies Program; and Program for Children and Youth With Serious Emotional Disturbance

AGENCY: Department of Education.

ACTION: Notice of Proposed Priorities.

SUMMARY: The Secretary proposes priorities for five programs administered by the Office of Special Education and Rehabilitative Services (OSERS) under the Individuals With Disabilities Education Act. The Secretary may use these priorities in Fiscal Year 1995 and subsequent years. The Secretary takes this action to focus Federal assistance on identified needs to improve outcomes for children with disabilities. The proposed priorities are intended to ensure wide and effective use of program funds.

DATES: Comments must be received on or before September 30, 1994 for the Research in Education of Individuals With Disabilities Program; August 31, 1994 for the Early Education Program for Children With Disabilities; the Technology, Educational Media, and Materials for Individuals With Disabilities Program; and the Program for Children and Youth With Serious Emotional Disturbance; and October 31, 1994 for the Special Studies Program.

ADDRESSES: All comments concerning proposed priorities, except for the Early Education Program for Children With Disabilities, should be addressed to: Linda Glidewell, U.S. Department of Education, 400 Maryland Avenue, S.W., Room 3524, Switzer Building, Washington, D.C. 20202–2641. All comments concerning the Early Education Program for Children With Disabilities should be addressed to Joseph Clair, U.S. Department of Education, 400 Maryland Avenue, S.W., Room 4622, Switzer Building, Washington, D.C., 20202–2644.

FOR FURTHER INFORMATION CONTACT: The name, address, and telephone number of the person at the Department to contact for information on each specific proposed priority is listed under that priority.

SUPPLEMENTARY INFORMATION: This notice contains two proposed priorities under the Research in Education of Individuals With Disabilities Program, one proposed priority under the Early Education Program for Children With Disabilities, one proposed priority under the Technology, Educational Media, and Materials for Individuals With Disabilities Program, one proposed priority under the Special Studies Program, and one proposed priority under the Program for Children and Youth With Serious Emotional Disturbance. The purpose of each program is stated separately under the title of that program.

These proposed priorities would support the National Education Goals by improving understanding of how to enable children and youth with disabilities to reach higher levels of academic achievement.

The Secretary will announce the final priorities in a notice in the **Federal Register**. The final priorities will be determined by responses to this notice, available funds, and other considerations of the Department. Funding of particular projects depends on the availability of funds, the content of the final priorities, and the quality of the applications received. Further, priorities could be affected by enactment of legislation reauthorizing these programs. The publication of these proposed priorities does not preclude the Secretary from proposing additional priorities, nor does it limit the Secretary to funding only these priorities, subject to meeting applicable rulemaking requirements.

Note: This notice of proposed priorities does not solicit applications. Notices inviting applications under these competitions will be published in the **Federal Register** concurrent with or following publication of the notices of final priorities.

Research in Education of Individuals with Disabilities Program

Purpose of Program:

The Research in Education of Individuals with Disabilities Program is authorized by Part E of the Individuals with Disabilities Education Act (20 U.S.C. 1441–1443). The program provides support (1) to advance and improve the knowledge base and improve the practice of professionals, parents, and others providing early intervention, special education, and related services—including professionals in regular education environments—to provide children with disabilities effective instruction and enable them to successfully learn; and (2) for research and related purposes, surveys, or demonstrations relating to physical education or recreation, including therapeutic recreation, for infants, toddlers, children, and youth with disabilities.

Priorities

Under 34 CFR 75.105(c)(3) the Secretary proposes to give an absolute preference to applications that meet any one of the following priorities. The Secretary proposes to fund under these competitions only applications that meet any one of these absolute priorities:

Proposed Absolute Priority 1—Examining Alternatives for Outcome Assessment for Children with Disabilities

Background

Many students with disabilities are currently excluded from national, State, and local outcome assessments and outcomes-based accountability systems. This exclusion has the effect of weakening educational accountability, limiting educational opportunities for students with disabilities, and denying these students the potential benefits of educational reforms.

This problem is addressed in new Federal legislation, "The Goals 2000: Educate America Act." (Public Law 103–227, March 31, 1994). Section 220 of this Act supports development and evaluation of State assessments aligned with State educational standards, with a portion of the funds reserved for developing assessments for students with disabilities. Section 1015 calls for "a comprehensive study of the inclusion of children with disabilities in school reform activities assisted under * * * [the Act]." This study is to include "* * * a review of the adequacy of assessments and measures used to gauge progress towards meeting * * * [education goals and standards], and an examination of other methods or accommodations necessary or desirable to collect data on the educational progress of children with disabilities, and the costs of such methods and accommodations * * *." To support and complement such efforts, further research is needed on a variety of technical and implementation issues.

Priority

The Assistant Secretary proposes to establish an absolute priority for research projects that—

(a) Pursue systematic programs of applied research focusing on one or more issues related to outcome assessment and/or outcomes-based accountability for students with disabilities. These issues include, but are not limited to:

(1) *Testing accommodations and adaptations.* When adaptations and accommodations are made to permit students with disabilities to participate

in outcome assessments, how are the technical characteristics of the assessments affected? How can the results be interpreted? To what degree can these scores be aggregated with nonadapted assessments? What are the best methods for selecting appropriate accommodations and adaptations? How can testing accommodations be related to instructional accommodations?

(2) *Alternative assessments.* When alternative assessments (such as performance assessments or portfolio assessments) are provided for students with disabilities, how can these assessments be compared with conventional assessments? What technical criteria can appropriately be applied to these assessments when used with students with disabilities?

(3) *Development of assessments.* How can general educational assessments be developed to be more inclusive for students with disabilities? How can problematic items and item formats be identified? How can students with disabilities be adequately represented in test development and validation samples? What are the effects when tests developed for general populations are administered to students with disabilities?

(4) *Including students with disabilities in general assessments.* How should decisions be made and documented to include or exclude students with disabilities in general educational assessments or alternative assessments? What factors influence these decisions?

(5) *Standards and outcomes.* How can standards and outcomes be developed for diverse populations? How can their appropriateness be judged?

(6) *System development.* How can assessment and accountability systems be developed with the range and flexibility to accommodate diverse student populations? How can accountability and individualization both be maintained?

(7) *Basic concepts and principles.* How can basic concepts and principles in assessment be revised to reflect new approaches to assessment and new roles and challenges in outcome assessment for diverse populations?

(b) Produce and disseminate information that can be applied in educational programs, as well as in subsequent research; and

(c) Coordinate their activities, as appropriate, with the Center to Support the Achievement of World Class Outcomes for Students with Disabilities, and with other related projects funded under The Goals 2000: Educate America Act.

A project must budget for two trips annually to Washington, D.C., for (1) a two-day Research Project Directors' meeting; and (2) another meeting, to meet and collaborate with the project officer of the Office of Special Education Programs and the other projects funded under this priority, to share information and to discuss findings and methods of dissemination.

For Further Information Contact: David Malouf, U.S. Department of Education, 400 Maryland Avenue, S.W., Room 3521, Switzer Building, Washington, D.C. 20202–2641. Telephone: (202) 205–8111. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Proposed Absolute Priority 2—Studying Models That Bridge The Gap Between Research And Practice

Background

Educational research most often includes the following phases: (1) Planning and preparation; (2) information gathering; (3) analysis and interpretation; (4) reporting and dissemination; and (5) use of findings. In traditional research models, the researcher is solely or primarily responsible for all phases but the last. Using research findings is seen as a job for the practitioner. However, it has been observed that research knowledge rarely translates directly into practice.

In recent years, a variety of models have been developed to bridge the gap between research and practice by altering the roles of researchers and practitioners in the school district for one or more phases of the research. In some models (e.g., interactive research and development, teacher-researcher partnership research) researchers and practitioners collaborate in all phases of the research process. Some of these models include parents on their school-based teams. In other models, practitioners, working individually (e.g., teacher research linkers) or in groups (e.g., teacher study groups), or in pairs (e.g., peer coaching) interpret extant research to understand how to integrate research into practice. In some models, teachers conduct research (e.g., action research, collegial experimentation). To date there have been few systematic examinations of the effectiveness of these models to improve practice in special education.

Priority

The Assistant Secretary proposes to establish an absolute priority for research projects to implement and examine one or more models for using research knowledge to improve education practice and outcomes for children with disabilities.

