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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 905

[Docket No. FV93-905-5FIR]

Oranges, Grapefruit, Tangerines, and Tangelos Grown in Florida; Finalize Revised Special Purpose Shipment Exemption Provisions for Organic Citrus Fruit

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting as a final rule, without change, the provisions of an interim final rule to redefine the term "Special Purpose Shipper" to mean those persons who handle citrus fruit which is certified as organically grown under Florida law, and requires such persons to certify that they will limit shipments of such fruit to outlets handling organically grown fruit. This final rule more precisely defines organically grown Florida citrus fruit, and is designed to increase the market for organic shipments. The rule was unanimously recommended by the Citrus Administrative Committee (committee), the agency responsible for local administration of the marketing order.

EFFECTIVE DATE: September 26, 1994.

FOR FURTHER INFORMATION CONTACT: Caroline C. Thorpe, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523-S, Washington, DC 20090-6456; telephone: 202-720-5127; or William G. Pimental, Southeast Marketing Field Office, USDA/AMS, P.O. Box 2276, Winter Haven, Florida 33883; telephone: 813-299-4770.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement No. 87 and Marketing Order No. 905 [7 CFR Part 905] regulating the handling of oranges, grapefruit, tangerines, and tangelos grown in Florida, hereinafter referred to as the order. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C 601-674], hereinafter referred to as the Act.

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

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

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

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

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

There are about 100 Florida citrus handlers subject to regulation under the marketing order covering oranges, grapefruit, tangerines, and tangelos grown in Florida, and about 11,000 growers of these citrus fruits in Florida.

Small agricultural service firms have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $5,000,000, and small agricultural growers are defined as those whose annual receipts are less than $500,000. A minority of these handlers and a majority of the growers may be classified as small entities.

An interim final rule was issued on May 18, 1994, and published in the **Federal Register** [59 FR 26927, May 25, 1994], with an effective date of May 25, 1994. That rule amended §§ 905.146, 905.147, and 905.148 of the rules and regulations in effect under the order. That rule provided a 30-day comment period which ended June 24, 1994. One comment was received.

Mr. Joseph B. Procacci, Assistant Chairman, National Association of Perishable Agricultural Receivers, filed a comment in support of the revisions. He supports the revision in the regulation's definition of Special Purpose Shippers to include Florida's new certification process of organic producers. He stated it is crucial in preserving the integrity of the organic citrus industry. He also expressed support for the regulation's requirement that such shippers also certify that they will limit organic shipments to organic outlets.

The order for Florida citrus provides for the establishment of minimum grade and size requirements. The minimum grade and size requirements are designed to provide fresh markets with fruit of acceptable quality, thereby maintaining consumer confidence for fresh Florida citrus. This helps create buyer confidence and contributes to stable marketing conditions. This is in the interest of producers, packers, and consumers, and is designed to increase returns to Florida citrus growers.

The cultural practices of producers of organically grown citrus differ from normal industry practices. Because of these differences, organically grown fruit is usually required to meet a different grade standard under the marketing order. This grade standard pertains only to the external characteristics of the fruit, not the internal quality.

The different grade standard is needed to facilitate the marketing of organic citrus. There are indications that organically grown citrus, from a marketing standpoint, are a different commodity than conventionally grown citrus. Organic citrus generally has higher external damage. Organic fruit for the most part is marketed differently, is not mixed with non-organic fruit, appeals only to certain consumers, and is in many respects, a specialized commodity.

The interim final rule also more precisely defined organic fruit, and the type of market outlets which organically grown fruit could be sold in, free from certain requirements imposed under the order. These changes were unanimously recommended by the committee at its November 16, 1993, meeting.

Sections 905.146, 905.147, and 905.148 of the regulations provide terms and conditions under which shippers may ship organically grown Florida citrus fruit, as Special Purpose Shippers, with a conditional release from certain grade requirements issued under § 905.52 of the order.

When the provisions concerning special purpose shipments were made effective in 1978, there were no laws governing organic fruit and vegetable growers in Florida. A "Special Purpose Shipper" was defined under the marketing order as one who had certified that they would handle only citrus fruit which they knew from their own personal knowledge was produced on trees on which only compost, non-acidulated fertilizer such as rock phosphate, dolomite, or ground limestone is used, and to which no chemical insecticide or fungicide had been applied. However, the State of Florida now requires all organically grown fruits and vegetables to be certified. Accordingly, the committee has recommended redefining the term "Special Purpose Shipper" in § 905.146 to mean a person who handles Florida citrus fruit that is certified by a Florida Department of Agriculture and Consumer Services licensed certifying agent as organically grown under Florida law. This definition reflects that organic fruit has been certified under Florida law, and also provides additional assurance that shippers claiming organic status and utilizing the grade standards for organic fruit qualify to do so.

Under Florida law, the Florida Department of Agriculture and Consumer Services licenses independent third parties to act as certifying agents. Growers who intend to sell organic fruit make an application to a certifying agent. The certifying agent inspects and certifies a grower's acreage as being in accordance with Florida law and issues the grower a certificate. The certificate number is transferred to a trip ticket which accompanies any shipments of fruit grown on the certified acreage. When the handler receives the shipment, a copy of the trip ticket is provided to the state inspector indicating that the fruit is certified organic and can be packed using the applicable organic grade standards.

The committee also recommended that § 905.146 be revised to require Special Purpose Shippers to certify that they will limit their shipments of organically grown citrus fruit to outlets handling organically grown fruits. The interim final rule replaced the requirement that only outlets registered and approved by the committee could receive such fruit and ended the requirement that receivers of special purpose shipments complete the applicable sections of the Report of Special Purpose Shipments form.

The language in §§ 905.146, 905.147, 905.148 concerning Certificates of Privilege is being revised for clarity, and procedural safeguards are being added to § 905.147(c) dealing with suspensions or denials of Certificates of Privilege.

This rule reflects the committee's and the Department's appraisal of the need to finalize the revised exemption provisions for special purpose shipments, as specified. The Department's view is that this rule may have a beneficial impact on growers and shippers of organic citrus fruit.

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

In accordance with the Paperwork Reduction Act of 1980 [44 U.S.C. chapter 35], the information collection requirements that are contained in this rule have been previously approved by the Office of Management and Budget (OMB) and have been assigned OMB number 0581–0094. This action will reduce the reporting burden on approximately 95 receivers of special purpose shipments of Florida citrus completing a section of the Report of Special Purpose Shipments form, taking about .04 hour to complete each report.

After consideration of all relevant material presented, including the Committee's recommendation, and other available information, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** [59 FR 26927, May 25, 1994] will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 905

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

For the reasons set forth in the preamble, 7 CFR Part 905 is amended as follows:

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

Accordingly, the interim final rule amending 7 CFR Part 905 which was published at FR 59 26927, on May 25, 1994, is adopted as a final rule without change.

Dated: August 22, 1994.

Eric M. Forman,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 94–21085 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–02–P

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7 CFR Parts 907, 908, and 910

[Docket No. FV94–907–2]

Termination of Provisions of Marketing Orders 907, 908, and 910; Navel and Valencia Oranges Grown in Arizona and Designated Parts of California; Lemons Grown in California and Arizona

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Termination order.

SUMMARY: This document terminates the Federal marketing orders regulating the handling of navel and Valencia oranges grown in Arizona and designated parts of California and lemons grown in California and Arizona. The Secretary of Agriculture has found that these marketing orders no longer tend to effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937. In a press release issued on May 16, 1994, the Department of Agriculture announced the intention to terminate the orders for California-Arizona navel oranges, Valencia oranges, and lemons, noting the division and turmoil in the industry and that the programs are not functioning as they should.

EFFECTIVE DATE: August 26, 1994.

FOR FURTHER INFORMATION CONTACT: Christian Nissen, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2522–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 720–5127; or Maureen Pello, California Marketing Field Office, Marketing Order Administration Branch, F&V, AMS, USDA, 2202 Monterey Street, Suite

102B, Fresno, California 93721; telephone: (209) 487–5901.

SUPPLEMENTARY INFORMATION: This action is governed by the provisions of section 608c(16)(A) of the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the "Act."

Marketing Order Nos. 907 and 908 [7 CFR Parts 907 and 908], as amended, regulate the handling of navel and Valencia oranges grown in Arizona and designated parts of California. Marketing Order No. 910 [7 CFR Part 910], as amended, regulates the handling of lemons grown in California and Arizona.

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12868.

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

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

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

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

There are approximately 140 handlers of navel oranges, 125 handlers of Valencia oranges, and 70 handlers of lemons who were subject to regulation under the respective marketing orders and there are approximately 3,750 producers of navel oranges, 3,700 producers of Valencia oranges, and 2,000 producers of lemons in the regulated areas. Small agricultural service firms have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those whose annual receipts are less than $500,000. The majority of handlers and producers of California-Arizona navel oranges, Valencia oranges, and lemons may be classified as small entities.

Marketing Order No. 907 has been in effect since 1953, Marketing Order No. 908 since 1954, and Marketing Order No. 910 since 1958. When order authorities were utilized, the orders provided for the establishment of weekly volume regulation and size requirements. In addition, the marketing orders authorized marketing research and development and provided for reporting and recordkeeping requirements for affected handlers.

This action terminates the provisions of the marketing orders regulating the handling of navel and Valencia oranges grown in Arizona and designated parts of California and lemons grown in California and Arizona.

On May 16, 1994, the Deputy Secretary announced in a press release that it was the Department's intention to terminate the marketing orders for California-Arizona navel oranges, Valencia oranges, and lemons. The decision noted the division and turmoil in the industry surrounding the California-Arizona citrus orders. The press release stated that there is a clear indication that the programs are not working as they should.

The California-Arizona citrus orders have been marked by industry divisiveness and widespread order violations. In an effort to reach a satisfactory resolution of industry differences, the Secretary suspended the weekly volume regulation provisions of the orange orders on June 18, 1993, and invited the industry to submit proposed amendments to the orders that could achieve the program objectives. After a year, serious differences remain, with no apparent consensus among the industry. Instead, the orders themselves are contributing to the divisiveness in the industry and are working to the detriment of growers, packers, and consumers.

Therefore, based on the above considerations, pursuant to section 8c(16)(A) of the Act and § 907.83, § 908.83, and § 910.84 of the respective marketing orders, it is found that 7 CFR Parts 907, 908, and 910 no longer tend to effectuate the declared policy of the Act, and they are hereby terminated.

Section 8c(16)(A) of the Act requires the Secretary to notify Congress 60 days in advance of the termination of a Federal marketing order. Congress was so notified on May 16, 1994, and the termination of Marketing Orders Nos. 907, 908, and 910 shall become effective on August 26, 1994.

Based on the unanimous recommendations of the Navel Orange Administrative Committee (NOAC), the Valencia Orange Administrative Committee (VOAC), and the Lemon Administrative Committee (LAC), the Secretary has determined that Alvin Freisen (VOAC chairperson), and all five members of the joint executive committee for the NOAC and the VOAC, will serve as trustees for the NOAC and the VOAC and that all six members of the executive committee of the LAC (including alternates) will serve as trustees for the LAC in order to oversee the administrative affairs of the respective orders.

The trustees will be responsible for completing the orders' unfinished business, including ensuring termination of all outstanding agreements and contracts, and the payment of all obligations. The trustees will be responsible for safeguarding program assets, holding committee records, and arranging for a financial audit to be conducted. All such actions by the trustees are subject to the approval of the Secretary. Those designated as trustees for the NOAC and VOAC are Ms. Darlene V. Ohnemus (VOAC and NOAC member), Mr. Robert O. Bream (NOAC member), Mr. Christopher R. Frame (NOAC chairperson), Mr. William E. Slattery (VOAC member), Mr. David R. Giller (VOAC member), and Mr. Alvin Friesen (VOAC chairperson). Those designated as trustees for the LAC are Mr. Solon J. Boydston (LAC member), Ms. Darlene V. Ohnemus (LAC member), Mr. David R. Giller (LAC member), Mr. Alvin Friesen (LAC member), Mr. Charles R. Bell (LAC member), and Mr. Christopher R. Frame (LAC member). The trustees shall continue in their capacity until discharged by the Secretary.

The remainder of the reserves, after immediate expenses are paid, will be held by the trustees to be used to cover

unforeseen, outstanding expenses obligated by the committees.

It is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice or to engage in further public procedure prior to putting this action into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication because: (1) Growers and handlers are aware of this action since notice was given to Congress and the termination was announced in a press release issued by the Secretary on May 16, 1994; (2) this action relieves restrictions on handlers by terminating the requirements of the marketing orders regulating the handling of California-Arizona navel oranges, Valencia oranges, and lemons; and (3) no useful purpose would be served by delaying this action.

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

List of Subjects

7 CFR Parts 907 and 908

Marketing agreements, Oranges, Reporting and recordkeeping requirements.

7 CFR Part 910

Lemons, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, under the authority of 7 U.S.C. 601–674, 7 CFR Parts 907, 908, and 910 are amended as follows:

PART 907—[REMOVED]

1. Part 907—Navel Oranges Grown in Arizona and Designated Part of California is removed.

PART 908—[REMOVED]

2. Part 908—Valencia Oranges Grown in Arizona and Designated Part of California is removed.

PART 910—[REMOVED]

3. Part 910—Lemons Grown in California and Arizona is removed.

Dated: August 22, 1994.

Patricia Jensen,

Acting Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 94–21079 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–02–P

7 CFR Part 926

[Docket No. FV94–926–1FIR]

Tokay Grapes Grown in San Joaquin County, CA; Expenses and Assessment Rate for 1994–95 Fiscal Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting as a final rule, without changes, the provisions of the interim final rule which authorized expenses and established an assessment rate for the Tokay Grape Industry Committee (Committee) under Marketing Order No. 926 for the 1994–95 fiscal year. Authorization of this budget enables the Committee to incur expenses that are reasonable and necessary to administer this program. Funds to administer this program are derived from assessments on handlers.

EFFECTIVE DATE: April 1, 1994, through March 31, 1995.

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

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 926 [7 CFR Part 926] regulating the handling of Tokay grapes grown in San Joaquin County, California. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the Act.

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

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order provisions now in effect, Tokay grapes grown in California are subject to assessments. It is intended that the assessment rate specified herein will be applicable to all assessable Tokay grapes handled during the 1994–95 fiscal year, beginning April 1, 1994, through March 31, 1995. This final rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

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

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

There are approximately 3 handlers of Tokay grapes regulated under the marketing order each season and approximately 15 Tokay grape producers in San Joaquin County, California. Small agricultural producers have been defined by the Small Business Administration [13 CFR § 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000. The majority of these handlers and producers may be classified as small entities.

The Tokay grape marketing order, administered by the Department, requires that the assessment rate for a particular fiscal year apply to all assessable grapes handled from the beginning of such year. Annual budgets of expenses are prepared by the Committee, the agency responsible for local administration of this marketing order, and submitted to the Department for approval. The members of the

Committee are grape handlers and producers. They are familiar with the Committee's needs and with the costs for goods, services, and personnel in their local area, and are thus in a position to formulate appropriate budgets. The Committee's budget is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

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

The Committee met on April 29, 1994, and unanimously recommended total expenditures of $5,150 with an assessment rate of $0.07 per carton for the 1994–95 fiscal year. In comparison, the expenditure amount and the assessment rate are remaining unchanged from the 1993–94 fiscal year.

Funds in the reserve at the end of the 1994–95 fiscal year, estimated at $4,500, will be within the maximum permitted by the order of one fiscal year's expenses.

An interim final rule was published in the **Federal Register** [59 FR 30872, June 16, 1994] and provided a 30-day comment period for interested persons. No comments were received.

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

It is found that the specified expenses for the marketing order covered in this rule are reasonable and likely to be incurred and that such expenses and the specified assessment rate to cover such expenses will tend to effectuate the declared policy of the Act.

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** [5 U.S.C. 553] because the Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis. The 1994–95 fiscal year for the program began April 1, 1994. The marketing order requires that the rate of assessment apply to all assessable grapes handled during the fiscal year. In addition, handlers are aware of this action which was recommended by the Committee at a public meeting and published in the **Federal Register** as an interim final rule. No comments were received concerning the interim final rule that is adopted in this action as a final rule without change.

List of Subjects in 7 CFR Part 926

Grapes, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 926 is amended as follows:

PART 926—TOKAY GRAPES GROWN IN SAN JOAQUIN COUNTY, CA

Accordingly, the interim final rule amending 7 CFR Part 926 which was published at 59 FR 30872 on June 16, 1994, is adopted as a final rule without change.

Dated: August 22, 1994.

Eric M. Forman,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 94–21092 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–02–P

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7 CFR Part 927

[Docket No. FV94–927–1IFR]

Expenses and Assessment Rate for the 1994–95 Fiscal Year; Winter Pears Grown in Oregon, Washington, and California

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule authorizes expenses and establishes an assessment rate for the Winter Pear Control Committee (Committee) under Marketing Order No. 927 for the 1994–95 fiscal year. Authorization of this budget enables the Committee to incur expenses that are reasonable and necessary to administer the program. Funds to administer the program are derived from assessments on handlers.

DATES: Effective beginning July 1, 1994, through June 30, 1995. Comments received by September 26, 1994, will be considered prior to issuance of a final rule.

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

FOR FURTHER INFORMATION CONTACT: Britthany E. Beadle, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2523–S, Washington, D.C. 20090–6456, telephone: (202) 720–5127; or Teresa L. Hutchinson, Northwest Marketing Field Office, Fruit and Vegetable Division, AMS, Green-Wyatt Federal Building, Room 369, Portland, Oregon, telephone: (503) 326–2724.

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

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

This interim final rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order provisions now in effect, winter pears grown in Oregon, Washington, and California are subject to assessments. It is intended that the assessment rate specified herein will be applicable to all assessable pears handled during the 1994–95 fiscal year, which began July 1, 1994, and ends June 30, 1995. This interim final rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an

inhabitant, or has his or her principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after date of the entry of the ruling.

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

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

There are approximately 90 handlers of winter pears regulated under the marketing order each season and approximately 1,850 winter pear producers in Oregon, Washington, and California. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000. The majority of these handlers and producers may be classified as small entities.

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

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

The Committee met on June 3, 1994, and unanimously recommended total expenses of $6,835,926 for the 1994–95 fiscal year. In comparison, the 1993–94 fiscal year expense amount was $6,933,615, which is $97,689 more than the amount recommended for the current fiscal year.

The Committee also unanimously recommended an assessment rate of $0.43 per standard box, or equivalent for winter pears. The Committee did not recommend a supplemental assessment rate for Anjou variety pears this fiscal year. In comparison, the 1993–94 winter pear assessment rate was $0.45 per standard box, or equivalent and $0.04 for the supplemental assessment rate on Anjou variety pears. This represents a $0.02 decrease in the assessment rate recommended for this fiscal year.

This rate, when applied to anticipated winter pear shipments of 13,817,000 boxes or equivalent, will yield a total of $5,941,310 in assessment income. Assessment income, along with $401,324 from other income sources, and $493,292 from the Committee's authorized reserve, will be adequate to cover budgeted expenses. The $493,292 withdrawal of funds from the Committee's authorized reserve will result in no reserve remaining at the end of the 1994–95 fiscal period.

Major expense categories for the 1994–95 fiscal year include $5,572,500 for advertising, $276,340 for SOPP data research, $276,340 for winter pear improvement, $142,310 for salaries and benefits, and $612,442 for unshared contingency.

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

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

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) The Committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (2) the fiscal year for the Committee began July 1, 1994, and the marketing order requires that the rate of assessment for the fiscal year apply to all assessable winter pears handled during the fiscal year; (3) handlers are aware of this action which was recommended by the Committee at public meetings and which is similar to budgets issued in past years; and (4) this interim final rule provides a 30-day comment period, and all comments timely received will be considered prior to finalization of this action.

List of Subjects in 7 CFR Part 927

Marketing agreements and orders, Pears, Reporting and recordkeeping requirements.

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

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

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

Authority: 7 U.S.C. 601–674.

2. A new § 927.234 is added to read as follows:

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

§ 927.234 Expenses and assessment.

Expenses of $6,835,926 by the Winter Pear Control Committee are authorized and an assessment rate of $0.43 per standard box, or equivalent, on assessable winter pears is established for the fiscal year ending June 30, 1995. Unexpended funds may be carried over as a reserve.