In studying the models, projects must apply methodologies with the capacity to judge the effectiveness of the model(s) as implemented in practice settings. The projects must specify components of the knowledge utilization model selected, the supports and policies necessary to support the model, both alterable and unalterable factors affecting practice improvement, and the effect of the model to improve the school culture, teacher attitudes and practices, and student outcomes. In judging effectiveness, the projects must address improvements for researchers, practitioners, and children and youth with disabilities.

The projects must report their findings in a manner which can serve as a "blueprint" for practitioners and researchers in other school districts to implement the model using research knowledge to improve practice in special education.

A project must budget for two trips annually to Washington, DC, for (1) a two-day Research Project Directors' meeting; and (2) another meeting, to meet and collaborate with the project officer of the Office of Special Education Programs and the other projects funded under this priority, to share information and to discuss findings and methods of dissemination.

For Further Information Contact Jane Hauser, U.S. Department of Education, 400 Maryland Avenue SW., Room 3521, Switzer Building, Washington, DC 20202–2641. Telephone: (202) 205–8126. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Proposed Absolute Priority 3—Student-Initiated Research Projects

This priority provides support for short-term (up to 12 months) postsecondary student-initiated research projects focusing on special education and related services for children and youth with disabilities and early intervention services for infants and toddlers, consistent with the purposes of the program, as described in 34 CFR 324.1.

Projects must—

(1) Develop research skills in postsecondary students; and

(2) Include a principal investigator who serves as a mentor to the student/researcher while the project is carried out by the student.

Proposed Competitive Priority

Within this proposed absolute priority 3, the Secretary, under 34 CFR 75.105(c)(2)(ii), will give preference to applications that meet the following competitive priority. An application that meets this competitive priority would be selected by the Secretary over applications of comparable merit that do not meet the priority:

A project that would give a priority to providing support for postsecondary students who are members of groups that have been underrepresented in the field of special education research, such as members of racial or ethnic minority groups (e.g. Black, Hispanic, American Indian, or Alaskan Native, Asian or Pacific Islander), and individuals with disabilities.

A project must budget for a trip to Washington, DC for the annual two-day Research Project Directors' meeting.

For Further Information Contact Melville J. Appell, U.S. Department of Education, 400 Maryland Avenue SW., Room 3529, Switzer Building, Washington, DC 20202–2641. Telephone: (202) 205–8113. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Applicable Program Regulations

34 CFR Part 324.

Program Authority: 20 U.S.C. 1441–1443.

Early Education Program for Children With Disabilities

Purpose of Program

The purpose of this program is to provide Federal financial assistance (a) to address the special needs of children with disabilities, birth through age eight, and their families; and, (b) to assist State and local entities in expanding and improving programs and services for these children and their families.

Priority

Under 34 CFR 75.105(c)(3) the Secretary proposes to give an absolute preference to applications that meet the following priority. The Secretary proposes to fund under this competition only applications that meet this absolute priority:

Proposed Absolute Priority 1—Early Childhood Research Institute: Follow Through

Background

This priority supports an Early Childhood Research Institute to develop, evaluate and disseminate strategies and procedures that will move the successful practices of early intervention and preschool programs into the early elementary school grades. These successful practices include, but are not limited to, (1) family-friendly and family-focused approaches to planning and providing special education and related services, (2) extensive parent involvement in service planning and delivery, (3) integrated and coordinated delivery of services when multiple services are necessary, (4) multi-disciplinary input into service planning and delivery, (5) developmentally appropriate services delivered in ungraded/mixed-age and mixed ability group settings, and (6) a pro-active approach to service planning and delivery in which services (e.g., team teaching, assistive technology applications, use of paraprofessionals) are integrated and concentrated to ensure that as many children with disabilities as possible successfully acquire critical skills taught in the primary grades (e.g., beginning literacy, social skills) that are crucial to children's progress and adjustment in school.

The Institute's research, development and evaluation activities must (1) identify administrative, attitudinal, and programmatic barriers to establishing these successful practices in kindergarten through grade three (or equivalent) for children with disabilities and their families; (2) develop and evaluate strategies and procedures that are designed to overcome these barriers, such as strategies parents can use to maintain their involvement once their child reaches school age, and strategies school personnel can use to encourage and facilitate continued parent involvement; and (3) identify effective ways to disseminate the findings and products of the Institute so that successful practices, or combinations of practices, can be adopted easily by school systems.

The Secretary anticipates funding one cooperative agreement with a project period of up to 60 months subject to the requirements of 34 CFR 75.253(a) for continuation awards. In determining whether to continue the Institute for the fourth and fifth years of the project period, the Secretary, in addition to applying the requirements of 34 CFR 75.253(a), considers the recommendation of a review team consisting of three experts selected by the Secretary. The services of the review team, including a two-day visit to the project, are to be performed during the last half of the Institute's second year and may be included in that year's evaluation required under 34 CFR 75.590.

Priority: The Early Childhood Research Institute considered for funding under this priority must—

(a) Conduct a program of research that addresses the issues identified above.

(b) Identify specific strategies and procedures that will be investigated.

(c) Carry out the research within a conceptual framework, based on previous research or theory, that provides a basis for the strategies and procedures to be studied, the research methods and instrumentation that will be used, and the specific target populations and settings that will be studied.

(d) Collect, analyze, and report a variety of descriptive and outcome data, including (1) specific information on the settings, the service providers, the children and families targeted by the Institute (e.g., age, disability, level of functioning and membership in a special population, if appropriate); (2) multiple, functional outcome data for the children and families who are the focus of the strategies and procedures; and (3) multiple outcome data for the teachers, administrators, and other school staff involved in the research.

(e) Conduct the research in typical school settings, including settings that are, or will be, implementing different combinations of the successful practices.

(f) Conduct the research using methodological procedures that are designed to produce unambiguous findings regarding the effects of the strategies and procedures, as well as any findings on interaction effects between particular strategies or procedures and particular characteristics of participants or settings. These findings will be rendered through appropriate sample selection and adequate sample size to permit use of the findings in policy analyses.

(g) Design all activities in a manner that is likely to lead to improved services for children with disabilities and their families, including those who are members of cultural, linguistic, or racial minority groups.

(h) Develop, field test, and disseminate a variety of products that can be used for training and technical assistance activities with policy makers, administrators, school board members, parents, and service providers and that

are likely to facilitate the implementation of the successful practices in early elementary school settings.

(i) Coordinate research and dissemination activities with other relevant efforts sponsored by the U.S. Department of Education, including other research institutes, technical assistance entities, and information clearinghouses.

(j) Provide research training and experience for at least 10 graduate students annually.

In determining whether to continue the Institute for the fourth and fifth years of the project period, in addition to considering factors in 34 CFR 75.253(a), the Secretary considers the following:

(a) The timeliness and effectiveness with which all requirements of the negotiated cooperative agreement have been or are being met by the Institute.

(b) The degree to which the Institute's research designs and methodological procedures demonstrate the potential for producing significant new knowledge and products.

In order to apply for funding for years four and five, the Institute must set aside in its budget for the second year, funds to cover costs associated with the services to be performed by the review team appointed by the Secretary to evaluate the project in the second year. These funds are estimated to be approximately $4,000.

For Further Information Contact: Gail Houle, U.S. Department of Education, 400 Maryland Avenue, S.W., Room 4613, Switzer Building, Washington, D.C., 20202–2644. Telephone (202) 205–9045. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at (202) 205–8169.

Program Authority: 20 U.S.C. 1423.

Technology, Educational Media, and Materials for Individuals With Disabilities Program

Purpose of Program

The purpose of this program is to support projects and centers for advancing the availability, quality, use, and effectiveness of technology, educational media, and materials in the education of children and youth with disabilities and the provision of early intervention services to infants and toddlers with disabilities. In creating Part G of the Individuals with Disabilities Education Act, Congress expressed the intent that the projects and centers funded under that part should be primarily for the purpose of enhancing research and development advances and efforts being undertaken by the public or private sector, and to provide necessary linkages to make more efficient and effective the flow from research and development to application.

Priority

Under 34 CFR 75.105(c)(3) the Secretary proposes to give an absolute preference to applications that meet the following priority. The Secretary proposes to fund under this competition only applications that meet this absolute priority:

Proposed Absolute Priority 1—Collaborative Research on Technology, Media, and Materials for Children and Youth With Disabilities

Background

In 1993 an agenda was developed for the Technology, Educational Media, and Materials for Individuals with Disabilities Program which set forth four program commitments. These four commitments were derived from broad-based input from the field, and together they represent the means by which the Office of Special Education Programs intends to advance the use of technology, media, and materials with students with disabilities. They are:

(1) *Enable the Learner Across Environments.* This means fostering instructional environments, both in and out of school, that use technology, educational media, and materials to enable students with disabilities to access knowledge, develop skills and problem-solving strategies, and engage in educational experiences necessary for their success as adults.