Dated: August 22, 1994.

Eric M. Forman,

Acting Director, Fruit and Vegetable Division.

[FR Doc. 94–21091 Filed 8–25–94; 8:45 am]

BILLING CODE 3410-02-P

7 CFR Part 929

[Docket No. FV94-929-2IFR]

Expenses and Assessment Rate for the 1994-95 Fiscal Year for the Marketing Order Covering Cranberries Grown in States of Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final authorizes expenses and establishes an assessment rate for the Cranberry Marketing Committee (Committee) under Marketing Order No. 929 for the 1994-95 fiscal year. Authorization of this budget enables the Committee to incur expenses that are reasonable and necessary to administer the program. Funds to administer this program are derived from assessments on handlers.

DATES: Effective beginning September 1, 1994, through August 31, 1995. Comments received by September 26, 1994, will be considered prior to issuance of a final rule.

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

FOR FURTHER INFORMATION CONTACT: Britthany Beadle or Mark Hessel, Marketing Order Administration Branch, F&V, AMS, USDA, P.O. Box 96456, Room 2523-S, Washington, DC 20090-6456; telephone: (202) 720-5127.

SUPPLEMENTARY INFORMATION: This interim final rule is issued under Marketing Agreement and Order No. 929 [7 CFR Part 929], as amended, regulating the handling of cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York, hereinafter referred to as the "order". The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601-674], hereinafter referred to as the "Act".

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

This interim final rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the marketing order provisions now in effect, cranberries grown in 10 states are subject to assessments. It is intended that the assessment rate as issued herein will be applicable to all assessable cranberries during the 1994-95 fiscal year beginning September 1, 1994, through August 31, 1995. This interim final rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

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

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

There are approximately 30 handlers of cranberries grown in Massachusetts, Rhode Island, Connecticut, New Jersey, Wisconsin, Michigan, Minnesota, Oregon, Washington, and Long Island in the State of New York who are subject to regulation under the cranberry marketing order and approximately 1,050 producers of cranberries in the regulated area. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000. The majority of cranberry producers and handlers may be classified as small entities.

The cranberry marketing order, administered by the Department, requires that the assessment rate for a particular fiscal year apply to all assessable cranberries handled from the beginning of such year. The budget of expenses for the 1994-95 fiscal year was prepared by the Committee, the agency responsible for local administration of this marketing order, and submitted to the Department for approval. The members of the Committee are producers of cranberries. They are familiar with the Committee's needs and with the costs for goods, services, and personnel in their local area and are thus in a position to formulate an appropriate budget.

The assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of cranberries. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the Committee's expected expenses. The recommended budget and rate of assessment are usually acted upon by the Committee shortly before a season starts, and expenses are incurred on a continuous basis. Therefore, the budget and assessment rate approval must be expedited so that the Committee will have funds to pay its expenses.

The Committee conducted a mail vote and unanimously recommended 1994-95 marketing order expenses of $164,690 and an assessment rate of $0.03 per 100-pound barrel of cranberries. In comparison, 1993-94 budgeted expenses were $155,000, with an approved assessment rate of $0.03 per 100-pound barrel of cranberries. This represents an increase of $9,690 in expenses recommended for this fiscal year, with the assessment rate remaining unchanged.

Assessment income for 1994-95 is estimated to total $122,580 based on anticipated fresh domestic shipments of 4,086,000 barrels of cranberries. The assessment income, plus $3,750 in interest income and a withdrawal of $38,360 from the Committee's authorized reserve fund will be adequate to cover budgeted expenses. Funds in the reserve at the end of the 1994-95 fiscal year are estimated to be $150,000. The reserve fund will be

within the maximum permitted by the order of one fiscal year's expenses.

Major expense categories for the 1994–95 fiscal year include $70,110 for operating expenses, $40,500 for travel expenses, and $33,241 for administrative expenses.

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

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

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) The committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis; (2) the 1994–95 fiscal year begins September 1, 1994, and the marketing order requires that the rate of assessment for the fiscal year apply to all assessable cranberries handled during the fiscal year; and (3) this interim final rule provides a 30-day comment period, and all comments timely received will be considered prior to finalization of this action.

List of Subjects in 7 CFR Part 929

Cranberries, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 929 continues to read as follows:

PART 929—CRANBERRIES GROWN IN STATES OF MASSACHUSETTS, RHODE ISLAND, CONNECTICUT, NEW JERSEY, WISCONSIN, MICHIGAN, MINNESOTA, OREGON, WASHINGTON, AND LONG ISLAND IN THE STATE OF NEW YORK

1. The authority citation for 7 CFR Part 929 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. A new § 929.234 is added to read as follows:

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

§ 929.234 Expenses and assessment rate.

Expenses of $164,690 by the Cranberry Administrative Committee are authorized, and an assessment rate of $0.03 per 100-pound barrel assessable cranberries is established for the 1994–95 fiscal year ending on August 31, 1995. Unexpended funds may be carried over as a reserve.

Dated: August 22, 1994.

Eric M. Forman,

Acting Director, Fruit and Vegetable Division.

[FR Doc. 94–21086 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–02–P

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7 CFR Part 982

[FV93–982–2FIR]

Filberts/Hazelnuts Grown In Oregon and Washington; Establishment of Interim Final and Final Free and Restricted Percentages for the 1993–94 Marketing Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Department of Agriculture (Department) is adopting as a final rule, without change, the provisions of an interim final rule establishing interim final and final free and restricted percentages for domestic inshell filberts/hazelnuts for the 1993–94 marketing year under the Federal marketing order for filberts/hazelnuts grown in Oregon and Washington. The percentages allocate the amounts of domestically produced filberts/hazelnuts which may be marketed in domestic, export and other outlets. The percentages are intended to stabilize the supply of domestic inshell filberts/hazelnuts in order to meet the limited domestic demand for such filberts/hazelnuts and provide reasonable returns to producers. This rule was recommended by the Filbert/Hazelnut Marketing Board (Board), which is the agency responsible for local administration of the order.

EFFECTIVE DATE: September 26, 1994.

FOR FURTHER INFORMATION CONTACT: Teresa Hutchinson, Marketing Specialist, Northwest Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 1220 SW Third Ave., Room 369, Portland, OR 97204; telephone (503) 326–2724 or Mark A. Slupek, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Room 2524–S, P.O. Box 96456, Washington, DC 20090–6456; telephone: (202) 205–2830.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Order No. 982 [7 CFR Part 982], both as amended, regulating the handling of filberts/hazelnuts grown in Oregon and Washington. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the "Act."

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

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. It is intended that this action apply to all merchantable filberts/hazelnuts handled during the 1993–94 marketing year. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

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

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

There are approximately 1,000 producers of filberts/hazelnuts in the production area and approximately 25 handlers subject to regulation under the marketing order. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of handlers and producers of filberts/hazelnuts may be classified as small entities.

The Board's recommendation and this rule are based on requirements specified in the order. This rule finalizes an interim final rule which established the amount of inshell filberts/hazelnuts that can be marketed in domestic markets. The domestic outlets for this commodity are characterized by limited demand, and interim final and final free and restricted percentages benefit the industry by promoting stronger marketing conditions and stabilizing prices and supplies, thus improving grower returns.

The interim final rule was issued on February 18, 1994, and published in the Federal Register [59 FR 9068, February 25, 1994], with an effective date of February 25, 1994. That rule added § 982.242 to the rules and regulations in effect under the order. That rule provided a 30-day comment period which ended March 28, 1994.

One comment was received, from the United States Small Business Administration's Chief Counsel for Advocacy (SBA). The SBA's comment alleged that the Department should have undertaken an analysis under the Regulatory Flexibility Act and should have sought public comment prior to placing the interim rule in effect. The comment by SBA fails to consider the distinct characteristics of the filbert program.

Under this marketing order, there are permanent regulations that authorize a market allocation program for filberts and that specify exactly how the free and restricted percentages should be established and revised. Those provisions were adopted after a formal rulemaking hearing, a process that allows for a full presentation of all economic and operational evidence not only in written form, but also through oral testimony under oath and subject to cross-examination. The process additionally permits further briefing and exceptions based on this record of exhibits and testimony. Hence, there has been extensive economic analysis and public participation in the rulemaking adopting the market allocation program and specifying the market allocation calculation procedures.

Each year the marketing order Board meets and considers a marketing policy for the coming year, including the activation of the market allocation program and the projected trade demand (as calculated under the specifications in the permanent regulations). The Board represents the entire filbert industry and brings to its deliberations the highest level of experience and expertise. The Board conducts open meetings and receives input of an economic nature from all interested persons. The Secretary's representatives are in attendance at such meetings and freely interact to gather any necessary economic or operational information. In addition, the Board is continually gathering economic data from a number of sources for its deliberations and for submission to the Secretary. At several points during the season, the Board holds further open meetings to update or revise the market allocation program for the year.

In view of this unique and comprehensive system, the Department believes it is sufficiently knowledgeable to make a Regulatory Flexibility Act certification without any further studies or reports. In addition, there has been ample opportunity for public participation both in the formal rulemaking process that created the detailed market allocation program formula being applied herein, as well as thereafter to assure the Secretary that there has been no misapplication. Finally, it should be noted that the specific action commented-on is an interim rule which relieved restrictions by releasing the full free percentage immediately on February 25 rather than waiting until late May as may be provided under the order. This relaxation was effectuated only 10 days after the last date for marketing policy revisions and seeking further prior public participation would have significantly temporally diluted the value of this relief to the industry. Hence, the alternative championed by SBA would have maintained for a longer time more restrictive trade controls on small handlers.

Therefore, for the reasons stated, the above comment in opposition to the interim final rule is denied.

The Board is required to meet prior to September 20 of each marketing year to compute an inshell trade demand and preliminary free and restricted percentages, if the use of volume regulation is recommended during the season. The order prescribes formulas for computing the inshell trade demand, as well as preliminary, interim final, and final percentages. The inshell trade demand establishes the amount of inshell filberts/hazelnuts the market can utilize throughout the season, and the percentages release the volume of filberts/hazelnuts necessary to meet the inshell trade demand. The preliminary percentages provide for the release of 80 percent of the inshell trade demand. The interim final percentages release 100 percent of the inshell trade demand. The inshell trade demand equals the average of the preceding three "normal" years' trade acquisitions of inshell filberts/hazelnuts, rounded to the nearest whole number. The Board may increase such estimate by no more than 25 percent, if market conditions warrant an increase. The final free and restricted percentages release an additional 15 percent of the average of the preceding three years' trade acquisitions of inshell filberts/hazelnuts for desirable carryout.

The preliminary free and restricted percentages make available portions of the filbert/hazelnut crop which may be marketed in domestic inshell markets (free) and exported, shelled, or otherwise disposed of (restricted) early in the 1993–94 season. The preliminary free percentage is expressed as a percentage of the total supply subject to regulation and is based on preliminary crop estimates. The majority of domestic inshell filberts/hazelnuts are marketed in October, November, and December. By November, the marketing season is well under way.

At its August 26, 1993, meeting, the Board announced preliminary free and restricted percentages of 7 percent and 93 percent, respectively, to release 80 percent of the inshell trade demand. The purpose of releasing only 80 percent of the inshell trade demand under the preliminary percentage is to guard against underestimates of crop size. The preliminary restricted percentage is 100 percent minus the free percentage.

On or before November 15, the Board must meet again to recommend interim final percentages and final percentages. The Board uses current crop estimates to calculate the interim final and final percentages. The interim final percentages are calculated in the same way as the preliminary percentages and release 100 percent of the inshell trade demand previously computed by the Board for the marketing year. Final free and restricted percentages release an additional 15 percent of the average of the preceding three years' trade acquisitions to ensure an adequate carryover into the following season. The final free and restricted percentages must be effective at least 30 days prior to the end of the marketing year (July 1

through June 30), or earlier, if recommended by the Board and approved by the Secretary. In addition, revisions in the marketing policy can be made until February 15 of each marketing year.

In accordance with order provisions, the Board met on November 10, 1993, reviewed and approved an amended marketing policy and recommended the establishment of interim final and final free and restricted percentages. Interim final percentages were recommended at 12 percent free and 88 percent restricted, and final free and restricted percentages were recommended at 13 percent and 87 percent. The interim final percentages made an additional 807 tons of product available for the domestic inshell market. The interim final marketing percentages were based on the industry's final production estimates and released 3,903 tons to the domestic inshell market from the 1993 crop. The final marketing percentages released an additional 605 tons from the 1993 crop for domestic use. Thus, a total of 4,508 tons of product was available from the 1993 crop for domestic use when the final percentages were established. The Oregon Agricultural Statistics Service provided an early estimate of 39,000 tons total production for the Oregon and Washington area. However, a handler survey conducted by the Board provided a more current estimate of 37,700 tons total production for the area. Therefore, the Board voted to unanimously accept the more current estimate of 37,700 tons.

Although the crop is large, the Board determined that the inshell domestic market conditions would allow more product without depressing the market and recommended immediate release of the additional 15 percent (the final percentages). The Board believed that the immediate release of the final percentages would benefit the industry with increased returns to growers and more product available for consumers.

The marketing policy of the marketing order states that the final percentages must be effective at least 30 days prior to the end of the marketing year, or earlier. The Board recommended immediate release of the final percentages, in accordance with the authority of the marketing policy. The marketing policy also requires that procedurally, the Board recommend interim final and final percentages. Therefore, the interim final percentages were established even though they would not be utilized this marketing season.

The marketing percentages were based on the Board's production estimates and the following supply and demand information for the 1993–94 marketing year:

Inshell supply	Tons
(1) Total production (Filbert/Hazelnut Marketing Board handler survey estimate)	37,700
(2) Less substandard, farm use (disappearance)	2,700
(3) Merchantable production (the Board's adjusted crop estimate)	35,000
(4) Plus undeclared carryin as of July 1, 1993, subject to regulation	338
(5) Supply subject to regulation (Item 3 plus Item 4)	35,338
Inshell Trade Demand	
(6) Average trade acquisitions of inshell filberts for three prior years	4,033
(7) Increase to encourage increased sales (20 percent)	807
(8) Less declared carryin as of July 1, 1993, not subject to regulation	937
(9) Adjusted Inshell Trade Demand	3,903
(10) 15 percent of the average trade acquisitions of inshell filberts for three prior years (Item 6)	605
(11) Adjusted Inshell Trade Demand plus 15 percent (Item 9 plus Item 10)	4,508

Percentages	Free	Restricted
(12) Interim final percentages (Item 9 divided by Item 5) x 100	11	89
(13) Final percentages (Item 11 divided by Item 5) x 100	13	87

In addition to complying with the provisions of the marketing order, the Board also considers the Department's 1982 "Guidelines for Fruit, Vegetable, and Specialty Crop Marketing Orders" (Guidelines) when making its computations in the marketing policy. This volume control regulation provides a method to collectively limit the supply of inshell filberts/hazelnuts available for sale in domestic markets. The Guidelines provide that this primary market have available a quantity equal to 110 percent of recent years' sales in those outlets before secondary market allocations are approved. This provides for plentiful supplies for consumers and for market expansion while retaining the mechanism for dealing with oversupply situations. An additional increase of 20 percent (807 tons) was included in the calculations used in determining the inshell trade demand. The established final percentages make available 4,508 tons from the 1993 crop plus 937 tons of declared carryin which is 135 percent of prior years' sales, thus exceeding the goal of the Guidelines.

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

After consideration of all relevant material presented, the information and recommendations submitted by the Board, and other information, it is found that finalizing the interim final rule, without change, as published in the **Federal Register** [59 FR 9068, February 25, 1994] will tend to effectuate the declared policy of the Act.

List of Subjects in 7 CFR Part 982

Filberts, Hazelnuts, Marketing agreements, Nuts, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR Part 982 is amended as follows:

PART 982—FILBERTS/HAZELNUTS GROWN IN OREGON AND WASHINGTON

1. The authority citation for 7 CFR Part 982 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Accordingly, the interim final rule amending 7 CFR part 982, which was published at 59 FR 9068 on February 25, 1994, is adopted as a final rule without change.

Dated: August 22, 1994.

Eric M. Forman,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 94–21090 Filed 8–25–94; 8:45 am]

BILLING CODE 3410-02-P

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7 CFR Part 985

[FV94–985–3IFR]

Spearmint Oil Produced in the Far West; Revision of the Salable Quantity and Allotment Percentage for "Class 3" Native Spearmint Oil for the 1994–95 Marketing Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule increases the quantity of "Class 3" (Native) spearmint oil produced in the Far West that handlers may purchase from, or handle for, producers during the 1994–95 marketing year. This rule was recommended by the Spearmint Oil Administrative Committee (Committee), the agency responsible for local administration of the marketing order

for spearmint oil produced in the Far West. The Committee recommended this rule to avoid extreme fluctuations in supplies and prices and thus help to maintain stability in the Far West spearmint oil market.

DATES: Effective on August 26, 1994; comments received by September 26, 1994 will be considered prior to issuance of a final rule.

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

FOR FURTHER INFORMATION CONTACT: Robert J. Curry, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, 1220 S.W. Third Avenue, Room 369, Portland, Oregon 97204–2807; telephone: (503) 326–2724; or Christian D. Nissen, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Room 2525, South Building, P.O. Box 96456, Washington, D.C. 20090–6456; telephone: (202) 720–5127.

SUPPLEMENTARY INFORMATION: This rule is issued under Marketing Order No. 985 [7 CFR Part 985], regulating the handling of spearmint oil produced in the Far West (Washington, Idaho, Oregon, and designated parts of California, Nevada, Montana, and Utah), hereinafter referred to as the "order." This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended [7 U.S.C. 601–674], hereinafter referred to as the "Act."

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

This rule has been reviewed under Executive Order 12778, Civil Justice Reform. Under the provisions of the marketing order now in effect, salable quantities and allotment percentages may be established for classes of spearmint oil produced in the Far West. This rule increases the quantity of Class 3 spearmint oil produced in the Far West that may be purchased from or handled for producers by handlers during the 1994–95 marketing year, which ends on May 31, 1995. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

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

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

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

There are eight spearmint oil handlers subject to regulation under the order and approximately 260 producers of spearmint oil in the regulated production area. Of the 260 producers, approximately 145 producers hold "Class 3" (Native) spearmint oil allotment base, and approximately 160 producers hold "Class 1" (Scotch) spearmint oil allotment base. Small agricultural service firms have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $5,000,000, and small agricultural producers are defined as those whose annual receipts are less than $500,000. A minority of handlers and producers of Far West spearmint oil may be classified as small entities.

The Far West spearmint oil industry is characterized by producers whose farming operations generally involve more than one commodity and whose income from farming operations are not exclusively dependent on the production of spearmint oil. The U.S. production of spearmint oil is concentrated in the Far West, primarily Washington, Idaho, and Oregon (part of the area covered by the order). Spearmint oil is also produced in the Midwest. The production area covered by the order normally accounts for 75 percent of the annual U.S. production of spearmint oil.

This rule increases the quantity of Native spearmint oil that handlers may purchase from, or handle for, producers during the 1994–95 marketing year, which ends on May 31, 1995. This rule increases the salable quantity from 897,388 pounds to 1,092,577 pounds and the allotment percentage from 46 percent to 56 percent for Native spearmint oil for the 1994–95 marketing year.

The salable quantity is the total quantity of each class of oil that handlers may purchase from, or handle for, producers during a marketing year. The salable quantity calculated by the Committee is based on the estimated trade. The total salable quantity is divided by the total industry allotment base to determine an allotment percentage. Each producer is allotted a share of the salable quantity by applying the allotment percentage to the producer's allotment base for the applicable class of spearmint oil.

The initial salable quantity and allotment percentages for both Native and Scotch spearmint oils for the 1994-95 marketing year were recommended by the Committee at its October 6, 1993, meeting. For both Native and Scotch spearmint oils, the Committee recommended salable quantities of 897,388 pounds and 723,326 pounds, and allotment percentages of 46 percent and 41 percent, respectively.

A proposed rule incorporating the Committee's October 6, 1993, recommendation was published in the December 21, 1993, issue of the **Federal Register** [58 FR 67378]. Comments on the proposed rule were solicited from interested persons until January 20, 1994. No comments were received. Accordingly, based upon analysis of available information, a final rule establishing the Committee's recommendation as the salable quantities and allotment percentages for both Native and Scotch spearmint oils for the 1994–95 marketing year was published in the March 16, 1994, issue of the **Federal Register** [59 FR 12151].