(2) *Promote Effective Policy.* This means policymaking at all levels in government, schools, and business to ensure accessibility, availability, effective application, and consistent use of appropriate technology, media, and materials.

(3) *Foster Use Through Professional Development.* This means training and supporting teachers, administrators, parents, and related service personnel on the benefits of instructional and assistive technologies so that they can increase productive use of instructional time, prepare students with disabilities for employment and citizenship, and promote their intellectual, ethical, cultural, emotional, and physical growth.

(4) *Create Innovative Tools.* This means encouraging development of varied and integrated technologies, media, and materials which open up and expand the lives of those with disabilities.

However, research is needed on how these interrelated commitments can be applied in the complex reality of educational practice. This priority addresses that need by supporting collaborative research, which means research based on a partnership between researchers and practitioners in which both are actively involved in all phases of the research—initial planning and design, collection of information or data, analysis of information or data, and reporting and dissemination. This research strategy is intended to produce methodologically sound research information that is relevant and applicable to practice and reduces the gap between research and practice.

Priority

The Assistant Secretary proposes to establish an absolute priority for collaborative research projects that—

(a) Formulate a research topic and design based on commitments (1), (2), and (3), as described above, as they relate to improving education and/or related services at the local level for students with disabilities. This priority is not intended to support projects that are primarily engaged in product development; thus, commitment (4) may be included only as a supporting activity. In formulating the research topic, projects must develop a focus in terms of curriculum areas, grade/age levels, disabilities, types of services provided, and/or specific types of technology, media and materials. In formulating the research design, projects must apply the standards for conducting rigorous social science research. The following research topics are offered as illustrative examples and do not represent the full range of possible topics. These examples are broad, and projects may opt for more narrow focuses. However, projects must address all three program commitments—either as background, contextual factors, or as components of interventions or manipulations.

Example 1: Research on how local policies in schools and other agencies restrict or facilitate the acquisition and use of assistive devices, and how professional development within the context of these policies can yield improved assistive technology services to better enable students to access school, home, and community environments.

Example 2: Research on how local policies regarding curriculum and accountability can be revised to promote interdisciplinary professional collaboration in the effective use of technology, media and materials to enable students with disabilities to

acquire high-level problem-solving strategies.

Example 3: Research on how policies and professional practices may contribute to inequitable access and use of technology, media and materials for some students with disabilities, and how the inequities can be reduced by means of policy and/or professional interventions to better enable students with disabilities to engage in beneficial educational experiences.

(b) Conduct a program of collaborative research on the research topic.

(c) Measure the effects of the intervention and relationships within and across the program commitments (1, 2, and 3).

(d) Disseminate information on the findings of the collaborative research in a form conducive to use by other schools or service providers, as well as other researchers.

(e) Coordinate their activities, as appropriate, with recipients of grants under the Technology-Related Assistance for Individuals with Disabilities Act (Pub. L. 100–407 as amended by Pub. L. 103–218).

A project must budget for two trips annually to Washington, DC, for (1) a two-day Research Project Directors' meeting; and (2) another meeting, to meet and collaborate with the project officer of the Office of Special Education Programs and the other projects funded under this priority, to share information and to discuss findings and joint methods of dissemination.

For Further Information Contact: Ellen Schiller, U.S. Department of Education, 400 Maryland Avenue SW., Room 3523 , Switzer Building, Washington, DC 20202–2641. Telephone: (202) 205–8123. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Applicable Program Regulations: 34 CFR Part 333.

Program Authority: 20 U.S.C. 1461.

Special Studies Program

Purpose of Program

To support studies to evaluate the impact of the Individuals with Disabilities Education Act (IDEA), including efforts to provide a free appropriate public education to children and youth with disabilities, and early intervention services to infants and toddlers with disabilities.

Priority

Under 34 CFR 75.105(c)(3) the Secretary proposes to give an absolute preference to applications that meet the following priority. The Secretary proposes to fund under this competition only applications that meet this absolute priority:

Proposed Absolute Priority 1—Center to Support the Achievement of World Class Outcomes for Students With Disabilities

Background

The enactment of the Goals 2000: Educate America Act (Public Law 103–227, March 31, 1994) will stimulate standards-based assessment and reform in schools across the Nation. Most States already conduct assessments of student achievement. However, surveys of States conducted by the Office of Special Education Programs (OSEP) funded National Center for Educational Outcomes (NCEO) have revealed that most States exclude large numbers of students with disabilities from assessments. Typically, no accommodations have been provided to enable students with disabilities to participate. In many States no policies or guidelines exist to facilitate or encourage participation of students with disabilities. NCEO has also observed that the development of national and State content standards often do not explicitly consider the needs of student with disabilities.

The new Federal law requires that students with disabilities be included in the Goals 2000 reform efforts. Because so few students with disabilities are currently included in assessments, States will need considerable assistance to permit these students to participate. States will need help developing accommodations for assessments and for designing policies to cover the implementation of these accommodations. States will also need assistance analyzing and reporting results of these assessments. In addition, it is essential to document the progress of the States in including students with disabilities in assessments and other reform initiatives.

Priority

The Assistant Secretary proposes to establish an absolute priority for a center to assist States in implementing activities to improve outcomes for students with disabilities and to assist in the implementation of the requirements of Goals 2000 for students with disabilities, and to document States' efforts in doing so.

The Center must—

(a) Work with Regional Resource Centers (RCCs), other technical assistance providers, and directly with States;

(b) Develop and facilitate the use of appropriate accommodations and adaptations of assessments in the States for students with disabilities and advance and support the use of outcome related data for these students;

(c) Document the extent to which students with disabilities are included in State activities;

(d) Provide assistance in analyzing and reporting outcome data for students with disabilities;

(e) Work with the Department to develop and report national level data on the status of outcomes for students with disabilities and the degree to which these students are achieving the National Education Goals;

(f) Synthesize and report on technical advances in the accommodation and participation of students with disabilities in State activities, especially those related to Goals 2000, and ensure that States are assisted in using such advances;

(g) Work with researchers and developers who are conducting related work and facilitate the exchange of information among such projects, including projects funded under the priority "Examining Alternatives for Outcome Assessment for Children with Disabilities", and projects funded under Goals 2000 authority;

(h) Assist States and the Department to ensure that standards-setting and assessment processes and documents, as well as any other Goals 2000 related activities, include the perspectives of the disability community; and

(i) Conduct periodic examinations of the status of standards-setting activities at the State and national level.

The center must budget for two trips annually to Washington, DC, for (1) a two-day Research Project Directors' meeting; and (2) another meeting, to meet with the project officer of the Office of Special Education Programs to plan and review project activities and progress.

For Further Information Contact: David Malouf, U.S. Department of Education, 400 Maryland Avenue SW., Room 3521, Switzer Building, Washington, DC 20202–2641. Telephone: (202) 205–8111. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Proposed Absolute Priority 2—Longitudinal Study of the Impact of Early Intervention Services on Infants and Toddlers With Disabilities

Background

As Part H of the Individuals with Disabilities Education Act moves into full implementation, there is a critical need to discern the immediate and long-term effects of this program on children, families, and service providers. Although federally mandated data collection activities provide some information on the ages of infants and toddlers served by the program and on the services received and their settings, little is known on a national basis about the developmental and behavioral characteristics of children served by the program. Moreover, a national systematic evaluation of the impact of the Part H program on children, families and other stakeholders within the context of child development is clearly lacking.

Priority

The Assistant Secretary proposes to establish an absolute priority for a project to design and conduct a five-year longitudinal study of infants and toddlers served under Part H. The project must assess the effects of the program over a five-year period, and include an evaluation of the Part H program impact on children, families and service providers. The study design must consider the interaction of program variables with variables related to childhood development. The project must conduct analyses that:

(1) Compare and evaluate different patterns of child development related to long-term outcomes;

(2) Assess the effects of socioeconomic, demographic and health-related variables on long-term developmental and behavioral characteristics of the children;

(3) Isolate and explain the long-term effects of intervention;

(4) Incorporate factors related to medical variables (e.g., psychological, physiological, and anatomical structure or function), personal functioning variables, and the interaction of the environment with these variables that could result in a disadvantage limiting or preventing the fulfillment of an age-appropriate role;

(5) Incorporate family variables, including family background and the need for service; and

(6) Provide information on services, service-providers, and the appropriateness of particular service settings.

The project must budget for three trips annually to Washington, D.C., for (1) a two-day Research Project Directors' meeting; and (2) an additional two meetings, to meet and collaborate with the project officer of the Office of Special Education Programs (OSEP), and with other relevant OSEP funded projects. The project must also coordinate activities with the ongoing Policy Research Institute funded by OSEP.

For Further Information Contact: Scott Brown, U.S. Department of Education, 400 Maryland Avenue, S.W., Room 3522, Switzer Building, Washington, D.C. 20202–2641. Telephone: (202) 205–8117. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Applicable Program Regulations: 34 CFR Part 327.

Program Authority: 20 U.S.C. 1418.

Program for Children and Youth With Serious Emotional Disturbance

Purpose of Program

This program supports projects designed to improve special education and related services to children and youth with serious emotional disturbance. Types of projects that may be supported under the program include, but are not limited to, research, development, and demonstration projects. Funds may also be used to develop and demonstrate approaches to assist and prevent children with emotional and behavioral problems from developing serious emotional disturbance.

Priority

Under 34 CFR 75.105(c)(3) the Secretary proposes to give an absolute preference to applications that meet the following priority. The Secretary proposes to fund under this competition only applications that meet this absolute priority:

Proposed Absolute Priority 1—Nondiscriminatory, Culturally-Competent, Collaborative Demonstration Models to Improve Services for Students with Serious Emotional Disturbance and Prevention Services for Students with Emotional and Behavioral Problems

Background

The rates of identification, placement, and achievement of children and youth with emotional and behavioral problems vary across racial, cultural, gender, and socioeconomic dimensions. For example, African-American students are most likely to be identified as students with serious emotional disturbance (SED). African-Americans comprise 16 percent of public school enrollment, but represent 22 percent of all students identified with SED (based on data from the 1990 OCR survey of school districts), and 25 percent of secondary students with SED (based on data from OSEP National Longitudinal Transition Study). Rates of SED identification for African-American students vary greatly across States but, on average, States with the lowest overall African-American enrollment have the highest SED incidence rates for those students and, conversely, States with the highest overall African-American enrollment have the lowest average rate of SED classification for these students (based on data from the 1990 OCR survey of school districts). These data suggest that African-American students may be over-represented in SED programs in some States, and underserved in others, and that some of these differences may be related to varying levels of familiarity with African-American culture.

Diversity must be acknowledged and valued, and both prevention and SED service delivery systems must be culturally-competent. Cultural competencies represent the interpersonal skills and attitudes that enable individuals to increase their understanding and appreciation of the rich and fluid nature of culture and of differences and similarities within, among, and between cultures and individuals.

Culturally-competent approaches recognize the cultural origins of teachers' and service providers' views, behaviors, and methods. These approaches also recognize the power of language and attend to the communicative styles of students and their families. Culturally-competent approaches address culturally- based definitions of family and networks. They view family and community as critical parts of a student's support system. Such approaches also demonstrate a willingness and ability to draw on community-based values, traditions, customs, and resources. Assessment, pre-referral, and preventive approaches that are culturally-competent and linguistically appropriate recognize and nurture the strengths—individual and cultural—that students bring to school.

There is a need to improve the capacity of individuals and systems to respond skillfully, respectfully, and effectively to students, families, teachers, and other providers in a manner that recognizes, affirms, and

values their worth and dignity. To accomplish this, collaboration must be fostered—among families, professionals, students, and communities—to identify and provide culturally-competent services for students with SED and prevention services that address the needs of children and youth with emotional and behavioral problems.

Priority

The Assistant Secretary proposes to establish an absolute priority for 3-year demonstration projects that develop, implement, evaluate, and disseminate nondiscriminatory, culturally-competent, collaborative practices to prevent children with emotional and behavioral problems from developing SED, and to improve special education and related services for ethnic and cultural minority students, in the least restrictive environment. The projects must establish local, community-based assessment, planning, prevention, and intervention teams that involve participation from education, mental health, juvenile justice agencies, other appropriate community service agencies, and organizations representing families. The first stage of each project must consist of the development and refinement of working agreements between the various community agencies and organizations, to identify approaches that improve the capacity of individuals and systems to respond skillfully, respectfully, and effectively to students, families, teachers, and other providers in a manner that recognizes, affirms, and values their worth and dignity.

The first stage planning must include the collaborative consideration and development, by all participating groups, of nondiscriminatory, culturally-competent techniques that enhance the fairness and effectiveness of key service delivery elements, including but not necessarily limited to assessment, education, training, transition planning, and the provision of related services. The second stage of each project must consist of the implementation and evaluation of the services delivered, across service providers, followed by dissemination of the results.

A project must budget for two trips annually to Washington, D.C., for (1) a two-day Research Project Directors' meeting; and (2) another meeting, to meet and collaborate with the OSEP project officer and the other projects funded under this priority, to share information and to discuss findings and methods of dissemination.

For Further Information Contact: Tom V. Hanley, U.S. Department of Education, Switzer Building, Room 3526, 400 Maryland Avenue, S.W., Washington, D.C. 20202–2640. Telephone: (202) 205–8110. Individuals who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Intergovernmental Review

The Technology, Educational Media, and Materials for Individuals with Disabilities Program and the Program for Children and Youth with Serious Emotional Disturbance are subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding these proposed priorities.

All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in Room 3524, 300 C Street, S.W., Washington, D.C., between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week except Federal holidays.

(Catalog of Federal Domestic Assistance Numbers: Research in Education of Individuals with Disabilities Program, 84.023; Early Education Program for Children with Disabilities, 84.024; Technology, Educational Media, and Materials for Individuals with Disabilities Program, 84.180; Special Studies Program, 84.159; and Program for Children and Youth with Serious Emotional Disturbance, 84.237)

Dated: July 27, 1994.

Howard R. Moses,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 94–18619 Filed 7–29–94; 8:45 am]

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Monday
August 1, 1994

Part XI

Department of Education

Federal Pell Grant Program; Notice

DEPARTMENT OF EDUCATION

Federal Pell Grant Program

AGENCY: Department of Education.

ACTION: Notice; deadline dates for receipt of applications, reports, and other documents for the 1994–95 award year.

SUMMARY: The Secretary announces the deadline dates for receiving documents from persons applying for financial assistance under, and from institutions participating in, the Federal Pell Grant Program during the 1994–95 award year.

SUPPLEMENTARY INFORMATION: The Federal Pell Grant Program provides grants to students attending eligible institutions of higher education to help them pay for their educational costs. The program supports Goals 2000, the President's strategy for moving the Nation toward the National Education Goals, by enhancing opportunities for postsecondary education. The National Education Goals call for increasing the rate at which students graduate from high school and pursue high quality postsecondary education and for supporting life-long learning. Authority for the Federal Pell Grant Program is contained in section 401 of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1070a. Regulations that govern the Federal Pell Grant Program are codified in 34 CFR part 690 and 34 CFR part 668.

The Pell Grant Program includes a three-step application process. Under the first step, the student must submit an application to have his or her expected family contribution (EFC) determined. The student may submit a paper application, or, if the institution he or she attends or will attend participates in the Department of Education's Electronic Data Exchange (EDE), the student may submit an electronic application. Under EDE, using software provided by the Department of Education (Department) or a needs analysis servicer, an institution electronically transmits the student's application data to the Department's Federal Student Aid Central Processing System (central processor). The institution may enter the application data, or the institution may have the student enter that data.

In the second step, the central processor determines a student's EFC based upon the information provided in a paper or electronic application and forwards the results to the student, either directly (if the student applied using a paper application) or through the institution (if the student applied electronically). The central processor may also forward the results to the student's institution, even if the student gets the information directly.

As a result of submitting a paper application, the student receives a Student Aid Report (SAR), and any institution designated by the student may draw down a student's data in the form of an electronic SAR (ESAR) if the institution participates in EDE. An ESAR or SAR contains the student's EFC and the information on which that EFC was based. If application data was submitted electronically under EDE, the student will not receive an SAR, but the institution may draw down an ESAR.