Pursuant to authority contained in sections 985.50, 985.51, and 985.52 of the order, the Committee unanimously recommended at its June 14, 1994, teleconference meeting that the salable

quantity and allotment percentage for Native spearmint oil for the 1994–95 marketing year be increased. The Committee recommended that the Native spearmint oil salable quantity be increased from 897,388 pounds to 1,092,577 pounds. Based on a revised total allotment base of 1,951,032 pounds, the allotment percentage is increased from 46 to 56 percent which results in a 195,189 pound increase in the salable quantity.

	Recommendations	
	October 6, 1993	June 14, 1994
(1) Salable Quantity	897,388	1,092,577
(2) Total Allotment Base	1,950,843	1,951,032
(3) Allotment Percentage	46	56

In making this recommendation the Committee considered all available information on supply and demand. As of June 14, 1994, the Committee reports that of the 1994–95 Native spearmint oil salable quantity of 897,388 pounds, 78,787 pounds remained available for handling. Handlers have indicated, however, that demand may approximate 200,000 pounds of Native spearmint oil for the remainder of this marketing year. This level of demand was not anticipated by the Committee when it made its initial recommendation for the establishment of a salable quantity and allotment percentage for Native spearmint oil for the 1994–95 marketing year.

The recommended salable quantity of 1,092,577 pounds of Native spearmint oil (an increase of 195,189 pounds), combined with the actual June 1, 1994, carry-in of 21,125 pounds, results in a revised 1994–95 available supply of 1,113,702 pounds. This available supply is approximately 30,000 pounds higher than the annual average of sales for the past five years. The Committee anticipates that foreseeable demand will be adequately met with the recommended increase.

The Committee did not recommend an increase in the available supply of Scotch spearmint oil since it is anticipated that there will be a surplus supply of this type of oil by the end of the 1994–95 marketing year.

The Department, based on its analysis of available information, has determined that an allotment percentage of 56 percent should be established for Native spearmint oil for the 1994–95 marketing year. This percentage will provide an increased salable quantity of 1,092,577 pounds of Native spearmint oil.

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

After consideration of all relevant matter presented, including that contained in the prior proposed and final rules in connection with the establishment of the salable quantities and allotment percentages for Native and Scotch spearmint oils for the 1994–95 marketing year, the Committee's recommendation and other available information, it is found that to revise section 985.213 [59 FR 12151] to change the salable quantity and allotment percentage for Native spearmint oil, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary, and contrary to public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** because: (1) This interim final rule increases the quantity of Native spearmint oil that may be marketed immediately; (2) Handlers and producers should be apprised as soon as possible of the salable quantity and allotment percentage of Native spearmint oil contained in this interim final rule; and (3) This rule provides a 30-day comment period and any comments received will be considered prior to finalization of this rule.

List of Subjects in 7 CFR Part 985

Marketing agreements, Oils and fats, Reporting and recordkeeping requirements, Spearmint oil.

For the reasons set forth in the preamble, 7 CFR part 985 is amended as follows:

PART 985—SPEARMINT OIL PRODUCED IN THE FAR WEST

1. The authority citation for 7 CFR part 985 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 985.213 is amended by revising the introductory text and paragraph (b) to read as follows:

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

§ 985.213 Salable quantities and allotment percentages—1994–95 marketing year.

The salable quantity and allotment percentage for each class of spearmint oil during the marketing year beginning on June 1, 1994, shall be as follows:

* * * * *

(b) "Class 3" (Native) oil—a salable quantity of 1,092,577 pounds and an allotment percentage of 56 percent.

Dated: August 22, 1994.

Eric M. Forman,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 94–21081 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–02–P

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7 CFR Part 989

[Docket No. FV94–989–3FR]

Raisins Produced From Grapes Grown in California; Removal of an Exemption for Raisins Produced in Southern California and Exported to Mexico

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule revises the administrative rules and regulations established under the Federal marketing order for raisins produced from grapes grown in California. It removes a provision that currently exempts raisins produced from grapes dried on the vine in southern California and exported to Mexico from all marketing order requirements. This rule is based on a unanimous recommendation of the Raisin Administrative Committee (Committee), which is responsible for local administration of the order. Elimination of the exemption will facilitate administration and improve enforcement efforts.

EFFECTIVE DATE: August 26, 1994.

FOR FURTHER INFORMATION CONTACT: Richard P. Van Diest, Marketing Specialist, California Marketing Field Office, Fruit and Vegetable Division, AMS, USDA, 2202 Monterey Street, Suite 102B, Fresno, California 93721; telephone: (209) 487–5901, or FAX (209) 487–5906; or Mark A. Slupek, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523–S, P.O. Box 96456, Washington, DC 20090–6456; Telephone: (202) 205–2830, or FAX (202) 720–5698.

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

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

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

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

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

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

There are approximately 20 handlers of California raisins who are subject to regulation under the raisin marketing order, and approximately 5,000 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000. A majority of producers and a minority of handlers of California raisins may be classified as small entities.

This final rule removes a provision that exempts raisins produced from grapes dried on the vine in southern California and exported to Mexico in natural condition from all marketing order requirements. It is based on a unanimous recommendation of the Committee and other available information.

Section 989.60 of the order provides that the Committee may establish, with the approval of the Secretary, rules and procedures to exempt from regulations raisins produced in southern California (i.e., the counties of Riverside, Imperial, San Bernardino, Ventura, Orange, Los Angeles, and San Diego) and disposed of for distillation, livestock feed, or by export in natural condition to Mexico.

Paragraph (b) of section 989.160 of Subpart—Administrative Rules and Regulations (7 CFR 989.102–989.176) currently exempts raisins produced from grapes dried on the vine in those southern California counties, which are disposed of for use in distillation, livestock feed, or by export in natural condition to Mexico, from all marketing order requirements. This final rule eliminates the exemption that applies to those raisins exported in natural condition to Mexico.

When that exemption provision was established in the early 1970's, the quantities of raisins exported to Mexico were relatively small and were of off-grade quality. It was determined at that time that the export exemption would not interfere with order regulations or with accomplishing program objectives.

Diminished demand in recent years for off-grade raisins and raisin residual material for distillation in California has made export in natural condition to Mexico a relatively lucrative market. The Committee has confirmed reports that large volumes of poor quality raisins, including lots as large as forty to fifty thousand pounds, have been exported into Mexico from southern California and other areas of California. This is a significant departure from the situation which existed when the exemption was first implemented. Raisins from areas which are not exempt from the provisions of the order appear to be passing into Mexico in violation of the regulations.

The North American Free Trade Agreement (NAFTA) has effected the removal of import duties and license requirements, opening the Mexican market to raisins which meet the quality requirements of the order. Hence, there is now an opportunity to build an export market in Mexico for high quality raisins. The Committee believes that all raisins eligible for export to Mexico need to be subject to the quality requirements of the order. The Committee also believes that the regulation of such raisins is essential to meeting program objectives and improving compliance efforts.

On the basis of this information, the Committee, on April 16, 1994, unanimously recommended the removal of the exemption that applies to raisins produced from grapes dried on the vine in southern California and exported in natural condition to Mexico.

Notice of this action was published in the **Federal Register** on July 15, 1994 [59 FR 36093]. The proposed rule provided a 15-day comment period which ended August 1, 1994. No comments were received.

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

After consideration of all relevant information presented, including the Committee's unanimous recommendation and other information, it is found that the issuance of this final rule, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that good cause exists for not postponing the effective date of this final rule until 30 days after publication in the **Federal Register** because: (1) The 1994–95 crop year began August 1, 1994, and the final rule should cover as much of the crop year as possible to accomplish program objectives and improve compliance efforts; (2) handlers are aware of this action which was unanimously recommended by the Committee at a public meeting; and (3) the proposed rule provided a 15-day comment period, and no comments were received.

List of Subjects in 7 CFR Part 989

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

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

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

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

Authority: 7 U.S.C. 601–674.

2. Section 989.160 is amended by revising paragraph (b) to read as follows:

§ 989.160 Exemptions.

* * * * *

(b) *Disposition of raisins produced in Southern California.* Raisins produced

from grapes dried on the vine in the counties of Riverside, Imperial, San Bernardino, Ventura, Orange, Los Angeles, and San Diego, which are disposed of for use in distillation or livestock feed, shall be exempt from the provisions of this part.

Dated: August 22, 1994.

Eric M. Forman,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 94–21082 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–02–P

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7 CFR Part 1030

[DA–94–16]

Milk in the Chicago Regional Marketing Area; Revision of Rule

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Revision of rule.

SUMMARY: This document temporarily revises the supply plant shipping standards under the Chicago Regional order for the month of September 1994. Shipping percentages for individual supply plants and units of supply plants are reduced to 1 percent and 4 percent, respectively, for the month of September. The action is necessary to prevent uneconomic and inefficient movements of milk to qualify plants for pooling. A proposed reduction for the month of August was found to be not necessary.

EFFECTIVE DATE: Amendment number 1 is effective September 1, 1994.

Amendment number 2 is effective September 1, 1994, through September 30, 1994.

Amendment number 3 is effective October 1, 1994.

FOR FURTHER INFORMATION CONTACT: Constance M. Brenner, Marketing Specialist, USDA/AMS/Division, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456, (202) 720–2357.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding:

Notice of Proposed Temporary Revision: Issued July 11, 1994; published July 15, 1994 (59 FR 36094).

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this rule will not have a significant economic impact on a substantial number of small entities. This rule lessens the regulatory impact of the order on certain milk handlers and tends to ensure that dairy farmers will continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

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

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

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provisions of the order, or any obligation imposed in connection with the order is not in accordance with the law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

This revision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the provisions of § 1030.7(b)(5) of the Chicago Regional milk order.

Notice of proposed rulemaking was published in the **Federal Register** (59 FR 36094) concerning a proposed temporary relaxation of the supply plant shipping percentages under the Chicago Regional milk order. The revisions were proposed to be effective for the months of August and September 1994. The public was afforded the opportunity to comment on the proposed notice by submitting written data, views and arguments by July 22, 1994.

Two comments supporting the proposed revision for the month of September were received. The comments agreed that the degree of adjustment that the order allows the market administrator to make in supply plant shipping requirements would be sufficient for the month of August. No opposing comments were received.

Statement of Consideration

For the month of September 1994 this rule revises from 5 percent to 1 percent the requirements of the Chicago Regional order that pool supply plants ship to distributing plants a minimum percentage of receipts. For a unit of supply plants, the action reduces the required shipping percentage from 10 percent of the supply plants' receipts to 4 percent. A proposed revision for the month of August is found to be unnecessary because the order authorizes the market administrator to reduce the supply plant shipping percentages to a great enough degree to meet current market needs. The degree to which the market administrator is authorized to revise shipping requirements is, however, not great enough to meet the needs of the market for September.

The temporary revision was requested by Central Milk Producers Cooperative (CMPC), a federation of cooperative associations that represent a substantial number of the producers who supply the market. CMPC contends that a reduction of the shipping percentages is necessary to prevent uneconomic shipments of milk from distant supply plants solely for pooling purposes.

CMPC originally requested that the required supply plant shipping percentages be eliminated for September for both individual supply plants and supply plant units. After having the opportunity to see data for further months, however, the cooperative federation stated that the revision originally requested would be excessive in view of recent increases in production over the volume CMPC had projected and recent increased demand for milk for manufacturing uses. CMPC therefore recommended that the proposed reduction be modified to establish shipping standards of 1 percent for individual supply plants and 4 percent for units. Dean Foods, a large fluid milk handler regulated under the Chicago Regional order, supported CMPC's request for September.

In view of the supply/demand relationship for the market the supply plant shipping percentages should be reduced for September 1994. A reduction of the shipping percentages will contribute to orderly marketing in that costly and inefficient shipments of milk from distant supply plants will not be necessary. Thus, dairy farmers who have supplied the market will continue to have their milk pooled under the order.

The revision needed for September is greater than the market administrator is authorized to accomplish under the

order. Therefore, it must be effectuated by the Director of the Dairy Division.

After consideration of all relevant material, including the proposal set forth in the aforesaid notice, and other available information, it is hereby found and determined that the pool supply plant shipping percentage set forth in §1030.7(b) should be reduced for the month of September to 1 percent of individual supply plant receipts and 4 percent of supply plant unit receipts.

It is hereby found and determined that 30 days' notice of the effective date hereof is impractical, unnecessary, and contrary to the public interest in that:

(a) This revision is necessary to reflect current marketing conditions and to maintain orderly marketing conditions in the marketing area for the month of September;

(b) This revision does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of the proposed revision was given interested parties and they were afforded opportunity to file written data, views, or arguments concerning this revision.

Two comments supporting the proposed revision were received, with no comments opposing.

Therefore, good cause exists for making this revision effective less than 30 days from the date of publication in the **Federal Register.**

List of Subjects in 7 CFR Part 1030

Milk marketing orders.

For the reasons set forth in the preamble, the following provisions in Title 7, Part 1030, are amended as follows:

PART 1030—MILK IN THE CHICAGO REGIONAL MARKETING AREA

1. The authority for 7 CFR Part 1030 continues to read as follows:

Authority: Secs. 1–19, 48 Stat 31, as amended; 7 U.S.C. 601–674.

§1030.7 [Amended]

2. In § 1030.7(b), the introductory text is amended by changing the "5 percent" to "1 percent", and by changing the "10 percent" to "4 percent" for the period September 1, 1994, through September 30, 1994.

3. In § 1030.7(b), the introductory text is amended by changing the "1 percent" to "5 percent", and by changing the "4 percent" to "10 percent", effective October 1, 1994.

Dated: August 22, 1994.

Silvio Capponi, Jr.,

Acting Director, Dairy Division.

[FR Doc. 94–21084 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 1205

[CN–94–006]

RIN 0581–AB29

Amendment to Cotton Research and Promotion Regulations Regarding Assessment of Imported Cotton-Containing Products

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Agricultural Marketing Service (AMS) is adopting without modification an interim final rule amending the Cotton Board Rules and Regulations to allow for the continuation of collections on renumbered imported cotton-containing products as long as no change in the product's Harmonized Tariff Schedule (HTS) description occurs. Since renumbering of products by the U.S. Customs Service occurs rather frequently, providing for a continuation of assessment collection will prevent unnecessary and costly interruptions of the program.

EFFECTIVE DATE: September 26, 1994.

FOR FURTHER INFORMATION CONTACT: Craig Shackelford, Chief, Cotton Research and Promotion Staff, Cotton Division, AMS, USDA, P.O. Box 96456, Room 2641–S, Washington, DC 20090–6456; or telephone: (202) 720–2259.

SUPPLEMENTARY INFORMATION: Prior Document: Interim final rule-Amendment to Cotton Research and Promotion Regulations Regarding Assessment of Imported Cotton-Containing Products published July 1, 1994, (59 FR 33901).

Regulatory Impact

This rule has been determined to be not significant for purposes of Executive Order 12866, and therefore has not been reviewed by the Office of Management and Budget.

This 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. The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 12 of the Act, any person subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such person is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the District Court of the United States in any district in which the person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling, provided a complaint is filed within 20 days from the date of the entry or the ruling.

There are an estimated 10,000 importers who are presently subject to rules and regulations issued pursuant to the Cotton Research and Promotion Order 7 U.S.C. 2101–2118. This rule will affect importers of cotton and products containing cotton. The majority of these importers are small businesses under the criteria established by the Small Business Administration. This rule will help ensure the uninterrupted collection of assessments on products already subject to assessment.

Economic Impact

The AMS Administrator has determined that this final 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.).

Paperwork Reduction Act

In compliance with Office of Management and Budget (OMB) regulations (5 CFR part 1320) which implement the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et seq.) the information collection and recordkeeping requirements contained in this subpart have been previously approved by OMB and assigned control number 0581–0093.

Background

In July of 1992, the Department of Agriculture (USDA) finalized rules and regulations for the authority to collect assessments on cotton and cotton-containing products as authorized in the 1990 Farm Bill. In order to designate specific imported products subject to assessment, AMS published, within the implementing regulations, a table of approximately 700 HTS numbers and individual assessment rates for each. Collections began on August 1, 1992. Soon after, the Department of Commerce changed certain HTS numbers that USDA had identified as subject to the

assessment. During the first 17 months of import assessments, AMS has found that the Department of Commerce may revise HTS numbers as a result of presidential proclamation, congressional actions, statistical tracking requirements, etc. Often, these changed numbers are merely replacements of previous numbers and have no impact on the physical properties, description or cotton content of the product it represents.

The U.S. Customs Service informed USDA prior to the publishing of this rule that several HTS numbers listed in the Import Assessment Table contained in 7 CFR 1205.510 would no longer be valid as of January 1, 1994, because of recent statistical changes made by the Department of Commerce. These statistical changes to the HTS numbers were made for reasons associated with the implementation of the North American Free Trade Agreement.

In order to collect cotton research and promotion assessments on imported products containing cotton, HTS numbers listed in the Assessment Table in 7 CFR 1205.510 must correspond to numbers listed in the Harmonized Tariff Schedule. USDA has found that frequent rulemaking is necessary in order to maintain an up-to-date list of HTS numbers in the regulations which provide the U.S. Customs Service the authority to collect cotton research and promotion assessments on imported cotton and products containing cotton.

Changes made to HTS numbers during calendar year 1993 have resulted in reduced collections by U.S. Customs under the import assessment program averaging over $30,000 per month.

USDA has reason to believe that changes in HTS numbering and the resulting impact on the Cotton Research and Promotion Program will continue. U.S. international trade agreements such as NAFTA, GATT, and changes in most favored nation trading status for certain textile producing countries will, according to the U.S. Customs Service, generate changes in HTS headings on a continuing basis. The Cotton Research and Promotion Program would in this environment experience an unpredictable loss of revenue.

With the number and frequency of HTS number changes USDA expects, updating the list of HTS numbers through rulemaking is an impractical solution to minimizing interruptions in assessment collections. Therefore, this rule provides for the continued collection of assessments when HTS numbers are changed so long as such changes have no impact on the physical properties, description, or cotton content of the products involved.

It is important to note that Commerce does renumber HTS headings where an actual change in the product occurs. This rule would not address this type of renumbering. USDA will continue to suspend assessments in these situations until the cotton content and a revised assessment rate could be determined and the assessment table revised.

Based on discussions with importers and U.S. Customs Service officials, USDA has determined that the import community supports continuing to pay assessments on products when numbers have changed but the product remains the same. In fact, suspending collections on HTS headings that undergo mere renumbering is causing confusion for importers and Customs. Customs officials have informed USDA that they can program their automated computer collection system to continue collecting assessments when HTS headings undergo renumbering.

On July 1, 1994, at 59 FR 33901, AMS published an interim final rule amending 7 CFR Part 1205 to allow for the continuation of collections on renumbered imported cotton-containing products as long as no change in the product's Harmonized Tariff Schedule (HTS) description occurs. The rule was published with a request for comments to be submitted by August 1, 1994. AMS received no comments pertaining to the interim final during the specified comment period. Therefore, this rule adopts the interim final rule without change.

List of Subjects in 7 CFR Part 1205

Advertising, Agricultural research, Cotton, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 1205 is amended as follows:

PART 1205—COTTON RESEARCH AND PROMOTION

Accordingly, the interim final rule amending 7 CFR part 1205 which was published at 59 FR 33901 on July 1, 1994, is adopted without change.

Dated: August 22, 1994.

Lon Hatamiya,

Administrator.

[FR Doc. 94–21083 Filed 8–25–94; 8:45 am]

BILLING CODE 3410-02-P

7 CFR Part 1207

[FV–94–703 IFR]

RIN: 0581–AB26

Potato Research and Promotion Plan; Amendments of the Rules and Regulations to Permit Changes in the Size of the Administrative Committee

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This interim final rule provides the National Potato Promotion Board (Board) the flexibility to change the number of producer members on the Administrative Committee to reflect changes in potato production in the United States through amendment of the Board's bylaws, with the Secretary's approval, updates the address of the Board's office, and revises the Harmonized Tariff Schedule code number for imported potato starch for human consumption.

DATES: Interim final rule effective August 26, 1994. Comments must be received by September 26, 1994.

ADDRESSES: Interested persons are invited to submit written comments concerning this action. Comments must be sent in triplicate to the Docket Clerk, Research and Promotion Branch, Fruit and Vegetable Division, AMS, USDA, room 2535–So., P.O. Box 96456, Washington, DC 20090–6456. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Georgia C. Abraham, Research and Promotion Branch, Fruit and Vegetable Division, AMS, USDA, room 2535–So., P.O. Box 96456, Washington, DC 20090–6456; telephone (202) 720–5057.

SUPPLEMENTARY INFORMATION: This interim final rule is issued under the Potato Research and Promotion Plan (Plan) [7 CFR Part 1207]. The Plan is authorized by the Potato Research and Promotion Act, as amended [7 U.S.C. 2611–2627], hereinafter referred to as the Act.

This rule is exempt from Executive Order 12866.

This 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.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 311 of the Act, a person subject to a plan may file a petition with the Secretary stating that such plan, any provision of such plan or any obligation imposed in connection with such plan is not in accordance with law; and requesting a modification of the plan or an exemption from the plan. Such person is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which such person is an inhabitant, or has principal place of business, has jurisdiction to review the Secretary's ruling on the petition, provided that a complaint is filed within 20 days after the date of entry of the ruling.

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

There are an estimated 2,000 handlers, 6,000 producers, 80 importers of potatoes and potato products for human consumption, and 25 importers of seed potatoes who are subject to the provisions of the Plan. The majority of these persons may be classified as small agricultural producers and small agricultural service firms. Small agricultural producers are defined by the Small Business Administration [13 CFR 121.601] as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $5 million. The majority of potato handlers and producers may be classified as small entities.

The National Potato Promotion Board (Board) administers a national program of research, development, advertising, and promotion designed to strengthen potatoes' competitive position and to maintain and expand domestic and foreign markets for potatoes and potato products. The program is financed by assessments on producers of 5 or more acres of potatoes (collected by the first handler) and on all imported fresh or processed potatoes for human consumption and seed potatoes (collected by the U.S. Customs Service). There are currently 103 members on the Board: 100 producers, 2 importers, and a public member.

Due to the large size of the Board, the Plan authorizes the Board to appoint an Administrative Committee which has the authority to conduct Board business on the Board's behalf. As currently set forth in paragraph (a) of section 1207.507 of the rules and regulations issued under the Plan, the Board is authorized to appoint up to 27 members to the Administrative Committee which includes 25 producer members, 1 importer member, and the public member. Producer membership on the Administrative Committee is allocated among six regions established in the Board's bylaws on the percentage of U.S. potato production in each region.

Since the six regions were established in 1972, potato production in the U.S. has increased and shifted to the extent that the number of producer members in each region is no longer representative of the percentage of production in each region.

At its March 20, 1993, annual meeting, the Board directed its Long-Range Planning Subcommittee to study the increase and shifts in potato production to determine whether or not producer member allocation by region was equitable and to recommend corrective action the following year.

Using data from the Department of Agriculture's National Agricultural Statistical Service, the subcommittee determined that, based on the percentage of U.S. potato production, some regions were under-represented and other regions were over-represented on the Administrative Committee. The subcommittee also determined that if the 25 producer members on the Administrative Committee were apportioned based on current production, some regions would lose representation disproportionately to the decrease in production in that region. Therefore, at the Administrative Committee's January 12, 1994, meeting, the subcommittee presented to the Administrative Committee four proposals for the Administrative Committee's consideration. The Administrative Committee approved a proposal to add 5 producer members to the Administrative Committee and to reallocate the 30 producer members to reflect, as closely as possible, the percentage of U.S. potato production in each region. The proposal approved by the Administrative Committee for presentation to the full Board would increase the total number of Administrative Committee members from 27 to 32 (30 producer members, 1 importer member, and the public member) and would reallocate the 30 producer members among the regions as follows: Northwest, from 8 members to 13; North Central, from 5 members to 6; Northeast, from 5 members to 4; Southwest, from 3 members to 2; South Central, from 2 members to 3; and Southeast, 2 members (no change).

This recommendation was presented to and approved by the full Board at the Board's annual meeting on March 18, 1994. The Board approved an amendment to Article VI, Section 1 of the Board's bylaws, which sets forth the allocation of Administrative Committee members, and recommended amending paragraph (a) of section 1207.507 of the Plan's rules and regulations, which sets forth the number of members and composition of the Administrative Committee.

While the Board, with the Secretary's concurrence, may amend its bylaws to reflect changes to the regional boundaries and allocation of the producer members, paragraph (a) of section 1207.507 of the rules and regulations issued under the Plan must be amended to change the number of Board members who may serve on the Administrative Committee. However, U.S. potato production and the distribution of that production among the states is subject to future change which would affect producer representation on the Administrative Committee. Therefore, in order to provide more flexibility to the Board in adjusting the size of its Administrative Committee based on current production trends and, at the same time, eliminate unnecessary rulemaking, this rule amends paragraph (a) of section 1207.507 to provide that the number of producer members on the Administrative Committee be as set forth in the Board's bylaws.

This action also revises section 1207.501 of the rules and regulations to reflect the Board's current place of business.

In addition, the Committee for Statistical Annotation of Tariff Schedules of the International Trade Commission, at the request of the Department, has revised the statistical reporting requirements for imported potato starch. As a result, Harmonized Tariff Schedule (HTS) code numbers which differentiate between imported potato starch for human consumption and imported potato starch for other uses have been established. Paragraph (b)(3) of section 1207.510 provides the HTS categories and assessment rates on imported tablestock potatoes and frozen or processed potatoes for ultimate consumption by humans and on imported seed potatoes. The Act provides the authority for the Board to assess only those potatoes and potato products intended for human consumption and for use as seed. Because the tariff schedule did not provide a statistical breakout to identify product intended for different uses, the present HTS code number in this

section identifying potato starch does not differentiate between the above uses. As a result, it is possible that assessments on potato starch not intended for human consumption are being collected by the U.S. Customs Service on the Board's behalf. Amending this section to list the correct HTS code for potato starch for human consumption will eliminate the need for importers to request a refund from the Board of assessments that might be erroneously collected by Customs on the Board's behalf. Therefore, this rule also amends paragraph (b)(3) of section 1207.510 to reflect the new HTS code number identifying potato starch for human consumption.

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

Pursuant to the provisions in 5 U.S.C. 553, it is found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because: (1) This action formalizes the Department's approval of amendments to the Board's bylaws which were approved by the full Board and makes other amendments to the rules and regulations that ensure effective administration of the Act; (2) a 30-day period is provided to allow interested parties to comment prior to finalization; and (3) no useful purpose would be served by a delay of the effective date.

All written comments received in response to this rule by the date specified herein will be considered prior to finalizing this action.

List of Subjects in 7 CFR Part 1207

Advertising, Agricultural research, Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 1207 is revised as follows:

PART 1207—POTATO RESEARCH AND PROMOTION PLAN

1. The authority citation for 7 CFR part 1207 continues to read as follows:

Authority: 7 U.S.C. 2611–2627.

2. Section 1207.501 is revised to read as follows:

§ 1207.501 Communications.

All communications in connection with the Potato Research and Promotion Plan shall be addressed to: National Potato Promotion Board, 7555 East Hampden Avenue, Suite 412, Denver, Colorado 80231.

3. Section 1207.507 is amended by revising the first sentence in paragraph (a) to read as follows:

§ 1207.507 Administrative Committee.

(a) The Board shall annually select from among its members an Administrative Committee composed of producer members as provided for in the Board's bylaws, one or more importer members, and the public member. * * *

* * * * *

4. The table in paragraph (b)(3) of § 1207.510 is revised to read as follows:

§ 1207.510 Levy of assessments.

* * * * *

(b) * * *

(3) * * *

Tablestock potatoes, processed potato products, and seed potatoes	Assessment	
	Cents/cwt	Cents/kg
0701.10.0020	2.00	0.0441
0701.10.0040	2.00	0.0441
0701.90.1000	2.00	0.0441
0701.90.5010	2.00	0.0441
0701.90.5020	2.00	0.0441
0701.90.5030	2.00	0.0441
0701.90.5040	2.00	0.0441
0710.10.0000	4.00	0.0882
2004.10.4000	4.00	0.0882
2004.10.8020	4.00	0.0882
2004.10.8040	4.00	0.0882
2005.20.6060	3.1446	0.0693
0712.10.0000	14.2857	0.3149
1105.10.0000	14.2857	0.3149
1105.20.0000	14.2857	0.3149
2005.20.6040	14.2857	0.3149
2005.20.2000	8.1633	0.1800
1108.13.0010	18.0018	0.3969

* * * * *

Dated: August 22, 1994.

Robert C. Keeney,

Director, Fruit and Vegetable Division.

[FR Doc. 94–21087 Filed 8–25–94; 8:45 am]

BILLING CODE 3410-02-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–19–1–5736a; FRL–5029–4]

Approval and Promulgation of Implementation Plan: Texas Emission Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action approves a revision to the Texas State Implementation Plan (SIP) to include revisions to the Texas Air Control Board, part III, chapter 101, *General Rules*, section 101.10, *Emission Inventory Requirements*. These revisions are for the purpose of implementing an emission statement program for stationary sources within the ozone nonattainment areas. The implementation plan was submitted by the State to satisfy the Federal requirements for an emission statement program as part of the SIP for Texas.

DATES: This final rule will become effective on October 25, 1994 unless notice is received by September 26, 1994 that someone wishes to submit adverse or critical comments. If the effective date is delayed, timely notice will be published in the **Federal Register.**

ADDRESSES: Written comments on this action should be addressed to Mr. Thomas H. Diggs, Chief, Planning Section, at the EPA Regional Office listed below. Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

U.S. Environmental Protection Agency, Region 6, Air Programs Branch (6T-AP), 1445 Ross Avenue, suite 700, Dallas, Texas 75202–2733.

The Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Texas Natural Resource Conservation Commission, Office of Air Quality, Emissions Inventory Branch, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Herbert R. Sherrow, Jr., Planning Section (6T-AP), Air Programs Branch, USEPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, Telephone (214) 655–7237.

SUPPLEMENTARY INFORMATION:

Background

The air quality planning and State Implementation Plan (SIP) requirements for ozone nonattainment and transport areas are set out in subparts I and II of part D of title I of the Clean Air Act, as amended by the Clean Air Act Amendments of 1990 (CAA or "the Act"). EPA has published a "General Preamble" describing EPA's preliminary views on how EPA intends to review SIPs and SIP revisions submitted under

title I of the CAA, including those State submittals for ozone transport areas within the States (see 57 FR 13498 (April 16, 1992) ("SIP: General Preamble for the Implementation of title I of the Clean Air Act Amendments of 1990"), 57 FR 18070 (April 28, 1992) ("Appendices to the General Preamble"), and 57 FR 55620 (November 25, 1992) ("SIP: NO_x Supplement to the General Preamble")).

EPA has also issued a draft guidance document describing the requirements for the emission statement programs discussed in this document, entitled "Guidance on the Implementation of an Emission Statement Program" (July, 1992). The Agency is also conducting a rulemaking process to modify part 40 of the CFR to reflect the requirements of the emission statement program.

Section 182 of the Act sets out a graduated control program for ozone nonattainment areas. Section 182(a) sets out requirements applicable in Marginal nonattainment areas, which are also made applicable in subsections (b), (c), (d), and (e) to all other ozone nonattainment areas. Among the requirements in section 182(a) is a program in paragraph (3) of that subsection for stationary sources to prepare and submit to the State each year emission statements showing actual emissions of volatile organic compounds (VOC) and nitrogen oxides (NO_x). This paragraph provides that the States are to submit a revision to their SIPs by November 15, 1992, establishing this emission statement program. Whatever minimum reporting level is established in a State emission statement program, if either VOC or NO_x is emitted at or above the designated level, the other pollutant should be included in the emission statement, even if it is emitted at levels below the specified cutoffs.

The CAA requires facilities to submit the first emission statement to the State within three years after November 15, 1990, and annually thereafter. EPA requests that the States submit the emission data to EPA through the Aerometric Information Retrieval System (AIRS). The minimum emission statement data should include: Certification of data accuracy; source identification information; operating schedule; emissions information (to include annual and typical ozone season day emissions); control equipment information; and process data. EPA developed emission statements data elements to be consistent with other source and State reporting requirements. This consistency is essential to assist States with quality assurance for emission estimates and to facilitate consolidation of all EPA reporting requirements.

In addition to the submission of the emission statement data to AIRS, States should provide EPA with a status report that outlines the degree of compliance with the emissions statement program. Beginning July 1, 1993, States should report quarterly to EPA the total number of sources affected by the emission statement provisions, the number that have complied with the provisions, and the number that have not. This status report should also include the total annual and typical ozone season day emissions from all reporting sources, both corrected and non-corrected for rule-effectiveness (RE). States should include in their status report a list of sources that are delinquent in submitting their emission statement and that emit 500 tons per year (tpy) or more of VOC or 2500 tpy or more of NO_x. This report should be a quarterly submittal until all the regulated sources have complied for the reporting year. Suggested submittal dates for the quarterly status reports are July 1, October 1, January 1, and April 1.

Analysis of State Submission

1. Procedural Background

The Act requires States to observe certain procedural requirements in developing its SIP, of which the emission statement program will become a part. Section 110(a)(2) of the Act provides that each implementation plan submitted by a State must be adopted after reasonable notice and public hearing.[1] Section 110(l) similarly provides that each revision to an implementation plan submitted by a State under the CAAA must be adopted by such State after reasonable notice and public hearing.

EPA must at the outset determine whether a submittal is complete and therefore warrants further EPA review and action (see section 110(k)(1) and 57 FR 13565). EPA's completeness criteria for SIP submittals are set out at 40 CFR part 51, appendix V (1991), as amended by 57 FR 42216 (August 26, 1991). EPA attempts to make completeness determinations within 60 days of receiving a submission. However, under section 110(k)(1)(B), a submittal is deemed complete by operation of law if a completeness determination is not made by EPA 6 months after receipt of the submission.

The State passed the revisions to the TACB General Rules, 101, by repealing the existing section 101.10 and replacing it with a new section 101.10 on August 20, 1992. The State submitted the revision to public hearing on April 19, 1992. The rule was submitted to EPA on October 15, 1992, by the Governor, as a proposed revision to the SIP.

The October 15, 1992, SIP revision was reviewed by EPA to determine completeness shortly after its submittal, in accordance with the completeness criteria set out at 40 CFR part 51, appendix V (1991), as amended by 57 FR 42216 (August 26, 1991). The submittal was found to be complete and a letter dated January 15, 1993, was forwarded to the Governor indicating the completeness of the submittal and the next steps to be taken in the review process. The provisions of the regulations are outlined under the analysis of the State's submission below.

On September 1, 1993, the TACB merged with the Texas Water Commission to form the Texas Natural Resource Conservation Commission (TNRCC) and is now called the Office of Air Quality within the TNRCC. The merger did not abrogate, void, or rescind any rules, regulations, Orders, permits, or any other action previously taken by the former TACB.

2. Components of Emission Statement Program

There are several key general and specific components of an acceptable emission statement program. Specifically, the State must submit a revision to its SIP and the emission statement program must meet the minimum requirements for reporting by the sources and the State. In general, the program must include, at a minimum, provisions for applicability, definitions, compliance, and specific source requirements detailed below.

A. SIP Revision Submission. Required within 2 years of enactment of the Clean Air Act Amendments of 1990 (CAAA) (November 15, 1990).

B. Program Elements. The State emission statement program must, at a minimum, include provisions covering applicability of the regulations, definitions for key terms used in the regulations, a compliance schedule for sources covered by the regulations, and the specific reporting requirements for sources. The emission statement submitted by the source should contain, at a minimum, a certification that the information is accurate to the best knowledge of the individual certifying the statement, source identification information, operating information, process rate data, control equipment information, and emissions information.

[1] Also section 172(c)(7) of the Act requires that plan provisions for nonattainment areas meet the applicable provisions of section 110(a)(2).

These elements are described in greater detail in section D of this document. EPA recommends that the State program require the submission of the data from the sources no later than April 15 of each year to insure that the State can meet the July 1 deadline for the submission of data into AIRS each year. The guidance document prepared by EPA provides a draft model State rule which can be used as the basis for the States to develop their program. The guidance document also provides suggested language for the specific program elements.

C. Sources Covered. Section 182(a)(3)(B) requires that States with areas designated as nonattainment for ozone require emission statement data from sources of volatile organic compounds (VOC) or oxides of nitrogen (NO_x) in the nonattainment areas. This requirement applies to all ozone nonattainment areas, regardless of the classification (Marginal, Moderate, etc.).

The States may waive, with EPA approval, the requirement for emission statements for classes or categories of sources with less than 25 tons per year of actual plant-wide NO_x or VOC emissions in nonattainment areas if the class or category is included in the base year and periodic inventories and emissions are calculated using emission factors established by EPA (such as those found in EPA publication AP–42) or other methods acceptable to EPA. States should get clearance from the appropriate EPA Regional Office to waive the emission statement requirement for these smaller sources.

D. Reporting Requirements for Sources. The State of Texas requires facilities to report on an emissions inventory questionnaire supplied by the State. Sources covered by the State emission statement program should submit, at a minimum, the following data elements:

1. Source identification information.
2. Operating information.
3. Process rate data.
4. Control equipment information.
5. Emissions information.

3. Review of the State's Emission Statement Regulations.

A. Applicability

The applicability of the regulation to ozone nonattainment areas is documented in subsection (a) and (a)(1). The rule states that the owner or operator of the following stationary sources in the State of Texas or on waters that extend 25 miles from the shoreline shall submit emissions inventories to the Texas Air Control Board (TACB) on forms or other media approved by the TACB: a major facility/stationary source, as defined in Section 101.1 of this title (relating to definitions), and any stationary source in an ozone nonattainment area emitting a minimum of 10 tons per year (tpy) volatile organic compounds (VOC), 25 tpy nitrogen oxides (NOx), or 100 tpy carbon monoxide (CO).

B. Types of Inventories

There are two types of inventories identified in the regulation which are pertinent to emission statements. They are an initial emissions inventory and an ozone nonattainment area inventory.

The requirement for initial emissions inventories is documented in subsection (b)(1). Stationary sources, as identified in subsection (a) of Section 101.10 shall submit an initial emissions inventory (IEI) for any criteria pollutant or hazardous air pollutant that has not been identified in a previous inventory. The IEI shall consist of actual emissions of VOC, NO_x, CO, sulfur dioxide (SO_2), lead (Pb), and particulate matter of less than 10 microns in diameter (PM_{10}) from stationary sources and emissions of all hazardous air pollutants identified in the FCAA, Section 112(b). For purposes of this section, the term "actual emission" is the actual rate of emissions of a pollutant from an emissions unit for the calendar year or seasonal period. Actual emission estimates must also include excess emissions occurring during maintenance, start-ups, shut-downs, upsets, and downtime to parallel the documentation of these events in the emissions inventory and must follow emissions calculations identified in subsection (c) of section 101.10.

The requirement for ozone nonattainment areas inventories is documented in subsection (b)(3). This subsection requires stationary sources in ozone nonattainment areas emitting a minimum of 10 TPY of VOC, 25 TPY of NO_x, or 100 TPY of CO to submit an annual inventory. The inventory shall consist of actual annual emissions and typical weekday emissions that occur during the summer months.

C. Minimum Data Requirements

The data requirements include a certifying statement, facility identification information, operating information, process rate data, control equipment information, and emissions information.

The certifying statement is documented in subsection (d). A statement is required from the owner or operator to accompany the emission inventory certifying that the information is true and accurate to the best knowledge of the certifying official. The certification will include the name, title, signature, date of signature, and telephone number of the certifying official.