The central processor may also transmit, to the institution that a student indicates he or she is attending or will attend, an institutional student information report (ISIR) that includes the student's EFC and the information on which that EFC was based. An ISIR is a paper document or an institutional paper printout from a computer-generated magnetic or electronic record.

Under the third step, a student must submit a valid SAR to the institution or sign a valid ESAR or ISIR. A valid SAR, ESAR, or ISIR is one on which all the information used to calculate the student's EFC is accurate and complete. For an ESAR or ISIR to be valid, the student must sign it. If corrections are made to an ESAR or ISIR and the student is married, the student's spouse must sign the corrected document. If corrections are made to an ESAR or ISIR and the student is a dependent student, one of his or her parents must sign the corrected document. However, for a student to receive his or her Federal Pell Grant using a valid ISIR, the institution he or she attends must report its Federal Pell Grant payment data to the Department by floppy disk, magnetic tape, or electronically under EDE. (Part IV of this notice describes the disbursement reporting requirements.)

I. Applications for Determination of Expected Family Contribution—Table I

Under the first application step described above, if a student uses a paper original or renewal application, he or she must submit an approved application to an agency listed in Table I of this notice, at the address indicated in Table I. That application must be *received* at that address no later than May 1, 1995. A paper application may not be hand-delivered.

An approved application is an application listed in the first column of Table I. Moreover, the student must send the application to the address of the organization whose application is being used. Thus, the Free Application for Federal Student Aid (FASFA) printed and distributed by the Department must be sent to the FAFSA processor in Iowa City, Iowa, forms printed and distributed by the American College Testing Program (ACT) must be sent to ACT, forms printed and distributed by the College Scholarship Service (CSS) must be sent to CSS, and forms printed and distributed by the Pennsylvania Higher Education Assistance Agency (PHEAA) must be sent to PHEAA.

If a student submits an electronic application under EDE, that application must be received by the Department's central processor prior to midnight (Central Daylight Savings Time) on May 1, 1995. (For purposes of this notice, this deadline means that a student has all of May 1, 1995, to apply.)

For the balance of this notice, the first application submitted by or on behalf of a student shall be called an "original application."

Applications of Students Receiving "Dependency Overrides"

Under section 480(d)(7) of the HEA, a financial aid administrator (FAA) may determine that a student qualifies as an "independent student" as a result of unusual circumstances even though the student does not qualify as an independent student under the other criteria in section 480(d). This determination, using what is known as "professional judgment," results in a "dependency override."

If an FAA makes a dependency override with regard to a student, the student must submit an original application, a Correction Application, renewal application, or correction to his or her SAR to the Federal Student Aid Programs after that document has been specially coded for the dependency override and signed by the FAA. If the student attends an institution that participates in EDE, the institution may electronically transmit to the central processor an original application, renewal application, Correction Application, or corrected SAR or ESAR information coded for the dependency override.

If a student has not submitted an original application, the deadline date for the submission of a Correction Application for a dependency override or any other reason is May 1, 1995. If the student has submitted an original or renewal application, the deadline date for the submission of a Correction Application is August 1, 1995. (For purposes of this notice, this deadline means that a student has all of August 1, 1995, to apply.) Applications submitted electronically must be received by the central processor prior

to midnight (Central Daylight Savings Time) on the applicable deadline date.

(Approved by the Office of Management and Budget under OMB Control Number Application: 1840–0110)

II. Other Documents—Table I

Once a student has filed his or her original or renewal application, additional transactions may occur as a result of that application. In some cases, the agency receiving the original or renewal application may request additional information. In other cases, the student is responsible for initiating a request to the agency to consider additional or alternative information.

Table I of this notice lists the addresses to which additional forms and information, known as transactions, must be sent and the deadline dates for the receipt of those transactions.

The following explains each type of transaction:

A. Correction Application

In addition to using a Correction Application for a "dependency override," the Secretary provides a Correction Application to a student if the student's original application lacks sufficient information to be processed or contains inaccurate information. The student must include on the Correction Application all the information necessary to process that application.

If a student has misreported his or her dependency status or if that status has changed after the student submitted an original application for reasons other than a change in marital status, the student may submit a Correction Application with the correct dependency status. A student may also report a dependency status change using part 2 of a SAR for the 1994–95 award year.

A Correction Application may be obtained (1) from an FAA or an Educational Opportunity Center counselor, (2) by writing to the addresses listed in Table I, (3) by writing to Federal Student Aid Information Center, P.O. Box 84, Washington, DC, 20044, or (4) by calling (800) 4 FED AID. The Correction Application must be returned to one of the addressees listed in Table I and received at that address no later than August 1, 1995, unless the Correction Application is submitted as an original application, in which case it must be received by May 1, 1995. A Correction Application submitted electronically under EDE through the electronic application process must be received by the central processor prior to midnight (Central Daylight Savings Time) on August 1, 1995, unless the Correction Application is submitted as an original application, in which case the correction application must be received prior to midnight (Central Daylight Savings Time) on May 1, 1995.

B. SAR and ISIR

• Correction or Verification of Information Requested by the Secretary—If the Secretary returns an SAR to a student for correction or notifies an institution through an ISIR that a student needs to correct application information, the student must correct that information on the SAR. The student must return the SAR to the appropriate address listed in Table I, and that corrected SAR must be received at the appropriate address no later than August 1, 1995. If the student attends an institution that participates in EDE, the corrected SAR may be transmitted electronically to the central processor. That SAR must be received by the central processor prior to midnight (Central Daylight Savings Time) on August 1, 1995.

If the Secretary returns an SAR to a student for verification of certain data items included on the application or notifies an institution through an ISIR that a student needs to verify application information, the student must verify the information. The student verifies the information on the SAR, and returns the SAR in the same manner as described for required corrections. This request for verification is separate and apart from the verification requirements contained in 34 CFR Part 668, Subpart E.

• Correction of Inaccurate Information—If an SAR or an ISIR reflects information that was inaccurate when the application was signed, the student must correct that information on the SAR and send the SAR to the appropriate address listed in Table I or submit the change electronically. The SAR must be received at that address no later than August 1, 1995.

• If the student attends an institution that participates in EDE, the corrected information may be transmitted electronically to the central processor. That SAR must be received by the central processor prior to midnight (Central Daylight Savings Time) on August 1, 1995.

• Recomputation of EFC—A student may request on his or her SAR that the Secretary recompute his or her EFC if the student believes the EFC is inaccurate because of an arithmetic or clerical error. The student must return the SAR to the appropriate address listed in Table I, and that SAR must be received at the appropriate address no later than August 1, 1995. If the student attends an institution that participates in EDE, the request for a recomputation may be transmitted electronically to the central processor. That SAR must be received by the central processor prior to midnight (Central Daylight Savings Time) on August 1, 1995.

• Request for Duplicate SAR—If a student wishes to receive a duplicate SAR, the student may write to the appropriate agency's address listed in Table I or call the appropriate agency's telephone number listed in Table I. All written and telephone requests must be received no later than August 1, 1995. A written request sent to the appropriate agency (listed in Table I) must be received through a U.S. Postal facility by August 1, 1995. Individuals at the agencies listed in Table I are not authorized to personally accept hand-delivered documents.

Note—Although corrections and requests for a duplicate SAR will be processed through August 1, 1995, this deadline date does not extend the deadline date by which a student must submit to the institution's financial aid office his or her valid SAR, valid ESAR, or valid ISIR with an EFC that permits the student to receive a Federal Pell Grant. If the student does not submit such a valid SAR, valid ESAR, or valid ISIR to the financial aid office by his or her last date of enrollment or June 30, 1995, whichever is earlier, he or she will be ineligible for a Federal Pell Grant award for the 1994–95 award year.

III. Verification Procedures and Deadline Dates Under 34 CFR 668 Subpart E

The information provided on an application and included on an SAR, ESAR, or ISIR may be subject to verification under verification procedures contained in 34 CFR part 668, Subpart E. In that case, in order to receive a Federal Pell Grant award for the 1994–95 award year, the student—and his or her parents, if applicable—must submit the necessary verification documents in accordance with the following procedures and by the deadline dates specified below. These dates do not conflict with or supersede the deadline dates specified in Table I of this notice.