The data requirements are contained in the questionnaire used by the State to gather emission statement data. The questionnaire is required from all facilities which must report emission statement data. A copy of the questionnaire and instructions for completion is contained in the Technical Support Document (TSD). Source data elements required by Texas through the questionnaire sent by the State to the facilities are:

1. Facility identification information.
a. Full name, physical location, and mailing address of facility.
b. Latitude and Longitude.
c. SIC code(s).
2. Operating information.
a. Percentage annual throughput by season.
b. Days per week during the normal operating schedule.
c. Hours per day during the normal operating schedule.
d. Hours per year during the normal operating schedule.
3. Process rate data.
a. Annual process rate (annual throughput).
b. Peak ozone season daily process rate (in nonattainment areas.
4. Control equipment information.
a. Current primary and secondary AIRS Facility System (AIRS) control equipment identification codes.
b. Current control equipment efficiency (percent).
5. Emissions information.
a. Estimated actual VOC and/or NO_x emissions at the segment level, in tpy for an annual emission rate and pounds per day for a typical ozone season day (defined as the average or typical operating day during the peak ozone season). The instructions for completion of the questionnaire require that if either VOC or NO_x is emitted at or above the designated level, the other pollutant must be included in the emission statement, even if it is emitted at levels below the specified cutoffs. Actual emission estimates must include upsets, downtime, and fugitive emissions, and must follow an emission estimation method. Emissions will be reported as one number.
b. AFS estimated emissions method code.
c. Emission factor (if emissions were calculated using an emissions factor).

D. Calculations

Calculations of emissions are documented in subsection (c). The subsection specifies that actual measurement with continuous monitoring systems (CEMS) is the preferred method of calculating emissions from a point source. Other means of determining actual emissions may be utilized if CEMS data is not

available in accordance with detailed instructions from the Emissions Inventory Division of the TACB.

E. Reporting Requirements

The reporting requirements are documented in subsection (e). The reporting deadline for the 1992 ozone nonattainment area is March 31, 1993. Subsequent emission statements are due on March 31 of each year and will contain data for the previous year.

F. Enforcement

The enforcement requirements are documented in subsection (f). The State of Texas has included language in its regulation that permits the State to enforce the provisions of the regulation under all pertinent State enforcement authorities.

All measures and other elements in the SIP must be enforceable by the State and EPA. The EPA criteria addressing the enforceability of SIPs and SIP revisions were stated in a September 23, 1987, memorandum (with attachments) from J. Craig Potter, Assistant Administrator for Air and Radiation, et al. (see 57 FR 13541 (April 16, 1992) ("Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency")). SIP provisions must also contain a program that provides for enforcement of the control measures and other elements in the SIP (see section 110(a)(2)(C)).

The analysis of the Texas regulation shows that it adequately addresses all components of an emission statement program.

In addition, the State has agreed to provide the EPA with emission statement data for the EPA AIRS through the State grants process and to provide quarterly status reports.

Final Action

In today's action, the EPA is granting final approval of the Texas emission statement program as submitted. The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this FR publication, the EPA is proposing to approve the SIP revision should adverse comments be received. Thus, this action will be effective October 25, 1994 unless, by September 26, 1994, notice is received that adverse or critical comments will be submitted.

If such notice is received, this action will be withdrawn before the effective date by publishing a subsequent document which will withdraw the final action. All public comments will then be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. If no comments are received, the public is advised that this action will be effective October 25, 1994.

The EPA has reviewed this request for revision of the federally-approved SIP for conformance with the provisions of the 1990 Clean Air Act Amendments of November 15, 1990. The EPA has determined that this action conforms with those requirements.

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

Regulatory process

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, the EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities (5 U.S.C. 603 and 604). Alternatively, the EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

The SIP approvals under section 110 and subchapter I, part D, of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids the EPA to base its actions concerning SIPs on such grounds (*Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (S. Ct. 1976; 42 U.S.C. 7410(a)(2)).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 25, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements.

Executive Order 12866

This action has been classified as a Table Two action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993, memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. A future document will inform the general public of these tables. On January 6, 1989, the Office of Management and Budget (OMB) waived Table Two and Table Three SIP revisions (54 FR 2222) from the requirements of section three of Executive Order 12291 for two years. The EPA has submitted a request for a permanent waiver for Table Two and Table Three SIP revisions. The OMB has agreed to continue the temporary waiver until such time as it rules on the EPA's request. This request continues in effect under Executive Order 12866, which superseded Executive Order 12291 on September 30, 1993.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Oxides of nitrogen, Reporting and recordkeeping requirements, Volatile organic compounds.

Note: Incorporation by reference of the SIP for the State of Texas was approved by the Director of the **Federal Register** on July 1, 1982.

Dated: July 27, 1994.

Allyn M. Davis,

Acting Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–767lq.

Subpart SS—Texas

2. Section 52.2270 is amended by adding paragraph (c)(82) to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

(82) A revision to the Texas SIP to include a new Texas Natural Resource Conservation Commission, Part III, Chapter 101, *General Rules*, section 101.10, *Emission Inventory Requirements*. In a concurrent action, the TNRCC repealed the existing section 101.10 concerning filing of emissions data. The new rule and the repealing of the old rule was submitted to the EPA on October 15, 1992, by the Governor, as a proposed revision to the SIP.

(i) Incorporation by reference.

(A) TNRCC, Part III, Chapter 101, *General Rules*, section 101.10, *Emission Inventory Requirements*, as adopted by the TNRCC on August 20, 1992.

(B) TNRCC Order No. 92–20, as adopted by the TNRCC on August 20, 1992.

(ii) Additional material.

(A) TNRCC certification letter dated October 8, 1992, and signed by William R. Campbell, Executive Director, TNRCC.

[FR Doc. 94–21014 Filed 8–25–94; 8:45 am]

BILLING CODE 6560–50–F

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40 CFR Parts 52 and 81

[IN15–3–6620; FRL–5058–9]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Indiana

AGENCY: United States Environmental Protection Agency (USEPA)

ACTION: Final rule; withdrawal.

SUMMARY: On July 8, 1994, (59 FR 35044) the United States Environmental Protection Agency (USEPA) approved a revision to the Indiana State Implementation Plan (SIP) for ozone. The action approved a request by Indiana to redesignate the following ozone nonattainment areas: St. Joseph and Elkhart, Vanderburgh, and Marion Counties to attainment of the National Ambient Air Quality Standard (NAAQS) for ozone. The USEPA also approved the State's maintenance plan for these counties. The USEPA is withdrawing this final rule due to the adverse comments received on these actions. In a subsequent final rule USEPA will summarize and respond to the comments received and announce final rulemaking action on this requested Indiana SIP revision and redesignation.

EFFECTIVE DATE: August 26, 1994.

ADDRESSES: Copies of the documents relevant to this action are available forpublic inspection during normal business hours at the following location:

U.S. Environmental Protection Agency, Region 5, Regulation Development Branch, 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Edward Doty, Environmental Scientist, Regulation Development Section, Regulation Development Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604. Telephone: (312) 886–6057.

List of Subjects in 40 CFR Parts 52 and 81

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: August 16, 1994.

David A. Ullrich,

Acting Regional Administrator.

[FR Doc. 94–21012 Filed 8–25–94; 8:45 am]

BILLING CODE 6560–50–F

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 12

RIN 1090–AA42

Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations

AGENCY: Department of the Interior, Office of the Secretary.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule will adopt for the Department of the Interior, standards which will be imposed on grantees covered by the revised Office of Management and Budget (OMB) Circular A–110, "Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations."

DATES: This rule is effective on August 26, 1994. Comments must be in writing and must be received by September 26, 1994.

ADDRESSES: Comments should be mailed to Acquisition and Assistance Division, Office of Acquisition and Property Management, Department of the Interior, 1849 C St., NW., Mail Stop 5512, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Dean A. Titcomb, (Chief, Acquisition and Assistance Division), (202) 208–6431.

SUPPLEMENTARY INFORMATION: OMB Circular A–110 covers both grants made by Federal agencies and subgrants made by States to nongovernmental organizations.

Agencies were required to adopt those standards which would be imposed on grantees in codified regulations within six months after publication in the **Federal Register.**

Over 200 comments were received by OMB from Federal agencies, non-profit organizations, professional organizations, and others in response to the notice published on August 27, 1992 (57 FR 39018) requesting comments on proposed revisions. The comments were considered in developing the final version. Consequently, this rule is published as an interim final rule because of the previous request for comment process used in the development of the Circular, the large number of comments already received and considered by OMB and the Federal agencies, and due to the limited flexibility to revise the rule provided by OMB.

This interim final rule essentially adopts all the language in the Circular with two exceptions. At Section 12.904, language has been added to describe the procedure for handling requests for class deviations and case-by-case exceptions. At Section 12.915, the Department is including a term and condition concerning use of the metric system of measurement.

The Department is revising 43 CFR part 12, by adding subpart F to implement these requirements.

Public Participation

The policy of the Department of the Interior, is whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written comments, suggestions or objections regarding the interim final rule to the location identified in this preamble.

Executive Order 12866, Paperwork Reduction Act, and Regulatory Flexibility Act

This interim final rule was not subject to Office of Management and Budget review under Executive Order 12866.

The Department has determined that this rule will not have a significant economic impact on a substantial number of small entities because it does not affect the amount of funds provided in the covered programs, but rather modifies and updates administrative and procedural requirements. This interim final rule does not contain a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Environmental Effects

The Department has determined that this rule does not constitute a major Federal action having a significant impact on the human environment under the National Environmental Policy Act of 1969.

Executive Order No. 12778

The Department has certified to the Office of Management and Budget that this proposed rule meets the applicable standards provided in Sections 2(a) and 2(b)(2) of Executive Order 12778.

List of Subjects in 43 CFR Part 12

Cooperative agreements, Grants administration, Grant program.

Dated: July 11, 1994.

B.R. Cohen,

Assistant Secretary—Policy, Management and Budget.

For the reasons set forth in the preamble, Title 43, part 12 of the Code of Federal Regulations is amended as set forth below:

PART 12—ADMINISTRATIVE AND AUDIT REQUIREMENTS AND COST PRINCIPLES FOR ASSISTANCE PROGRAMS

1. The authority citation for part 12 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 7501; 41 U.S.C. 701 *et seq.*; E.O. 12539, 3 CFR, 1986 Comp. p. 189; E.O. 12674, 3 CFR, 1989 Comp. p. 215; E.O. 12731, 3 CFR, 1990 Comp. p. 306; OMB Circular A–102; OMB Circular A–110; OMB Circular A–128; and OMB Circular A–133.

2. Part 12 is amended by adding subpart F to read as set forth below.

Subpart F—Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations

General

Sec
12.901 Purpose and applicability.
12.902 Definitions.
12.903 Effect on other issuances.
12.904 Deviations.
12.905 Subawards.

Pre-Award Requirements

12.910 Purpose.
12.911 Pre-award policies.
12.912 Forms for applying for Federal assistance.
12.913 Debarment and suspension.
12.914 Special award conditions.
12.915 Metric system of measurement.
12.916 Resource Conservation and Recovery Act.
12.917 Certifications and representations.

Post-Award Requirements

Financial and Program Management

12.920 Purpose of financial and program management.
12.921 Standards for financial management systems.
12.922 Payment.
12.923 Cost sharing or matching.
12.924 Program income.
12.925 Revision of budget and program plans.
12.926 Non-Federal audits.
12.927 Allowable costs.
12.928 Period of availability of funds.

Property Standards

12.930 Purpose of property standards.
12.931 Insurance coverage.
12.932 Real property.
12.933 Federally-owned and exempt property.
12.934 Equipment.
12.935 Supplies and other expendable property.
12.936 Intangible property.
12.937 Property trust relationship.

Procurement Standards

12.940 Purpose of procurement standards.
12.941 Recipient responsibilities.
12.942 Codes of conduct.
12.943 Competition.
12.944 Procurement procedures.
12.945 Cost and price analysis.
12.946 Procurement records.
12.947 Contract administration.
12.948 Contract provisions.

Reports and Records

12.950 Purpose of reports and records.
12.951 Monitoring and reporting program performance.
12.952 Financial reporting.
12.953 Retention and access requirements for records.

Termination and Enforcement

12.960 Purpose of termination and enforcement.
12.961 Termination.
12.962 Enforcement.

After-the-Award Requirements

12.970 Purpose.
12.971 Closeout procedures.
12.972 Subsequent adjustments and continuing responsibilities.
12.973 Collection of amounts due.

Appendix A to Subpart F—Contract Provisions

General

§ 12.901 Purpose and applicability.

This subpart establishes uniform administrative requirements for grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations.

§ 12.902 Definitions.

Accrued expenditures means the charges incurred by the recipient during a given period requiring the provision of funds for:

(1) goods and other tangible property received;

(2) services performed by employees, contractors, subrecipients, and other payees; and,

(3) other amounts becoming owed under programs for which no current services or performance is required.

Accrued income means the sum of:

(1) earnings during a given period from:

(i) services performed by the recipient, and

(ii) goods and other tangible property delivered to purchasers, and

(2) amounts becoming owed to the recipient for which no current services or performance is required by the recipient.

Acquisition cost of equipment means the net invoice price of the equipment, including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

Advance means a payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

Award means financial assistance that provides support or stimulation to accomplish a public purpose. Awards include grants and other agreements in the form of money or property in lieu of money, by the Federal Government to an eligible recipient. The term does not include: technical assistance that provides services instead of money; other assistance in the form of loans, loan guarantees, interest subsidies, or insurance; direct payments of any kind to individuals; and contracts which are required to be entered into and administered under procurement laws and regulations.

Cash contributions means the recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

Closeout means the process by which a Federal agency determines that all applicable administrative actions and all required work of the award have been completed by the recipient and Federal awarding agency.

Contract means a procurement contract under an award or subaward, and a procurement subcontract under a recipient's or subrecipient's contract.

Cost sharing or matching means that portion of project or program costs not borne by the Federal Government.

Date of completion means the date on which all work under an award is completed or the date on the award document, or any supplement or amendment thereto, on which Federal sponsorship ends.

Disallowed costs means those charges to an award that the Federal awarding agency determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

Equipment means tangible nonexpendable personal property, including exempt property charged directly to the award having a useful life of more than one year and an acquisition cost of $5000 or more per unit. However, consistent with recipient policy, lower limits may be established.

Excess property means property under the control of any Federal awarding agency that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

Exempt property means tangible personal property acquired in whole or in part with Federal funds, where the Federal awarding agency has statutory authority to vest title in the recipient without further obligation of the Federal Government. An example of exempt property authority is contained in the Federal Grant and Cooperative Agreement Act (31 U.S.C. 6306), for property acquired under an award to conduct basic or applied research by a non-profit institution of higher education or non-profit organization whose principal purpose is conducting scientific research.

Federal funds authorized means the total amount of Federal funds obligated by the Federal Government for use by the recipient. This amount may include any authorized carryover of unobligated funds from prior funding periods when permitted by agency regulations or agency implementing instructions.

Federal share of real property, equipment, or supplies means that percentage of the property's acquisition costs and any improvement expenditures paid with Federal funds.

Funding period means the period of time when Federal funding is available for obligation by the recipient.

Intangible property and debt instruments means, but is not limited to: trademarks; copyrights; patents and patent applications; and such property as loans, notes and other debt instruments; lease agreements; stock and other instruments of property ownership, whether considered tangible or intangible.

Obligations means the amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

Outlays or expenditures means charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of: cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied, and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of: cash disbursements for direct charges for goods and services; the amount of indirect expense incurred; the value of in-kind contributions applied; and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

Personal property means property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

Prior approval means written approval by an authorized official evidencing prior consent.

Program income means gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award (see exclusions in paragraphs 12.924 (e) and (h)). Program income includes, but is not limited to, income from: fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal awarding agency regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

Project costs means all allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

Project period means the period established in the award document during which Federal sponsorship begins and ends.

Property means, unless otherwise stated, real property, equipment, supplies, intangible property, and debt instruments.

Real property means land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

Recipient means an organization receiving financial assistance directly from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, commercial organizations, and quasi-public and private non-profit organizations such as, but not limited to: community action agencies, research institutes, educational associations, and health centers. The term may include, at the discretion of the Federal awarding agency foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients. The term does not include government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are government-owned or controlled, or are designated as federally-funded research and development centers.

Research and development means all research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions.

(1) "Research" is defined as a systematic study directed toward fuller scientific knowledge or understanding of the subject studied.

(2) "Development" is the systematic use of knowledge and understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes. The term research also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

Small awards means a grant or cooperative agreement not exceeding the small purchase threshold fixed at 41 U.S.C. 403(11) (currently $25,000).

Subaward means an award of financial assistance in the form of

money, or property in lieu of money, made under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but does not include procurement of goods and services nor does it include any form of assistance that is excluded from the definition of "award" in this section.

Subrecipient means the legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided. The term may include foreign or international organizations (such as agencies of the United Nations) at the discretion of the Federal awarding agency.

Supplies means all personal property excluding equipment, intangible property, and debt instruments as defined in this section, and inventions of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement ("subject inventions"), as defined in 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts, and Cooperative Agreements."

Suspension means an action by a Federal awarding agency that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the Federal awarding agency. Suspension of an award is a separate action from suspension under the Department of the Interior regulations implementing E.O.'s 12549 and 12689, "Debarment and Suspension." See Subpart D of 43 CFR part 12.

Termination means the cancellation of Federal sponsorship, in whole or in part, under an agreement at any time prior to the date of completion.

Third party in-kind contributions means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

Unliquidated obligations, for financial reports prepared on a cash basis, means the amount of obligations incurred by the recipient that have not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the recipient for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by Federal awarding agency that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

Unrecovered indirect cost means the difference between the amount awarded and the amount that could have been awarded under the recipient's approved negotiated indirect cost rate.

Working capital advance means a procedure whereby funds are advanced to the recipient to cover its estimated disbursement needs for a given initial period.

§ 12.903 Effect on other issuances.

For awards subject to this subpart, all administrative requirements of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with the requirements of this subpart shall be superseded, except to the extent they are required by statute, or authorized in accordance with the deviations provision in section 12.904.

§ 12.904 Deviations.

The Office of Management and Budget (OMB), may grant exceptions for classes of grants or recipients subject to the requirements of this subpart when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this subpart shall be permitted only in unusual circumstances. Federal awarding agencies may apply more restrictive requirements to a class of recipients when approved by OMB. All requests for class deviations shall be processed through the Assistant Secretary—Policy, Management, and Budget. Federal awarding agencies may apply less restrictive requirements when awarding small awards, except for statutory requirements. Exceptions on a case-by-case basis may also be made by Federal awarding agencies. Bureau/office application of less restrictive requirements when awarding small awards, except for statutory requirements as well as exceptions on a case-by-case basis, will be approved by designated officials identified in bureau/office procedures.

§ 12.905 Subawards.

Unless sections of this subpart specifically exclude subrecipients from coverage, the provisions of this subpart shall be applied to subrecipients performing work under awards if such subrecipients are institutions of higher education, hospitals, or other non-profit organizations. State and local government subrecipients are subject to the provisions of regulations implementing the grants management common rule, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 43 CFR part 12.

Pre-Award Requirements

§ 12.910 Purpose.

Sections 12.911 through 12.917 prescribe forms and instructions and other pre-award matters to be used in applying for Federal awards.

§ 12.911 Pre-award policies.

(a) *Use of Grants and Cooperative Agreements, and Contracts.* In each instance, the Federal awarding agency shall decide on the appropriate award instrument (i.e., grant, cooperative agreement, or contract). The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301–08) governs the use of grants, cooperative agreements and contracts. A grant or cooperative agreement shall be used only when the principal purpose of a transaction is to accomplish a public purpose of support or stimulation authorized by Federal statute. The statutory criterion for choosing between grants and cooperative agreements is that for the latter, "substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement." Contracts shall be used when the principal purpose is acquisition of property or services for the direct benefit or use of the Federal Government.

(b) *Public Notice and Priority Setting.* Federal awarding agencies shall notify the public of their funding priorities for discretionary grant programs, unless funding priorities are established by Federal statute.

§ 12.912 Forms for applying for Federal assistance.

(a) Federal awarding agencies shall comply with the applicable report clearance requirements of 5 CFR part 1320, "Controlling Paperwork Burdens on the Public," with regard to all forms used by the Federal awarding agency in place of or as a supplement to the Standard Form 424 (SF–424) series.

(b) Applicants shall use the SF–424 series or those forms and instructions prescribed by the Federal awarding agency.

(c) For Federal programs covered by E.O. 12372, "Intergovernmental Review of Federal Programs," the applicant shall complete the appropriate sections

of the SF–424 (Application for Federal Assistance) indicating whether the application was subject to review by the State Single Point of Contact (SPOC). The name and address of the SPOC for a particular State can be obtained from the Federal awarding agency or the *Catalog of Federal Domestic Assistance*. The SPOC shall advise the applicant whether the program for which application is made has been selected by that State for review.

(d) Federal awarding agencies that do not use the SF–424 form will indicate whether the application is subject to review by the State under E.O. 12372.