A. Verification of Information on Application

If a student is selected to have the information on his or her application verified under the verification procedures set forth in Subpart E of the Student Assistance General Provisions regulations (34 CFR part 668, Subpart E), he or she must submit the requested documents as specified below in steps 1–4. The deadline date for the completion of these steps is the earlier

of 60 days after the student's last date of enrollment for a student who leaves school because of graduation, completion of an academic term, or withdrawal; or August 30, 1995. A student who will still be enrolled in a course of study in the 1994–95 award year after August 30, 1995, must submit the requested documents by August 30, 1995. (Documents that are hand-delivered must be received by the institution by the close of business on August 30, 1995. Documents sent by mail must be postmarked or demonstrate other comparable proof of mailing by August 30, 1995.)

This process is complete when the student has:

(1) Submitted all requested verification documents to his or her institution;

(2) Made all necessary corrections on (a) Part 2 of the SAR, (b) an ESAR, (c) a correction application, or (d) an EDE Correction Application;

(3) Either (a) signed the corrected Part 2 of the SAR or completed and signed a paper Correction Application and submitted it to the appropriate address indicated in Table I so that the addressee receives the form prior to midnight (Central Daylight Savings Time) on August 1, 1995; or (b) signed and submitted the corrected ESAR or electronic Correction Application to the institution so that the institution can transmit the data to the central processor (for those institutions participating in EDE) prior to midnight (Central Daylight Savings Time) on August 1, 1995; and

(4) By August 30, 1995, submitted to the institution the corrected and reprocessed SAR, ESAR, or ISIR that, if required, is appropriately signed (34 CFR 668.60).

B. Application Forms and Information

Student aid application forms, Correction Applications, and information brochures may be obtained at an institution's financial aid office, at an Educational Opportunity Center, or by writing or calling: Federal Student Aid Information Center, P.O. Box 84, Washington, DC 20044. Telephone: (800) 4 FED AID.

Table I

Deadline Date for Receipt of Original Application Forms for Determining Expected Family Contributions: May 1, 1995. Deadline Date for receipt of Correction Application Forms other than an original Correction Application Form, Applications other than originals, and Other Documents: August 1, 1995.

Type of form	For information about	Contact Federal Student Aid Programs
Free Application for Federal Student Aid (FAFSA) printed and distributed by ED.	English/Spanish/Correction Application request.	Box 84, Washington, DC 20044. (800) 4 FED AID. TTY (800) 730–8913.
	English Application submission	C/o Federal Student Aid Programs: P.O. Box 4016, Iowa City, IA 52243.
	Renewal Application submission	P.O. Box 4053, Iowa City, IA 52243.
	Spanish Application submission	P.O. Box 4046, Iowa City, IA 52243.
	Correction Application submission	P.O. Box 4045, Iowa City, IA 52243.
	SAR corrections	P.O. Box 4049, Iowa City, IA 52243.
	Duplicate requests/address changes	P.O. Box 4050, Iowa City, IA 52243.
	All other correspondence/inquiries	P.O. Box 84, Washington, DC 20044, (800) 4 FED AID.
Federal Electronic Application, Correction application, or Renewal Application of the Electronic Data Exchange.	Application, correction application, or renewal application request, electronic corrections, electronic duplicate requests, and other inquiries.	Contact institution's financial aid office to find out if it participates in the electronic application of EDE.
		Electronically submitted by the institution to the central processor via General Electronic Support computer network.
	Diskette and tape submission	C/o National Computer Systems—Electronic Application, Box 30, Iowa City, IA 52244, (319) 339–6642.
Free Application for Federal Student Aid (printed, distributed, and processed by ACT).	Application Requests and other inquiries	American College Testing, P.O. Box 1002, Iowa City, IA 52243.
	Application submission	Federal Student Aid Programs, P.O. Box 4054, Iowa City, IA 52243.
	Renewal Application submission	P.O. Box 4052, Iowa City, IA 52243.
	Correction application submission	P.O. Box 4019, Iowa City, IA 52243.
	SAR corrections	P.O. Box 4018, Iowa City, IA 52243.
	Duplicate request and address changes	P.O. Box 4017, Iowa City, IA 52243.
Free Application for Federal Student Aid (printed, distributed, and processed by CSS).	Application requests and other inquiries	C/o College Scholarship Service: P.O. Box 6327, Princeton, NJ 08541–6327, (609) 771–7725, TDD (609) 883–7051.
	Application submission	Federal Student Aid Programs, P.O. Box 7381, London, KY 40742–7381.
	Renewal Application submission	P.O. Box 7383, London, KY 40742–7383.
	Correction Application submission	Federal Student Aid Programs, P.O. Box 7382, London, KY 40742–7382.
	SAR corrections	Federal Student Aid Programs: P.O. Box 7384, London, KY 40742–7384.
	Duplicate Request and Address Changes	Federal Student Aid Programs, P.O. Box 7385, London, KY 40742–7385.
Free Application for Federal Student Aid (printed, distributed, and processed by PHEAA).	Application request and other inquiries	C/o Pennsylvania Higher Education Assistance Agency (PHEAA): Grant Division, 1200 North 7th Street, Harrisburg, PA 17102, 800–692–7435 (PA only), Out of state—(717) 257–2800.

Type of form	For information about	Contact Federal Student Aid Programs
	Application and correction submission application.	P.O. Box 8173, Harrisburg, PA 17105–8173.
	Renewal Application submission	P.O. Box 8174, Harrisburg, PA 17105.
	SAR corrections/duplicate requests/address changes.	P.O. Box 8135, Harrisburg, PA 17105–8135.

IV. Submissions to the Secretary of Institutional Payment Summary and Student Aid Reports (Part 3 Payment Vouchers)

Each institution that participates in the Federal Pell Grant Program is required by 34 CFR 690.83(b) to submit to the Secretary reports and information in connection with the Federal Pell Grant funds the Department makes available to the institution for payment to students during an award year. One of the required reports is the Institutional Payment Summary (IPS). The IPS accompanies an institution's submission of Federal Pell Grant Payment Vouchers and summarizes the information contained on the individual Payment Vouchers.

The Secretary provides a paper IPS form to the institution for completion and return to the Department.

The institution may also meet this reporting requirement by submitting the IPS and Payment Voucher information to the Department on a floppy disk, on a magnetic tape, or by an electronic transmission through a modem from a personal computer, minicomputer, or mainframe computer. These submissions are referred to, respectively, as the Federal Pell Grant Program Floppy Disk Data Exchange, the Federal Pell Grant Program Recipient Data Exchange (RDE), and Electronic Payments service under EDE. An institution that wishes to use one of these automated reporting methods must enter into a written agreement with the Department and must agree to (1) comply with the Department's prescribed manner of formatting and presenting the submitted information, (2) restrict access to the records from which the IPS and Payment Voucher information is derived, and (3) ensure that only authorized officials or agents of the institution may enter the data sent in the IPS submission to the Department.

The Department credits an institution's Federal Pell Grant account on the basis of acceptable Federal Pell Grant payment data submitted through the system described in this notice. Such information must be submitted to the Department in a timely, certified, and acceptable form. A submission is *timely* if received by the Department by the deadlines prescribed in Tables II and III in Part IV.C. of this notice; *certified* if its accuracy is attested to by the institution in the manner described in Part IV.D. of this notice; and *acceptable* if submitted in accordance with the directions provided by the Department for the particular medium of submission used by the institution.

Failure to meet these reporting requirements may result in administrative action by the Department under Subpart G of 34 CFR part 668 under which the Department may fine the institution or limit or terminate its participation in the Federal Pell Grant Program. In addition, failure to report accurately a student's award amount by the reporting deadline may render the student ineligible for all or part of his or her Federal Pell Grant payment.

A. Data and Records To Be Submitted

In each IPS submission, the institution must submit:

(1) On the IPS form, or in the IPS record format, information described in Section II of the IPS, including the number and amount of each Federal Pell Grant award adjustment that the institution made, and the institution's total payments to all Federal Pell Grant recipients for the award year up to the date of the submission; and

(2) An SAR Payment Voucher (Part 3 of the SAR), or its equivalent as defined by the Secretary, that discloses—

(i) Any new Federal Pell Grant recipients identified by the institution during the reporting period for which the IPS is submitted; or

(ii) Any change in enrollment status, cost of attendance, or other event that occurred during either the reporting period for which the IPS is submitted or the reporting period immediately preceding that reporting period, if that event causes a change in the amount of the Federal Pell Grant that a student has received or qualifies to receive for the award year.