§ 12.913 Debarment and suspension.

Federal awarding agencies and recipients shall comply with the nonprocurement debarment and suspension common rule implementing E.O.s 12549 and 12689, "Debarment and Suspension," Subpart D of 43 CFR part 12. This common rule restricts subawards and contracts with certain parties that are debarred, suspended or otherwise excluded from or ineligible for participation in Federal assistance program or activities.

§ 12.914 Special award conditions.

(a) Federal awarding agencies may impose additional requirements as needed, if an applicant or recipient:

(1) Has a history of poor performance,

(2) Is not financially stable,

(3) Has a management system that does not meet the standards prescribed in this part,

(4) Has not conformed to the terms and conditions of a previous award, or

(5) Is not otherwise responsible.

(b) Additional requirements may only be imposed provided that the applicant or recipient is notified in writing as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the corrective action needed;

(4) The time allowed for completing the corrective actions; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

§ 12.915 Metric system of measurement.

The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205) declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally-funded activities. Federal awarding agencies will follow the provisions of E.O. 12770, "Metric Usage in Federal Government Programs." When applicable, the awarding agency shall request that measurement-sensitive information to be included as part of the application be expressed in metric units. When required by the awarding agency for grants to recipients, the following term and condition will be incorporated into the grant:

Provision

All progress and final reports, other reports, or publications produced under this award shall employ the metric system of measurement. However, the recipient may use non-metric measurements to the extent that the recipient has supporting documentation that the use of metric measurements is impracticable or is likely to cause significant inefficiencies or loss of markets to the recipient, such as when foreign competitors are producing competing products in non-metric units.

End of Provision

§ 12.916 Resource Conservation and Recovery Act.

Under the Resource Conservation and Recovery Act (42 U.S.C. 6962), any State agency or agency of a political subdivision of a State that is using appropriated Federal funds must comply with Section 6002. Section 6002 requires that preference be given in procurement programs to the purchase of specific products containing recycled materials identified in guidelines developed by the Environmental Protection Agency (EPA) (40 CFR parts 247–254). Accordingly, State and local institutions of higher education and hospitals that receive direct Federal awards or other Federal funds shall give preference in their procurement programs funded with Federal funds to the purchase of recycled products pursuant to the EPA guidelines.

§ 12.917 Certifications and representations.

Unless prohibited by statute or codified regulation, each Federal awarding agency is authorized and encouraged to allow recipients to submit certifications and representations required by statute, executive order, or regulation on an annual basis, if the recipients have ongoing and continuing relationships with the agency. Annual certifications and representations shall be signed by responsible officials with the authority to ensure recipients' compliance with the pertinent requirements.

Post-Award Requirements

Financial and Program Management

§ 12.920 Purpose of financial and program management.

Sections 12.921 through 12.928 prescribe standards for financial management systems, methods for making payments, and rules for: satisfying cost sharing and matching requirements, accounting for program income, budget revision approvals, making audits, determining allowability of cost, and establishing fund availability.

§ 12.921 Standards for financial management systems.

(a) Federal awarding agencies shall require recipients to relate financial data to performance data and develop unit cost information whenever practical.

(b) Recipients' financial management systems shall provide for the following.

(1) Accurate, current and complete disclosure of the financial results of each federally-sponsored project or program in accordance with the reporting requirement set forth in Section 12.952. If a Federal awarding agency requires reporting on an accrual basis from a recipient that maintains its records on other than an accrual basis, the recipient shall not be required to establish an accrual accounting system. These recipients may develop accrual data for their reports on the basis of an analysis of the documentation on hand.

(2) Records that identify adequately the source and application of funds for federally-sponsored activities. These records shall contain information pertaining to Federal awards, authorizations, obligations, unobligated balances, assets, outlays, income and interest.

(3) Effective control over and accountability for all funds, property, and other assets. Recipients shall adequately safeguard all such assets and assure they are used solely for authorized purposes.

(4) Comparison of outlays with budget amounts for each award. Whenever appropriate, financial information should be related to performance and unit cost data.

(5) Written procedures to minimize the time elapsing between the transfer of funds to the recipient from the U.S. Treasury and the issuance or redemption of checks, warrants, or

payments by other means for program purposes by the recipient. To the extent that the provisions of the Cash Management Improvement Act (CMIA) (Pub. L. 101–453) govern, payment methods of State agencies, instrumentalities, and fiscal agents shall be consistent with CMIA Treasury-State Agreements or the CMIA default procedures codified at 31 CFR part 205, "Withdrawal of Cash from the Treasury for Advances under Federal Grant and Other Programs."

(6) Written procedures for determining the reasonableness, allocability and allowability of costs in accordance with the provisions of the applicable Federal cost principles and the terms and conditions of the award.

(7) Accounting records, including cost accounting records, that are supported by source documentation.

(c) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the Federal awarding agency at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(d) The Federal awarding agency may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(e) Where bonds are required in the situations described above in Section 12.921 (c) & (d), the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, "Surety Companies Doing Business with the United States."

§ 12.922 Payment.

(a) Payment methods shall minimize the time elapsing between the transfer of funds from the United States Treasury and the issuance of redemption of checks, warrants, or payment by other means by the recipients. Payment methods of State agencies or instrumentalities shall be consistent with Treasury-State CMIA agreements or default procedures codified at 31 CFR part 205.

(b) (1) Recipients are to be paid in advance, provided they maintain or demonstrate the willingness to maintain or demonstrate:

(i) written procedures that minimize the time elapsing between the transfer of funds and disbursement by the recipient, and

(ii) financial management systems that meet the standards for fund control and accountability as established in Section 12.921.

(2) Cash advances to a recipient organization shall be limited to the minimum amounts needed and be timed to be in accordance with the actual, immediate cash requirements of the recipient organization in carrying out the purpose of the approved program or project. The timing and amount of cash advances shall be as close as is administratively feasible to the actual disbursements by the recipient organization for direct program or project costs and the proportionate share of any allowable indirect costs.

(c) Whenever possible, advances will be consolidated to cover anticipated cash needs for all awards made by the Federal awarding agency to the recipient.

(1) Advance payment mechanisms include, but are not limited to, Treasury check and electronic funds transfer.

(2) Advance payment mechanisms are subject to 31 CFR Part 205.

(3) Recipients shall be authorized to submit requests for advances and reimbursements at least monthly when electronic fund transfers are not used.

(d) Requests for Treasury check advance payment shall be submitted on SF–270, "Request for Advance or Reimbursement," or other forms as may be authorized by OMB. This form is not to be used when Treasury check advance payments are made to the recipient automatically through the use of a predetermined payment schedule or if precluded by special Federal awarding agency instructions for electronic funds transfer.

(e) Reimbursement is the preferred method when the requirements in paragraph (b) of this section cannot be met. Federal awarding agencies may also use this method on any construction agreement, or if the major portion of the construction project is accomplished through private market financing or Federal loans, and the Federal assistance constitutes a minor portion of the project.

(1) When the reimbursement method is used, the Federal awarding agency shall make payment within 30 days after receipt of the billing, unless the billing is improper.

(2) Recipients shall be authorized to submit a request for reimbursement at least monthly when electronic funds transfers are not used.

(f) If a recipient cannot meet the criteria for advance payments and the Federal awarding agency has determined that reimbursement is not feasible because the recipient lacks sufficient working capital, the Federal awarding agency may provide cash on a working capital advance basis. Under this procedure, the Federal awarding agency shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the awardee's disbursing cycle. Thereafter, the Federal awarding agency shall reimburse the recipient for its actual cash disbursements. The working capital advance method of payment shall not be used for recipients unwilling or unable to provide timely advances to their subrecipient to meet the subrecipient's actual cash disbursements.

(g) To the extent available, recipients shall disburse funds available from repayments to and interest earned on a revolving fund, program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(h) Unless otherwise required by statute, Federal awarding agencies shall not withhold payments for proper charges made by recipients at any time during the project period unless paragraph (h)(1) or (h)(2) of this section apply:

(1) A recipient has failed to comply with the project objectives, the terms and conditions of the award, or Federal reporting requirements; or

(2) The recipient or subrecipient is delinquent in a debt to the United States as defined in OMB Circular A–129, "Managing Federal Credit Programs." Under such conditions, the Federal awarding agency may, upon reasonable notice, inform the recipient that payments shall not be made for obligations incurred after a specified date until the conditions are corrected or the indebtedness to the Federal Government is liquidated.

(i) Standards governing the use of banks and other institutions as depositories of funds advanced under awards are as follows.

(1) Except for situations described in paragraph (i)(2) of this section, Federal awarding agencies shall not require separate depository accounts for funds provided to a recipient or establish any eligibility requirements for depositories for funds provided to a recipient. However, recipients must be able to account for the receipt, obligation and expenditure of funds.

(2) Advances of Federal funds shall be deposited and maintained in insured accounts whenever possible.

(j) Consistent with the national goal of expanding the opportunities for women-owned and minority-owned business enterprises, recipients are encouraged to use women-owned and minority-owned banks (a bank which is owned at least

50 percent by women or minority group members).

(k) Recipients shall maintain advances of Federal funds in interest bearing accounts, unless paragraph (h)(1), (2) or (3) apply:

(1) The recipient receives less than $120,000 in Federal awards per year.

(2) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(l) For those entities where CMIA and its implementing regulations do not apply, interest earned on Federal advances deposited in interest bearing accounts shall be remitted annually to Department of Health and Human Services, Payment Management System, P.O. Box 6021, Rockville, MD 20852. Interest amounts up to $250 per year may be retained by the recipient for administrative expense. In keeping with Electric Funds Transfer rules, (31 CFR part 206), interest should be remitted to the HHS Payment Management System through an electric medium such as the FEDWIRE Deposit system. Recipients who do not have this capability should use a check. State universities and hospitals shall comply with CMIA as it pertains to interest. If an entity subject to CMIA uses its own funds to pay preaward costs for discretionary awards without prior written approval from the Federal awarding agency, it waives its right to recover the interest under CMIA.

(m) Except as noted elsewhere in this subpart, only the following forms shall be authorized for the recipients in requesting advances and reimbursements. Federal agencies shall not require more than an original and two copies of these forms.

(1) SF–270, "Request for Advance or Reimbursement." Each Federal awarding agency shall adopt the SF–270 as a standard form for all nonconstruction programs where electronic funds transfer or predetermined advance methods are not used. Federal awarding agencies, however, have the option of using this form for construction programs in lieu of the SF–271, "Outlay Report and Request for Reimbursement for Construction Programs."

(2) SF–271, "Outlay Report and Request for Reimbursement for Construction Programs." Each Federal awarding agency shall adopt the SF–271 as the standard form to be used for requesting reimbursement for construction programs. However, a Federal awarding agency may substitute the SF–270 when the Federal awarding agency determines that it provided adequate information to meet Federal needs.

§ 12.923 Cost sharing or matching.

(a) All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when the contributions meet all of the following criteria.

(1) Are verifiable from the recipient's records.

(2) Are not included as contributions for any other federally-assisted project or program.

(3) Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) Are allowable under the applicable cost principles.

(5) Are not paid by the Federal Government under another award, except where authorized by Federal statute to be used for cost sharing or matching.

(6) Are provided for in the approved budget when required by the Federal awarding agency.

(7) Conform to other provisions of this subpart, as applicable.

(b) Unrecovered indirect costs may be included as part of cost sharing or matching only with the prior approval of the Federal awarding agency.

(c) Values for recipient contributions of services and property shall be established in accordance with the applicable cost principles. If a Federal awarding agency authorizes recipients to donate buildings or land for construction/facilities acquisition projects or long-term use, the value of the donated property for cost sharing or matching shall be the lesser of paragraph (c)(1) or (2) of this section:

(1) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation.

(2) The current fair market value. However, when there is sufficient justification, the Federal awarding agency may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project.

(d) Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(e) When an employer other than the recipient furnishes the services of an employee, these services shall be valued at the employee's regular rate of pay (plus an amount of fringe benefits that are reasonable, allowable, and allocable, but exclusive of overhead costs), provided these services are in the same skill for which the employee is normally paid.

(f) Donated supplies may include such items as office supplies, laboratory supplies, or workshop and classroom supplies. Value assessed to donated supplies included in the cost sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(g) The method used for determining cost sharing or matching for donated equipment, buildings, and land for which title passes to the recipient may differ according to the purpose of the award, if paragraph (1) or (2) of this section apply:

(1) If the purpose of the award is to assist the recipient to acquire equipment, buildings, or land, the total value of the donated property may be claimed as cost sharing or matching.

(2) If the purpose of the award is to support activities that require the use of equipment, buildings, or land, normally only depreciation or use charges for equipment and buildings may be made. However, the full value of equipment or other capital assets and fair rental charges for land may be allowed, provided that the Federal awarding agency has approved the charges.

(h) The value of donated property shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications.

(1) The value of donated land and buildings shall not exceed their fair market value at the time of donation to the recipient as established by an independent appraiser (e.g., certified real property appraiser or General Services Administration representative) and certified by a responsible official of the recipient.

(2) The value of donated equipment shall not exceed the fair market value of

equipment of the same age and condition at the time of donation.

(3) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(4) The value of loaned equipment shall not exceed its fair rental value.

(i) The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

(1) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(2) The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

§ 12.924 Program income.

(a) Federal awarding agencies shall apply the standards in this section in requiring recipient organization to account for program income related to projects financed in whole or in part with Federal funds.

(b) Except as provided in paragraph (h) of this section, program income earned during the project period shall be retained by the recipient and, in accordance with Federal awarding agency regulations or the terms and conditions of the award, shall be used in one or more of the following ways:

(1) added to funds committed to the project or program by the Federal awarding agency and recipient and used to further eligible project or program objectives;

(2) used to finance the non-Federal share of the project or program; or

(3) deducted from the total project or program allowable cost in determining the net allowable costs upon which the Federal share of costs is based.

(c) When an agency authorizes the disposition of program income as described in paragraph (b)(1) or (b)(2) of this section, program income in excess of any limits stipulated shall be use in accordance with paragraph (b)(3) of this section.

(d) If the Federal awarding agency does not specify in its regulations or the terms and conditions of the award how program income is to be used, paragraph (b)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (b)(1) of this section shall apply automatically unless the awarding agency indicates in the terms and conditions another alternative on the award or the recipient is subject to special award conditions, as indicated in Section 12.924.

(e) Unless Federal awarding agency regulations or the terms and conditions of the award provide otherwise, recipients shall have no obligation to the Federal Government regarding program income earned after the end of the project period.

(f) If authorized by Federal awarding agency regulations or the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(g) Proceeds from the sale of property shall be handled in accordance with the requirements of the Property Standards (See Sections 12.930 through 12.937).

(h) Unless Federal awarding agency regulations or the terms and condition of the award provide otherwise, recipients shall have no obligation to the Federal Government with respect to program income earned from license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. However, Patent and Trademark Amendments (35 U.S.C. 18) apply to inventions made under an experimental, developmental, or research award.

§ 12.925 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the Federal and non-Federal share, or only the Federal share, depending upon Federal awarding agency requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) For nonconstruction awards, recipients shall request prior approvals from Federal awarding agencies for one or more of the following program or budget related reasons.

(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(2) Change in a key person specified in the application or award document.

(3) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(4) The need for additional Federal funding.

(5) The transfer of amounts budgeted for indirect costs to absorb increases in direct costs, or vice versa, if approval is required by the Federal awarding agency.

(6) The inclusion, unless waived by the Federal awarding agency, of costs that require prior approval in accordance with OMB Circular A–21, "Cost Principles for Institutions of Higher Education," OMB Circular A–122, "Cost Principles for Non-Profit Organizations," or 45 CFR part 74 Appendix E, "Principles for Determining Costs Applicable to Research and Development under Grants and Contracts with Hospitals," or 48 CFR part 31, "Contract Cost Principles and Procedures," as applicable.

(7) The transfer of funds allotted for training allowances (direct payment to trainees) to other categories of expense.

(8) Unless described in the application and funded in the approved award, the subaward, transfer or contracting out of any work under an award. This provision does not apply to the purchase of supplies, material, equipment, or general support services.

(d) No other prior approval requirements for specific items may be imposed unless a deviation has been approved by OMB.

(e) Except for requirements listed in paragraph (c)(1) and (c)(4) of this section, Federal Awarding agencies are authorized, at their option to waive cost-related and administrative prior written approvals required by this subpart and OMB Circulars A–21 and A–122. Such waivers may include authorizing recipients to do any one or more of the following:

(1) Incur pre-award costs 90 calendar days prior to award or more than 90 calendar days with the prior approval of the Federal awarding agency. All pre-award costs are incurred at the recipient's risk (i.e., the Federal awarding agency is under no obligation to reimburse such costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover such costs).

(2) Initiate a one-time extension of the expiration date of the award of up to 12 months unless one or more of the conditions listed below apply. For one-time extensions, the recipient must notify the Federal awarding agency in writing, with the supporting reasons and revised expiration date, at least 10 days before the expiration date specified in the award. This one-time extension may not be exercised merely for the purpose of using unobligated balances. The conditions that prevent issuance of a one-time extension are:

(i) the terms and conditions of award prohibit the extension;

(ii) the extension requires additional Federal funds; or

(iii) the extension involves any change in the approved objectives or scope of the project.

(3) Carry forward unobligated balances to subsequent funding periods.

(4) For awards the support research, unless the Federal awarding agency provides otherwise in the award or in the agency's regulations, the prior approval requirements described in paragraph (e)(1) through (3) of this section are automatically waived (i.e., recipients need not obtain such prior approvals) unless one of the conditions included in paragraph (e)(2) applies.

(f) The Federal awarding agency may, at its option, restrict the transfer of funds among direct cost categories or programs, functions, and activities for awards in which the Federal share of the project exceeds $100,000 and the cumulative amount of the transfer exceeds or is expected to exceed 10 percent of the total budget as last approved by the Federal awarding agency. No Federal awarding agency shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(g) No other changes to nonconstruction budgets, except for the changes described in paragraph (j) of this section require prior approval.

(h) For construction awards, recipients shall request prior written approval promptly from Federal awarding agencies for budget revisions whenever paragraph (h)(1), (2) or (3) of this section apply:

(1) the revision results from changes in the scope or the objective of the project or program;

(2) additional Federal funds are needed to complete the project; or

(3) the recipient requests a revision that involves specific costs for which prior written approval requirements may be imposed under Section 12.927.

(i) No other prior approval requirements for specific items will be imposed unless OMB approves a deviation.

(j) When a Federal awarding agency makes an award that provides support for both construction and nonconstruction work, the Federal awarding agency may require the recipient to request prior approval before making any fund or budget transfers between the two types of work supported.

(k) For both construction and nonconstruction awards, Federal awarding agencies shall require recipients to notify the Federal awarding agency in writing promptly whenever the amount of Federal authorized funds is expected to exceed the needs of the recipient for the project period by more than $5,000 or five percent of the Federal award, whichever is greater. This notification shall not be required if an application for additional funding is submitted for a continuation award.

(l) When requesting approval for budget revisions, recipients shall use the budget forms that were used in the application unless the Federal awarding agency indicates that a letter of request suffices.

(m) Within 30 calendar days from the date of receipt of the request for budget revisions, the Federal awarding agency shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the Federal awarding agency shall inform the recipient in writing of the date when the recipient may expect the decision.

§ 12.926 Non-Federal audits.

Certain recipients and subrecipients shall be subject to non-Federal audits in accordance with the applicable directive from the table below.

Type of recipient	Applicable directive
Institution of higher education or other non-profit organization.	OMB Circular A–133.
State or local government.	Single Audit Act 31 U.S.C. 7501–7 and 43 CFR Part 12, Subpart B.
Hospital	OMB Circular A–133 or audit requirements of the Federal awarding agency.

§ 12.927 Allowable Costs.

Federal awarding agencies shall determine allowable costs in accordance with the type of entity incurring the costs, using the appropriate directive from the table below.

Entity incurring costs	Applicable directive
State, local, or Federally recognized Indian Tribe.	OMB Circular A–87, Cost Principles for State and Local Governments.
Non-profit organization	OMB Circular A–122, Cost Principles for Non-profit Organizations and 43 CFR 12.927(b).
Institution of Higher Education	OMB Circular A–21, Cost Principles for Educational Institutions.
Hospital	45 CFR 74, Appendix E, Principles for Determining Costs Applicable to Research and Development Under Grants and Contracts with Hospitals.
Commercial organization or non-profit organization listed in Attachment C of OMB Circular A–122.	48 CFR Part 31, Contract Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 12.928 Period of availability of funds.