The institution may submit the IPS without SAR Payment Vouchers (or the equivalent) if (1) the institution had no Federal Pell Grant recipients in attendance or identified no new Federal Pell Grant recipients during the reporting period for which the IPS is submitted and (2) did not identify any changes to the awards of previously reported recipients during the reporting period immediately preceding the period for which the IPS is submitted. If an institution that submits IPS information under RDE exercises this option, it must use the paper IPS document. If an institution that submits IPS information via a floppy disk or electronic transmission exercises this option, it may use its usual submission medium or the paper IPS document.

(Approved by the Office of Management and Budget under OMB Control Numbers 1840–0132 (SAR) and 1840–0540 (IPS))

B. Addresses for Delivery

The institution must submit the IPS and any accompanying SAR Payment Vouchers, or the floppy disk or the RDF magnetic tape containing this information, as follows: If by regular mail: U.S. Department of Education, Pell Grant Systems Division, PSS, P.O. Box 10800, Herndon, Virginia 22070–7009. If delivered by a courier other than the U.S. Postal Service: U.S. Department of Education, Pell Grant Systems Division, PSS, c/o PRC, ATTN: G35 PGRFMS/DMS, 1500 PRC Drive, McLean, Virginia 22102–5050.

C. Frequency and Schedules for IPS Submissions

An institution must make an IPS submission or its equivalent at least once *during* each of the reporting periods established in Tables II and III. The table that is applicable to a particular institution depends on the amount of the institution's 1993–94 award year Federal Pell Grant authorization. An institution may make IPS submissions more frequently, up to but not exceeding 98 times during the entire reporting cycle (July 1, 1994 through September 30, 1995). For purposes of complying with the reporting requirements of Part IV.A. of this notice, an institution must ensure that the IPS and SAR Payment Vouchers (or their equivalent) are received by the Department no later than the applicable closing date for each reporting period as specified in the appropriate table below. Proof of mailing, such as a date on a U.S. Postal Service postmark, is not considered confirmation of receipt by the Department. If an institution submits the IPS and SAR Payment Voucher information electronically, the

transmission must be *received* at the Department's central processor prior to midnight (Central Time or, if applicable, Central Daylight Savings Time) of the applicable closing date for the reporting periods indicated in Tables II and III.

TABLE II.—INSTITUTIONS WITH A 1993–94 AWARD YEAR PELL GRANT AUTHORIZATION OF AT LEAST $750,000

Reporting periods	Closing date for receipt
July 1, 1994 through Oct. 15, 1994.	Oct. 15, 1994.
Oct. 16, 1994 through Dec. 15, 1994	Dec. 15, 1994.
Dec. 16, 1994 through Feb. 15, 1995.	Feb. 15, 1995.
Feb. 16, 1995 through Apr. 15, 1995.	Apr. 15, 1995.
Apr. 16, 1995 through June 15, 1995.	June 15, 1995.
June 16, 1995 through Aug. 15, 1995.	Aug. 15, 1995.

TABLE III.—INSTITUTIONS WITH A 1993–94 PELL GRANT AUTHORIZATION OF LESS THAN $750,000

Reporting periods	Closing date for receipt
July 1, 1994 through Dec. 15, 1994.	Dec. 15, 1994.
Dec. 16, 1994 through Apr. 15, 1995.	Apr. 15, 1995.
Apr. 16, 1995 through Aug. 15, 1995.	Aug. 15, 1995.

If any closing date for receipt falls on a Saturday, Sunday, or Federal holiday, submissions received on the next Federal business day will be considered as being submitted on time.

D. Certification of Accuracy

Institutions participating in the Federal Pell Grant Program must certify the accuracy of the data with each IPS submission. An institution submitting an IPS form certifies the accuracy of the data by including on the form an original signature by the official of the institution accountable for the accuracy of the data submitted. An institution submitting IPS information by floppy disk or electronic transmission certifies the accuracy of the data by including in that transmission a code or signature flag prescribed by the Department for that certification. By including the prescribed code or signature flag, an institution certifies that the *submitted data* has been provided from a file or record to which only officials with appropriate security clearance have access and that the data contained in the submission are accurate. In the case of an institution submitting IPS information by magnetic tape, the institution signs the tape transmittal form assuring the accuracy of the data.

V. Annual Deadline for Submission of SAR Payment Vouchers and Requests for Adjustments of Federal Pell Grant Accounts

An institution obtains an adjustment to its Federal Pell Grant account, and the amount of Federal Pell Grant funds for which it is accountable, by submitting supporting SAR Payment Vouchers, or their equivalent, under the procedures described in this notice and the reporting system described in the regulations. An institution is required by 34 CFR 690.83(a) to submit all SAR Payment Vouchers for an award year by a specified date following that award year; for 1994–95 that date is September 30, 1995. An institution, therefore, must submit any Payment Vouchers not previously submitted during the required reporting periods established in this notice by September 30, 1995 to receive an adjustment to its Federal Pell Grant account on the basis of these Payment Vouchers.

Except as provided in Part V. B. of this notice, after September 30, 1995, the Secretary closes the institution's Federal Pell Grant account for the 1994–95 award year. The institution's account is closed on the basis of the information reported by the institution in its submissions of IPS and supporting SAR Payment Voucher information (or the equivalent) through September 30, 1995, and the data reported on the Federal Cash Transaction Report (PMS 272A). The final IPS information submitted by the institution must accurately report the institution's total payments to all Federal Pell Grant recipients for the 1994–95 award year (IPS Item 15 or its equivalent).

A. Timely Delivery for Final Submissions of SAR Payment Vouchers and Requests for Adjustments of Federal Pell Grant Accounts: Proof of Delivery

The Department may require an institution to prove that it mailed or otherwise submitted its IPS and SAR Payment Vouchers (or the equivalent) by the September 30, 1995 deadline date. The Department accepts as proof, if the documents were submitted by mail or by non-U.S. Postal Service courier, one of the following:

(1) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(2) A legibly-dated U.S. Postal Service postmark.

(**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method of proof of mailing, an institution should check with the post office at which it mails its submission. An institution is strongly encouraged to use First Class Mail.)

(3) A dated shipping label, invoice, or receipt from a commercial courier.

(4) Other proof of mailing or delivery acceptable to the Secretary.

The Department accepts hand deliveries at the address stated in Part IV.B. between 8 a.m. and 4:30 p.m. Eastern Time on days other than Saturday, Sunday, or Federal holidays.

An institution that transmits IPS and SAR Payment Voucher information via the EDE Electronic Payments service must ensure that its transmission is completed before midnight (local time) on September 30, 1995.

B. Postdeadline Adjustments to Federal Pell Grant Accounts

In accordance with § 690.83(a), § 690.83(c), and § 690.83 (e), the Secretary permits a post-September 30, 1995 adjustment to the Federal Pell Grant account of an institution for the 1994–95 award year or any prior award year in the following circumstances:

(1) *Underpayment of previously reported awards.* An institution may receive a payment or credit for the full amount of an award made to a student if—

(i) The institution submitted in a timely manner an SAR Payment Voucher or its equivalent for a student in accordance with the requirements of this notice and § 690.83(a);

(ii) The institution did not submit in a timely manner or in an acceptable form an SAR Payment Voucher necessary to document the full amount of the award for which that student was eligible;

(iii) The underpayment for that award is or would be at least $100; and

(iv) A program review or an audit report produced in accordance with the standards prescribed in 34 CFR 668.23(c) demonstrates to the satisfaction of the Secretary that the student was eligible to receive an amount greater than that reported on the SAR Payment Voucher submitted in a timely fashion to, and accepted by, the Department.

(2) *Decreasing previously reported awards.* An institution must report a reduction in a student's Federal Pell Grant award (1) if the institution determines that the student's Federal Pell Grant award amount, as reported on either the Student Payment Summary that the Department provides to the institution or any subsequent

adjustment to the student's award amount on file with the Department, is greater than the amount the student actually received; or (2) if the institution determines that a student was not qualified for the amount reported on either the Student Payment Summary or any subsequent adjustment to the student's award amount on file with the Department. The institution should not make such a report, however, for an overaward for which it is not liable under § 690.79(a) unless the student never received the funds or has repaid all or a portion of the overaward. If a student is repaying an overaward for which the institution is not liable on an installment plan, the institution may report periodically the amount repaid. The institution does NOT submit such postdeadline award reduction data through SAR Payment Vouchers (or their equivalents). The institution reports postdeadline reductions through a letter or report sent to the address stated in Part IV.B.

(3) The Secretary, in addition, makes adjustments where the institution satisfactorily demonstrates that its failure to submit Payment Vouchers on a timely basis and have them accepted by the Department was caused by a processing or administrative error made by the Department or one of its contractors, or was due to unusual circumstances beyond the control of the institution.

(4) If an institution demonstrates to the satisfaction of the Secretary that the institution has provided Federal Pell Grants but has not received credit or payment for those grants, the institution may receive payment or a reduction in accountability for those grants. In accordance with § 690.83(e), the institution shall demonstrate that it qualifies for a credit or payment by means of a finding contained in an audit submitted in accordance with 34 CFR part 668.23(c).

The Secretary adjusts an institution's Federal Pell Grant account on the basis of student award data submissions made after September 30 following the award year only in these specified circumstances. Thus, if an institution submits SAR Payment Vouchers (or their equivalents) for the 1994–95 award year to the Department after the September 30, 1995 deadline, the institution will not receive additional Federal Pell Grant funds from the Department unless the institution can demonstrate to the satisfaction of the Secretary that one of the prescribed conditions exists. The institution also will be liable for Federal Pell Grant funds that were used to pay grants that were not reported in a timely manner.

If an institution made Federal Pell Grant overpayments for which it is liable under § 690.79(a) of the Federal Pell Grant program regulations, the Secretary will subtract from any funds the institution may be entitled to receive under the first exception described in Part V-B of this notice the amount of the institution's unpaid liability.

If an institution believes that an adjustment is warranted on the basis of the above-described conditions, it should contact the Pell Grant Financial Management Division at (202) 708–9807. If the institution seeks administrative relief on the basis of an administrative error by the Department or its contractors, the institution's request must provide a complete description of all relevant facts, including each student's identifying data and full Federal Pell Grant payment history. The request must be received by the Department no later than January 31, 1996. The request must be delivered to: U.S. Department of Education, Pell Grant Systems Division, PSS, P.O. Box 23791, Washington, DC 20026–0791.

C. Request for Duplicate Payment Vouchers or Related Information

To receive a duplicate Payment Voucher, Processed Payment Voucher, or processed payment data, an institution must contact the Federal Pell Grant Program by fax at (202) 708–9700 or by mail to: U.S. Department of Education, Pell Grant Systems Division, PSS, P.O. Box 23791, Washington, DC 20026–0791.

To receive a duplicate Payment Voucher for a student, an institution must include with its request a photocopy of either Part 1 or Part 2 of that student's SAR or a photocopy of that student's ESAR or ISIR. All requests must be received no later than August 1, 1995.

Applicable Regulations

The regulations applicable to this program are the Federal Pell Grant Program regulations in 34 CFR part 690 and the Student Assistance General Provisions regulations in 34 CFR part 668.

FOR FURTHER INFORMATION CONTACT: Michael Oliver, Program Specialist, Pell and State Grants Section, Grants Branch, Policy Development Division, Policy, Training, and Analysis Service, Office of Postsecondary Education, U.S. Department of Education, 400 Maryland Avenue S.W. (ROB–3, Room 4018), Washington, DC 20202–5447. Telephone: (202) 708–4607. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Authority: (20 U.S.C. 1070a).

(Catalog of Federal Domestic Assistance No. 84.063, Federal Pell Grant Program)

Dated: July 26, 1994.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

[FR Doc. 94–18617 Filed 7–29–94; 8:45 am]

BILLING CODE 4000–01–P

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38875–39246

CFR PARTS AFFECTED DURING AUGUST

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws.**

Last List July 27, 1994

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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Title	Stock Number	Price	Revision Date
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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200-599	(869-019-00201-4)	21.00	Oct. 1, 1993
600-End	(869-019-00202-2)	22.00	Oct. 1, 1993
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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.

[5] No amendments to this volume were promulgated during the period July 1, 1991 to June 30, 1993. The CFR volume issued July 1, 1991, should be retained.

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August 4	August 19	September 6	September 19	October 3	November 2
August 5	August 22	September 6	September 19	October 4	November 3
August 8	August 23	September 7	September 22	October 7	November 7
August 9	August 24	September 8	September 23	October 11	November 7
August 10	August 25	September 9	September 26	October 11	November 8
August 11	August 26	September 12	September 26	October 11	November 9
August 12	August 29	September 12	September 26	October 11	November 10
August 15	August 30	September 14	September 29	October 14	November 14
August 16	August 31	September 15	September 30	October 17	November 14
August 17	September 1	September 16	October 3	October 17	November 15
August 18	September 2	September 19	October 3	October 17	November 16
August 19	September 6	September 19	October 3	October 18	November 17
August 22	September 6	September 21	October 6	October 21	November 21
August 23	September 7	September 22	October 7	October 24	November 21
August 24	September 8	September 23	October 11	October 24	November 22
August 25	September 9	September 26	October 11	October 24	November 23
August 26	September 12	September 26	October 11	October 25	November 25
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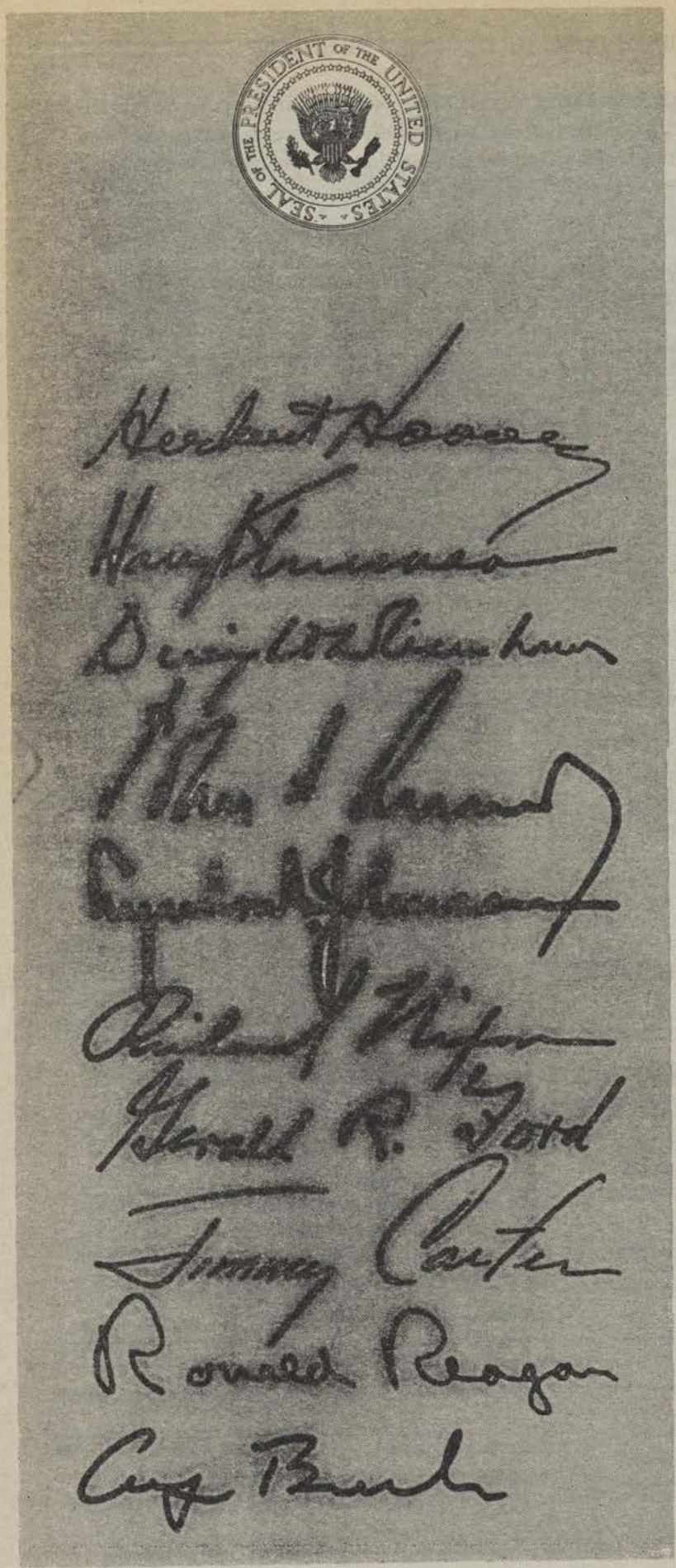

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