Where a funding period is specified, a recipient may charge to the grant only allowable costs resulting from obligations incurred during the funding period and any pre-award costs authorized by the Federal awarding agency.

Property Standards

§ 12.930 Purpose of property standards.

Sections 12.931 through 12.937 set forth uniform standards governing management and disposition of property furnished by the Federal Government whose cost was charged to a project supported by a Federal award. The recipient may use its own property management standards and procedures provided it observes the provisions of §§ 12.931 through 12.937.

§ 12.931 Insurance coverage.

Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award.

§ 12.932 Real property.

(a) Title to real property shall vest in the recipient subject to the condition that the recipient shall use the real property for the authorized purpose of the project as long as it is needed and shall not encumber the property without approval of the awarding agency.

(b) The recipient shall obtain written approval by the Federal awarding agency for the use of real property in other federally-sponsored projects when the recipient determines that the property is no longer needed for the

purpose of the original project. Use in other projects shall be limited to those under federally-sponsored projects (i.e., awards) or programs that have purposes consistent with those authorized for support by the Department of the Interior.

(c) When the real property is no longer needed as provided in paragraphs (a) and (b) of this section, the recipient shall request disposition instructions from the Federal awarding agency or its successor. The Federal awarding agency shall give one or more of the following disposition instructions.

(1) The recipient may be permitted to retain title without further obligation to the Federal Government after it compensates the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project.

(2) The recipient may be directed to sell the property under guidelines provided by the Federal awarding agency and pay the Federal Government for that percentage of the current fair market value of the property attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) The recipient may be directed to transfer title to the property to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the property.

§ 12.933 Federally-owned and exempt property.

(a) *Federally-owned property.* (1) Title to federally-owned property remains vested in the Federal Government. Recipients shall submit annually to the Federal awarding an inventory listing of federally-owned property in their custody. Upon completion of the award, or when the property is no longer needed, the recipient shall report the property to the Federal awarding agency for further Federal utilization.

(2) If the Federal awarding agency has no further need for the property, it shall be declared excess and reported to the General Services Administration, unless the Federal awarding agency has statutory authority to dispose of the property by alternative methods (e.g., the authority provided by the Federal Technology Transfer Act (15 U.S.C. 3710 (I)) to donate research equipment to educational and non-profit organizations in accordance with E.O. 12821, "Improving Mathematics and Science Education in Support of the National Education Goals.") Appropriate instructions shall be issued to the recipient by the Federal awarding agency.

(b) *Exempt property.* When statutory authority exists, the Federal awarding agency has the option to vest title to property acquired with Federal funds in the recipient without further obligation to the Federal Government and under conditions the Federal awarding agency considers appropriate. Such property is "exempt property." Should a Federal awarding agency not establish conditions, title to exempt property upon acquisition shall vest in the recipient without further obligation to the Federal Government.

§ 12.934 Equipment.

(a) Title to equipment acquired by a recipient with Federal funds shall vest in the recipient, subject to conditions of this section.

(b) The recipient shall not use equipment acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, for as long as the Federal Government retains an interest in the equipment.

(c) The recipient shall use the equipment in the project or program for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds and shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the original project or program, the recipient shall use the equipment in connection with its other federally-sponsored activities, in the following order of priority:

(1) activities sponsored by the Federal awarding agency, then

(2) activities sponsored by other Federal agencies.

(d) During the time that equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs if such other use will not interfere with the work on the project or program for which the equipment was originally acquired. First preference for such other use shall be given to other projects or programs sponsored by the Federal awarding agency that financed the equipment; second preference shall be given to projects or programs sponsored by other Federal agencies. If the equipment is owned by the Federal Government, use on other activities not sponsored by the Federal Government shall be permissible if authorized by the Federal awarding agency. User charges shall be treated as program income.

(e) When acquiring replacement equipment, the recipient may use the equipment to be replaced as trade-in or sell the equipment and use the proceeds to offset the costs of the replacement equipment subject to the approval of the Federal awarding agency.

(f) The recipient's property management standards for equipment acquired with Federal funds and federally-owned equipment shall include all of the following.

(1) Equipment records shall be maintained accurately and shall include the following information.

(i) A description of the equipment.

(ii) Manufacturer's serial number, model number, Federal stock number, national stock number, or other identification number.

(iii) Source of the equipment, including the award number.

(iv) Whether title vests in the recipient or the Federal Government.

(v) Acquisition date (or date received, if the equipment was furnished by the Federal Government) and cost.

(vi) Information from which one can calculate the percentage of Federal participation in the cost of the equipment (not applicable to equipment furnished by the Federal Government).

(vii) Location and condition of the equipment and the date the information was reported.

(viii) Unit acquisition cost.

(ix) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Federal awarding agency for its share.

(2) Equipment owned by the Federal Government shall be identified to indicate Federal ownership.

(3) A physical inventory of equipment shall be taken and the results reconciled with the equipment records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the equipment.

(4) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the equipment.

Any loss, damage, or theft of equipment shall be investigated and fully documented; if the equipment was owned by the Federal Government, the recipient shall promptly notify the Federal awarding agency.

(5) Adequate maintenance procedures shall be implemented to keep the equipment in good condition.

(6) Where the recipient is authorized or required to sell the equipment, proper sales procedures shall be established which provide for competition to the extent practicable and result in the highest possible return.

(g) When the recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. For equipment with a current per unit fair market value of $5,000 or more, the recipient may retain the equipment for other uses if compensation is made to the original Federal awarding agency or its successor. The amount of compensation shall be computed by applying the percentage of Federal participation in the cost of the original project or program to the current fair market value of the equipment. If the recipient has no need for the equipment, the recipient shall request disposition instructions from the Federal awarding agency. The Federal awarding agency shall determine whether the equipment can be used to meet the agency's requirements. If no requirement exists within that agency, the availability of the equipment shall be reported to the General Services Administration by the Federal awarding agency to determine whether a requirement for the equipment exists in other Federal agencies. The Federal awarding agency shall issue instructions to the recipient no later than 120 calendar days after the recipient's request and the following procedures shall govern:

(1) If so instructed, or if disposition instructions are not issued within 120 calendar days after the recipient's request, the recipient shall sell the equipment and reimburse the Federal awarding agency an amount computed by applying to the sales proceeds the percentage of Federal participation in the cost of the original project or program. However, the recipient shall be permitted to deduct and retain from the Federal share $500 or ten percent of the proceeds, whichever is less, for the recipient's selling and handling expenses.

(2) If the recipient is instructed to ship the equipment elsewhere, the recipient shall be reimbursed by the Federal Government by an amount which is computed by applying the percentage of the recipient's participation in the cost of the original project or program to the current fair market value of the equipment, plus any reasonable shipping or interim storage costs incurred.

(3) If the recipient is instructed to otherwise dispose of the equipment, the recipient will be reimbursed by the Federal awarding agency for such costs incurred in its disposition.

(h) The Federal awarding agency may reserve the right to transfer the title to the Federal Government or to a third party named by the Federal Government when the third party is otherwise eligible under existing statutes. The transfer shall be subject to the following standards.

(1) The equipment shall be appropriately identified in the award or otherwise described to the recipient in writing.

(2) The Federal awarding agency shall issue disposition instructions within 120 calendar days after receipt of a final inventory. The final inventory shall list all equipment acquired with Federal funds and federally owned equipment. If the Federal awarding agency fails to issue disposition instructions within the 120-calendar-day period, the recipient shall apply the standards of this section, as appropriate.

(3) When the Federal awarding agency exercises its right to take title, the equipment shall be subject to the provisions for federally owned equipment.

§ 12.935 Supplies and other expendable property.

(a) Title to supplies and other expendable property shall vest in the recipient upon acquisition. If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate value upon termination or completion of the project or program and the supplies are not needed for any other federally sponsored project or program, the recipient shall retain the supplies for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share. The amount of compensation shall be computed in the same manner as for equipment.

(b) The recipient shall not use supplies acquired with Federal funds to provide services to non-Federal outside organizations for a fee that is less than private companies charge for equivalent services, unless specifically authorized by Federal statute, as long as the Federal Government retains an interest in the supplies.

§ 12.936 Intangible property.

(a) The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. The Federal awarding agency(ies) reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(b) Recipients are subject to applicable regulations governing patents and inventions, including government-wide regulations issued by the Department of Commerce at 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements."

(c) Unless waived by the Federal awarding agency, the Federal Government has the right to:

(1) Obtain, reproduce, publish or otherwise use the data first produced under an award; and

(2) Authorize others to receive, reproduce, publish, or otherwise use the data for Federal purposes.

(d) Title to intangible property and debt instruments acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally authorized purpose, and the recipient shall not encumber the property without approval of the Federal awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of Section 12.934(g).

§ 12.937 Property trust relationship.

Real property, equipment, intangible property and debt instruments that are acquired or improved with Federal funds shall be held in trust by the recipient as trustee for the beneficiaries of the project or program under which the property was acquired or improved. Agencies may require recipients to record liens or other appropriate notices of record to indicate that personal or real property has been acquired or improved with Federal funds and that use and disposition conditions apply to the property.

Procurement Standards

§ 12.940 Purpose of procurement standards.

Sections 12.941 through 12.948 set forth standards for use by recipients in establishing procedures for the procurement of supplies and other expendable property, equipment, real

property and other services with Federal funds. These standards are furnished to ensure that materials and services are obtained in an effective manner and in compliance with the provisions of applicable Federal statutes and executive orders. No additional procurement standards or requirements shall be imposed by the Federal awarding agencies upon recipients, unless specifically required by Federal statute or executive order or approved by OMB.

§ 12.941 Recipient responsibilities.

The standards contained in this section do not relieve the recipient of the contractual responsibilities arising under its contract(s). The recipient is the responsible authority, without recourse to the Federal awarding agency, regarding the settlement and satisfaction of all contractual and administrative issues arising out of procurements entered into in support of an award or other agreement. This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

§ 12.942 Codes of conduct.

The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization that employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

§ 12.943 Competition.

All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for the related procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

§ 12.944 Procurement procedures.

(a) All recipients shall establish written procurement procedures. These procedures shall provide, at a minimum, that:

(1) Recipients avoid purchasing unnecessary items.

(2) Where appropriate, an analysis is made of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government; and

(3) Solicitations for goods and services provide for all of the following.

(i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, the description shall not contain features which unduly restrict competition.

(ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.

(iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.

(iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.

(v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.

(vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

(b) Positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of Federal awards shall take all of the following steps to further this goal.

(1) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.

(2) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

(3) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.

(4) Encourage contracting with consortiums of small businesses, minority-owned firms, and women's business enterprises when a contract is too large for one of these firms to handle individually.

(5) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises.

(c) The type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

(d) Contracts shall be made only with responsible contractors who posses the potential ability to perform successfully under the terms and conditions of the proposed procurement. Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources, and accessibility to other necessary resources. In certain circumstances, contracts with certain parties are restricted by agencies' implementation of E.O.s 12549 and 12689, "Debarment and Suspension." See Subpart D of 43 CFR part 12.

(e) Recipients shall, on request, make available for the Federal awarding agency, pre-award review of procurement documents, such as

request for proposals or invitations for bids, independent cost estimates, etc., when any of the following conditions apply.

(1) A recipient's procurement procedures or operation fails to comply with the procurement standards in this part.

(2) The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403 (11) (currently $25,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation.

(3) The procurement, which is expected to exceed the small purchase threshold, specifies a "brand name" product.

(4) The proposed award over the small purchase threshold is to be awarded to other than the apparent low bidder under a sealed bid procurement.

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

§ 12.945 Cost and price analysis.

Some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability, and allowability.

§ 12.946 Procurement records.

Procurement records and files for purchases in excess of the small purchase threshold shall include the following at a minimum:

(a) Basis for contractor selection,

(b) justification for lack of competition when competitive bids or offers are not obtained, and

(c) basis for award cost or price.

§ 12.947 Contract administration.

A system for contract administration shall be maintained to ensure contractor conformance with the terms, conditions, and specifications of the contract and to ensure adequate and timely follow-up of all purchases. Recipients shall evaluate contractor performance and document, as appropriate, whether contractors have met the terms, conditions, and specifications of the contract.

§ 12.948 Contract provisions.

The recipient shall include, in addition to provisions to define a sound and complete agreement, the provisions below in all contracts and subcontracts.

(a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

(c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds $100,000. For those contracts or subcontracts exceeding $100,000, the Federal awarding agency may accept the bonding policy and requirements of the recipient, provided the Federal awarding agency has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.

(1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.

(4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."

(d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, the Federal awarding agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor that are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.

(e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions of Appendix A to this subpart, as applicable.

Reports and Records

§ 12.950 Purpose of reports and records.

Sections 12.951 through 12.953 set forth the procedures for monitoring and reporting on the recipient's financial and program performance and the necessary standard reporting forms. They also set forth record retention requirements.

§ 12.951 Monitoring and reporting program performance.

(a) Recipients are responsible for managing and monitoring each project, program, subaward, function, or activity supported by the award. Recipients shall monitor subawards to ensure that subrecipients have met the audit requirements in Section 12.926.

(b) The Federal awarding agency shall prescribe the frequency of submission for performance reports. Except as provided in § 12.951(f), performance reports will not be required more frequently than quarterly or less frequently than annually. Annual reports shall be due 90 calendar days after the end of the grant year; quarterly or semi-annual reports shall be due 30 days after the end of the reporting period. The Federal awarding agency may require annual reports before the anniversary dates of multiple year awards in lieu of these requirements. Final performance reports are due 90 calendar days after the expiration or termination of the award.

(c) A final technical or performance report shall be required after completion of the project only if the awarding agency determines this to be appropriate.

(d) When required, performance reports shall generally contain, for each award, brief information on each of the following:

(1) A comparison of actual accomplishments with the goals and objectives established for the period, the findings of the investigator, or both. Whenever appropriate and the output of programs or projects can be readily quantified, such quantitative data should be related to cost data for computation of unit costs.

(2) Reasons why established goals were not met, if appropriate.

(3) Other pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(e) Recipients shall not be required to submit more than the original and two copies of performance reports.

(f) Recipients shall immediately notify the Federal awarding agency of developments that have a significant impact on the award-supported activities. Also, notification shall be given in the case of problems, delays, or adverse conditions that materially impair the ability to meet the objectives of the award. This notification shall include a statement of the action taken or contemplated, and any assistance needed to resolve the situation.

(g) Federal awarding agencies may make site visits, as needed.

(h) Federal awarding agencies shall comply with clearance requirements of 5 CFR part 1320 when requesting performance data from recipients.

§ 12.952 Financial reporting.

(a) The following forms or such other forms as may be approved by OMB are authorized for obtaining financial information from recipients.

(1) SF–269 or SF–269A, Financial Status Report.

(i) Each Federal awarding agency will require recipients to use either the SF–269 or SF–269A to report the status of funds for all nonconstruction projects or programs. A Federal awarding agency may, however, have the option of not requiring the SF–269 or SF–269A when the SF–270, Request for Advance or Reimbursement, or SF–272, Report of Federal Cash Transactions, is determined to provide adequate information to meet its needs, except that a final SF–269 or SF–269A shall be required at the completion of the project when the SF–270 is used only for advances.

(ii) The Federal awarding agency shall prescribe whether the report shall be on a cash or accrual basis. If the Federal awarding agency requires accrual information and the recipient's accounting records are not normally kept on an accrual basis, the recipient shall not be required to convert its accounting system, but shall develop accrual information through best estimates based upon an analysis of the documentation on hand.

(iii) The Federal awarding agency shall determine the frequency of the Financial Status Report for each project or program, considering the size and complexity of the particular project or program. However, the report shall not be required more frequently than quarterly or less frequently than annually. A final report shall be required at the completion of the agreement.

(iv) The Federal awarding agency shall require recipients to submit the SF–269 or SF–269A (an original and no more than two copies) no later than 30 days after the end of each specified reporting period for quarterly and semi-annual reports, and 90 calendar days for annual and final reports. Extensions of reporting due dates may be approved by the Federal awarding agency upon request by the recipient.

(2) SF–272, Report of Federal Cash Transactions.

(i) When funds are advanced to recipients, the Federal awarding agency shall require each recipient to submit the SF–272 and, when necessary, its continuation sheet, SF–272a. The Federal awarding agency shall use this report to monitor cash advanced to recipients and to obtain disbursement information for each agreement with the recipients.

(ii) Federal awarding agencies may require forecasts of Federal cash requirements in the "Remarks" section of the report.

(iii) When practical and deemed necessary, Federal awarding agencies may require recipients to report in the "Remarks" section the amount of cash advances received in excess of three days. Recipients shall provide short narrative explanations of actions taken to reduce the excess balances.

(iv) Recipients shall be required to submit not more than the original and two copies of the SF–272 15 calendar days following the end of each quarter. The Federal awarding agencies may require a monthly report from those recipients receiving advances totaling $1 million or more per year.

(v) Federal awarding agencies may waive the requirement for submission of the SF–272 for any one of the following reasons:

(A) When monthly advances do not exceed $25,000 per recipient, provided that the advances are monitored through other forms contained in this section;

(B) If, in the Federal awarding agency's opinion, the recipient's accounting controls are adequate to minimize excessive Federal advances; or

(C) When the electronic payment mechanisms provide adequate data.

(b) When the Federal awarding agency needs additional information or more frequent reports, the following shall be observed.

(1) When additional information is needed to comply with legislative requirements, Federal awarding agencies shall issue instructions to require recipients to submit such information under the "Remarks" section of the reports.

(2) When a Federal awarding agency determines that a recipient's accounting system does not meet the standards in Section 12.921, additional pertinent information to further monitor awards may be upon written notice to the recipient until such time as the system is brought up to standard. The Federal awarding agency, in obtaining this information, shall comply with report clearance requirements of 5 CFR part 1320.

(3) Federal awarding agencies are encouraged to shade out any line item or any report if not necessary.

(4) Federal awarding agencies may accept the identical information from the recipients in machine readable format or computer printouts or electronic outputs in lieu of prescribed formats.

(5) Federal awarding agencies may provide computer or electronic outputs to recipients when such expedites or contributes to the accuracy of reporting.

§ 12.953 Retention and access requirements for records.

(a) This section sets forth requirements for record retention and access to records for awards to recipients. Federal awarding agencies shall not impose any other record retention or access requirements upon recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds

shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the Federal awarding agency, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, etc. as specified in paragraph 12.953(g).

(c) Copies of original records may be substituted for the original records.

(d) The Federal awarding agency will request transfer of certain records to its custody from recipients when it determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a Federal awarding agency may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) The Federal awarding agency, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no Federal awarding agency shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the Federal awarding agency can demonstrate that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the Federal awarding agency.

(g) *Indirect cost rate proposals, cost allocations plans, etc.* Paragraphs (g)(1) and (g)(2) of this section apply to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(1) If submitted for negotiation. If the recipient submits to the Federal awarding agency or the subrecipient submits to the recipient the proposal, plan, or other computation to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts on the date of the submission.

(2) If not submitted for negotiation. If the recipient is not required to submit to the Federal awarding agency or the subrecipient is not required to submit to the recipient the proposal, plan, or other computation for negotiation purposes, then the 3-year retention period for the proposal, plan, or other computation and its supporting records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

Termination and Enforcement

§ 12.960 Purpose of termination and enforcement.

Sections 12.961 and 12.962 set forth uniform suspension, termination and enforcement procedures.

§ 12.961 Termination.

(a) Awards may be terminated in whole or in part only if paragraph (a)(1), (a)(2) or (a)(3) apply.

(1) By the Federal awarding agency, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the Federal awarding agency with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the Federal awarding agency written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the Federal awarding determines in the case of partial termination that the reduced or modified portion of the grant will not accomplish the purposes for which the grant was made, it may terminate the grant in its entirety.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 12.971(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 12.962 Enforcement.

(a) Remedies for noncompliance. If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the Federal awarding agency may in addition to imposing any of the special conditions outlined in Section 12.914, take one or more of the following actions, as appropriate in the circumstances.

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the Federal awarding agency.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, the awarding agency shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the Federal awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if paragraph (c)(1) and (2) of this section apply:

(1) The costs result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable.

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under E.O.s 12549 and 12689 and the Federal awarding agency implementing regulations (see 43 CFR Part 12).

After-the-Award Requirements

§ 12.970 Purpose.

Sections 12.971 through 12.973 contain closeout procedures and other procedures for subsequent disallowances and adjustments.

§ 12.971 Closeout procedures.

(a) Recipients shall submit, within 90 calendar days after the date of completion of the award, all financial, performance, and other reports as required by the terms and conditions of the award. The Federal awarding agency may approve extensions when requested by the recipient.

(b) Unless the Federal awarding agency authorizes an extension, a recipient shall liquidate all obligations incurred under the award not later than 90 calendar days after the funding period or the date of completion as specified in the terms and conditions of the award or in agency implementing instructions.

(c) The Federal awarding agency shall make prompt payments to a recipient for allowable reimbursable costs under the award being closed out.

(d) The recipient shall promptly refund any balance of obligated cash that the Federal awarding agency has advanced or paid and that the recipient is not authorized to retain for use in other projects. OMB Circular A–129 governs unreturned amounts that become delinquent debts.

(e) When authorized by the terms and conditions of the award, the Federal awarding agency shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(f) The recipient shall account for any real and personal property acquired with Federal funds or received from the Federal Government in accordance with Sections 12.931 through 12.937.

(g) If a final audit has not been performed prior to the closeout of an award, the Federal awarding agency shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 23.972 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following.

(1) The right of the Federal award agency to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in Section 12.926.

(4) Property management requirements in Sections 12.931 through 12.937.

(5) Records retention as required in Section 12.953.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the Federal awarding agency and the recipient, provided the responsibilities of the recipient referred to in paragraph 12.973(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 12.973 Collection of amounts due.

(a) Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. If the recipient does not pay within a reasonable period after the demand for payment, the Federal awarding agency may reduce the debt by:

(1) making an administrative offset against other requests for reimbursements;

(2) withholding advance payments otherwise due to the recipient; or

(3) taking other action permitted by statute.

(b) Except as otherwise provided by law, the Federal awarding agency shall charge interest on an overdue debt in accordance with 4 CFR Chapter II, "Federal Claims Collection Standards."

Appendix A to Subpart F—Contract Provisions

All contracts, awarded by a recipient including small purchases, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246, "Equal Employment Opportunity," as amended by E.O. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

2. *Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 276c)*—All contracts and subgrants in excess of $2,000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the Federal awarding agency.

3. *Davis-Bacon Act, as amended (40 U.S.C. 276a to a–7)*—When required by Federal program legislation, all construction contracts awarded by the recipients and subrecipients of more than $2,000 shall include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 276a to a–7) and as supplemented by Department of Labor regulations (29 CFR part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction"). Under this Act, contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less than once a week. The recipient shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The recipient shall report all suspected or reported violations to the Federal awarding agency.

4. *Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333)*—Where applicable, all contracts awarded by recipients in excess of $2,000 for construction contracts and in excess of $2,500 for other contracts that involve the employment of mechanics or laborers shall include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

5. *Rights to Inventions Made Under a Contract or Agreement*—Contracts or agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

6. *Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended)*—Contracts and subgrants of amounts in excess

of $100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 et seq.). Violations shall be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

7. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of $100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

8. *Debarment and Suspension (E.O.s 12549 and 12689)*—No contracts shall be made to parties listed on the General Services Administration's "Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs" in accordance with E.O.s 12549 and 12689, "Debarment and Suspension." This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold shall provide the required certification regarding its exclusion status and that of its principals.

* * * * *

[FR Doc. 94–20974 Filed 8–25–94; 8:45 am]

BILLING CODE 4310–RF–M

NATIONAL SCIENCE FOUNDATION

45 CFR Part 615

Testimony and Production of Official Records and Information

AGENCY: National Science Foundation.

ACTION: Final rule.

SUMMARY: This final rule establishes procedures to be followed when a National Science Foundation (NSF) employee is issued a court demand or is requested to provide testimony or produce records in a legal proceeding. These procedures are designed to promote economy and efficiency in NSF's programs and operations, to minimize the possibility of involving NSF in controversial issues not related to its functions, to maintain the impartiality of NSF among private litigants, and to protect sensitive, confidential information and the deliberative process.

EFFECTIVE DATE: August 26, 1994.

FOR FURTHER INFORMATION CONTACT: Miriam Leder, Assistant General Counsel, National Science Foundation, National Science Foundation, 4201 Wilson Boulevard, Room 1265, Arlington, Virginia 22230, (703) 306–1060.

SUPPLEMENTARY INFORMATION: On July 8, 1994, NSF published proposed procedures to be followed when a National Science Foundation (NSF) employee is issued a court demand or is requested to provide testimony or produce records in a legal proceeding. 59 FR 35079 (July 8, 1994). NSF received two comment letters, one from an individual who supported adoption of the procedures as proposed, and the other from a university concerned that the definition of the term "employee" could be interpreted to include university faculty who receive NSF awards and/or serve as peer reviewers on NSF panels.

The term "employee" was not intended to cover investigators under NSF awards, and the definition has been revised to make this explicit. However, the rule was intended to reach peer reviewers, but only as to matters directly relating to their service for the Foundation. To the extent this was not clear in the proposed rule, Section 615.2 has been revised to specifically provide that the rule's procedures do not apply to requests or demands for testimony by peer reviewers that is directly related to their service as reviewers.

In addition to these clarifications, the final rule includes the following four minor revisions:

Section 615.2 Applicability

The phrase "while in leave status" was deleted from this provision because only Government employees can be "in leave status" but the provision is intended to apply to certain other individuals as well.

Section 615.4 Legal Proceedings Before NSF or in Which the United States Is a Party

This provision was revised to provide that the General Counsel will arrange for testimony of current employees for the United States, rather than for the testimony of both past and current employees.

Section 615.5 Legal Proceedings Between Private Litigants

Subsection (a) was intended to prevent employees from producing official records and information or providing testimony unless authorized to do so by the General Counsel. The proposed rule's inclusion of the phrase "or by other applicable law" at the end of the subsection created uncertainty as to the intent of the subsection, and, as a result, was deleted.

Subsection (c) was revised to specifically provide that employees may testify as to any matter, if authorized to do so by the General Counsel.

I have determined that this proposed rule is not an economically significant rule as that term is defined in Executive Order 12866. I have also determined that this proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities as that term is defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612, because it would affect only the conduct of NSF activities and actions of NSF personnel. Pursuant to 5 U.S.C. 605(b), the rule is therefore exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

List of Subjects in 45 CFR Part 615

Administrative practice and procedure, Courts, and Government employees.

For the reasons set forth in the preamble, NSF hereby amends 45 CFR by adding a new part 615 as follows:

PART 615—TESTIMONY AND PRODUCTION OF RECORDS

Sec.
615.1 Purpose
615.2 Applicability
615.3 Definitions
615.4 Legal proceedings before NSF or in which the United States is a party
615.5 Legal proceedings between private litigants: Testimony and production of documents
615.6 Legal proceedings between private litigants: Procedure when demand is made
615.7 Legal proceedings between private litigants: Office of Inspector General employees

Authority: 42 U.S.C. 1870(a).

§ 615.1 Purpose.

(a) This part sets forth policies and procedures to be followed when, in connection with a legal proceeding, an NSF employee is issued a demand to provide testimony or produce official records and information.

(b) The provisions of this part are intended to promote economy and efficiency in NSF's programs and operations; minimize the possibility of involving NSF in controversial issues not related to its functions; maintain the impartiality of NSF among private litigants; and protect sensitive,

confidential information and the deliberative process.

(c) This part is not intended to and does not waive the sovereign immunity of the United States.

(d) This part is intended only to provide guidance for the internal operations of NSF, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

§ 615.2 Applicability.

This part applies to demands and requests for factual or expert testimony or for official records or information in legal proceedings, whether or not the United States is a party, except that it does not apply to

(a) Demands upon or requests for an NSF employee to testify as to facts or events that are in no way related to his or her official duties or to the functions of NSF,

(b) Demands upon or requests for a former NSF employee to testify as to matters in which the former employee was not directly or materially involved while at NSF,

(c) Demands upon or requests for an NSF reviewer to testify as to matters not directly related to that individual's employment by or service to NSF, and

(d) Congressional demands and requests for testimony or records.

§ 615.3 Definitions.

(a) *Demand*—A subpoena, order, or other demand of a court or other competent authority for the production of records or for the appearance and testimony of an NSF employee, issued in a legal proceeding between private litigants.

(b) *Foundation* or *NSF* means the National Science Foundation.

(c) *General Counsel* means the General Counsel of the Foundation, or any person to whom the General Counsel has delegated authority under this part.

(d) *Legal proceeding* means any proceeding before a court of law, administrative board or commission, hearing officer, or other body conducting a legal or administrative proceeding.

(e) *Official records and information* means all documents and material which are records of the Foundation under the Freedom of Information Act, 5 U.S.C. 552; all other records contained in NSF's files; and all other information or material acquired by an NSF employee in the performance of his or her official duties or because of his or her official status.

(f) *NSF employee or employee* means any present or former officer or employee of NSF; any other individual hired through contractual agreement by or on behalf of NSF, or who has performed or is performing services under such an agreement for NSF; and any individual who served or is serving on any advisory committee or in any advisory capacity, whether formal or informal.

(g) *Request* means any informal request, by whatever method, for the production of official records and information or for testimony which has not been ordered by a court or other competent authority.

(h) *Testimony* means any written or oral statement by a witness, including depositions, answers to interrogatories, affidavits, declarations, and statements at a hearing or trial.

§ 615.4 Legal proceedings before NSF or in which the United States is a party.

In any legal proceeding before NSF or to which the United States is a party, the General Counsel shall arrange for a current employee to testify as a witness for the United States whenever the attorney representing the United States requests it. The employee may testify for the United States both as to facts within the employee's personal knowledge and as an expert or opinion witness. For any party other than the United States, the employee may testify only as to facts within his or her personal knowledge.

§ 615.5 Legal proceedings between private litigants: Testimony and production of documents.

(a) No employee may produce official records and information or provide any testimony in response to a demand or request unless authorized to do so by the General Counsel in accordance with this part.

(b) The General Counsel, in his or her discretion, may grant an employee permission to testify or produce official records and information in response to a demand or request. In making this decision, the General Counsel shall consider whether

(1) The purposes of this part are met;

(2) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(3) NSF has an interest in the decision that may be rendered in the legal proceeding; and

(4) Allowing such testimony or production of records would be in the best interest of NSF or the United States.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, shall not

(1) Disclose confidential or privileged information;

(2) Testify as to facts when the General Counsel determines such testimony would not be in the best interest of the Foundation or the United States; or

(3) Testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the Foundation.

§ 615.6 Legal proceedings between private litigants: Procedure when demand is made.

(a) Whenever an employee is served with a demand to testify in his or her official capacity, or to produce official records and information, the employee shall immediately notify the General Counsel.

(b) The General Counsel shall review the demand and, in accordance with the provisions of § 615.5, determine whether, or on what conditions, to authorize the employee to testify and/or produce official records and information.

(c) If a response to a demand is required before the General Counsel has made the determination referred to in § 615.6(b), the General Counsel shall provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand is being reviewed, and seek a stay of the demand pending a final determination. If the court fails to stay the demand, the employee must appear at the stated time and place, produce a copy of this part, and respectfully decline to comply with the demand. *"United States ex rel Touhy* v. *Ragen,"* 340 US 462 (1951).

(d) If a court or other competent authority orders that a demand be complied with notwithstanding a final decision by the General Counsel to the contrary, or at any other stage in the process, the General Counsel may take steps to arrange for legal representation for the employee, and shall advise the employee on how to respond to the demand.

§ 615.7 Legal proceedings between private litigants: Office of Inspector General employees.

Notwithstanding the requirements set forth in §§ 615.1 through 615.6, when an employee of the Office of Inspector General is issued a demand to provide testimony or produce official records and information, the Inspector General or his or her designee shall be responsible for performing the functions assigned to the General Counsel with respect to such demand pursuant to the provisions of this part.

Dated: August 23, 1994.

Charles S. Brown,

Acting General Counsel.

[FR Doc. 94–21073 Filed 8–25–94; 8:45 am]

BILLING CODE 7555–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 24

[PP Docket No. 93–253; FCC 94–219]

Implementation of Section 309(j) of the Communications Act—Competitive Bidding

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, the Commission responds to petitions for reconsideration or clarification of the rules and policies adopted in the *Third Report and Order* in this proceeding, which sets forth the service specific competitive bidding rules for narrowband PCS. In this regard, the Commission makes certain modifications to the rules adopted on the *Third Report and Order*. These rules will promote the development and rapid deployment of narrowband PCS technologies, products and services for the benefit of the public. These rules also will promote economic opportunity and competition, and disseminate licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women. This action will result in recovery for the public of a portion of the value of the public spectrum make available for commercial use.

EFFECTIVE DATE: September 26, 1994.

FOR FURTHER INFORMATION CONTACT: Jackie Chorney, Office of Plans and Policy, (202) 418–2030.

SUPPLEMENTARY INFORMATION: This *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in PP Docket No. 93–253, adopted August 16, 1994, and released August 17, 1994, is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 230, 1919 M Street N.W., Washington, D.C. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, telephone (202) 857–3800.

Paperwork Reduction Act

In the *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in PP Docket No. 93–253, the Commission has amended 47 CFR Part 24 which contain rules and requirements governing the award of narrowband PCS licenses through a system of competitive bidding. Applicants are required to file certain information so that the Commission can determine whether the applicants are legally, technically, and financially qualified to be licensed. Affected members of the public are any members of the public who want to become a narrowband PCS licensee. Implementation of the rules contained in the *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* will impose reporting and recordkeeping requirements on certain members of the public. The Federal Communications Commission will submit an information collection request 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 collection should contact Timothy Fain, Office of Management and Budget, Room 3225, New Executive Office Building, Washington, D.C. 20503, (202) 395–3561. For further information, contact Judy Boley, Federal Communications Commission, (202) 418–0210.

In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Narrowband PCS, PP Docket No. 93–253 and Amendment of the Commission's Rules to Establish New Narrowband Personal Communication Services, GEN Docket No. 90–314, ET Docket No. 92–100.

Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking

Adopted: August 16, 1994.

Released: August 17, 1994.

Comment Date: September 16, 1994.

Reply Comment Date: October 3, 1994.

By the Commission:

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I. Introduction

1. By this action, we respond to petitions for reconsideration of the *Third Report and Order* in this proceeding.[1] The *Third Report and Order* established service-specific rules for competitive bidding for the award of licenses for Personal Communications Services in the 900 MHz band (narrowband PCS). Seven such petitions were received, as well as three oppositions and comments and one reply.[2]

2. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added a new section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. 151–173 (the Communications Act). This amendment to the Communications Act gave the Commission express authority to employ competitive bidding procedures to choose from among mutually exclusive applications for initial licenses. The Commission's *Second Report and Order* established general rules and procedures and a broad menu of competitive bidding methods to be used for all auctionable services.[3]

3. The *Third Report and Order* established competitive bidding rules for narrowband PCS. The Commission decided that because of the interdependence within certain classes of narrowband PCS licenses and the relatively high expected value of such licenses, where the agency received

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[1] *See Third Report and Order* in PP Docket No. 93–253, 9 FCC Rcd 2941, 59 FR 26741 (May 24, 1994), (*Third Report and Order*).

[2] Petitions for reconsideration were received from the Association of Independent Designated Entities (AIDE), Mercury Communications, Inc. (Mercury), Paging Network, Inc. (PageNet), Phase One Communications, Inc. (Phase One), the Rural Cellular Association (RCA), Tri-State Radio Co. (Tri-State), and U.S. Intelco Networks, Inc. (USIN). Oppositions or comments were received from United States Telephone Association (USTA), AirTouch Paging (AirTouch), and Paging Network, Inc. (PageNet); a reply was received from American Paging, Inc. (API).

[3] *Second Report and Order* in PP Docket No. 93–253, 9 FCC Rcd 2348, 59 FR 22980 (May 4, 1994), (*Second Report and Order*).

mutually exclusive applications most narrowband PCS licenses would be awarded through a sequence of simultaneous multiple round auctions. However, we stated that we might alternatively use oral sequential or single round sealed bidding to award certain narrowband PCS licenses if the operational complexity or administrative costs associated with simultaneous auctions proved excessive relative to the expected value of the licenses to be awarded. We stated that in conducting narrowband PCS auctions we would generally follow the payment and procedural rules adopted in the *Second Report and Order*, and we adopted general procedural and processing rules for the narrowband PCS service based on Parts 22 and 90 of the Commission's rules. We also structured our rules to provide opportunities for small businesses and businesses owned by women and minorities to participate in the auction and in the provision of spectrum based services.

4. On July 29, 1994 we completed the first spectrum auction for the ten available nationwide narrowband PCS licenses. This auction was the first test of the simultaneous multiple round auction design and of our provisions for designated entities. This auction was enormously successful. One indication of the efficiency of the simultaneous multiple round bidding process is the fact that the winning bids were either identical or virtually identical for virtually identical licenses. As we expected, this auction also attracted broad participation by designated entities. Of the 29 registered bidders 9, or 30 percent, indicated status as either minority or woman-owned firms. The strong bidding competition among relatively large firms and incumbent paging companies, however, may have been a factor in the lack of designated entities among the winning bidders. These results have caused us to reexamine some of the auction rules and designated entity provisions previously adopted in the *Third Report and Order*. In addition, we request comment on a number of possible further changes in the designated entity provisions that might apply to the upcoming MTA and BTA auctions.

II. Auction Design

A. Bidding Procedures

5. In the *Third Report and Order*, the Commission noted its earlier findings: (1) That licenses with strong value interdependencies should be auctioned simultaneously, (2) that multiple round auctions will generally yield more efficient allocations of licenses and higher revenues than other auction methodologies because they provide bidders with information regarding other bidders' valuations of licenses, and (3) that simultaneous multiple round auctions become less cost effective as the value of licenses decreases, because they are relatively time-consuming and expensive to implement.[4] The Commission stated that where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals.[5] We stated, however, that we might use methods other than simultaneous multiple round bidding in cases where license values are expected to be relatively low, where bidder participation is expected to be limited, or where the interdependence of licenses is less significant.[6] We stated that in selecting the auction method for each narrowband PCS auction, we would balance the advantages of more sophisticated auction methods, such as simultaneous multiple round bidding, with the greater complexity and cost they might entail.[7]

6. In the *Third Report and Order* the Commission decided to auction the 12.5 kHz unpaired MTA and BTA response channel licenses in a single round sealed bid auction because the value of those licenses is low relative to the cost of conducting more complex auctions. We also stated that because only incumbent paging licensees already serving the license area are eligible to bid on these licenses, sealed bid auctions might help to reduce the likelihood of collusion. We further stated that information about license values from earlier narrowband auctions would also be available to assist bidders in valuing these licenses. Moreover, because under the sealed bid approach bidders cannot be certain that they will be the high bidder on the licenses they seek to obtain, we allowed bidders to bid without risking a default penalty on more than the two licenses in each service area, provided they specify in advance the order in which they wish to be awarded such licenses if they are the high bidder on more than they are permitted to hold.[8]

7. *Petitions*. Paging Network, Inc. (PageNet) and Tri-State Radio Co. (Tri-State) seek reconsideration of the decision to use single round sealed bid auction procedures for assignment of the 12.5 kHz unpaired licenses.[9] PageNet and Tri-State assert that the Commission has underestimated the likely value of the response channel licenses.[10] PageNet and Tri-State also assert that great value interdependence exists among the response channel licenses.[11] They state that there are likely to be numerous bidders for most licenses.[12] In this regard, PageNet claims that collusive behavior is no more likely for these licenses than for other narrowband PCS licenses. PageNet and Tri-State question whether bidders for response channel licenses will obtain useful information about license values from previous narrowband PCS auctions. PageNet asserts that license values will vary from one provider and area to another, and that bidders may have no realistic idea as to the value of the licenses.[13] PageNet claims that the single sealed bid mechanism will require exorbitantly expensive market research on the part of bidders, and the result will still depend on chance.[14] Further, PageNet states that it is important to choose an auction method which provides useful information on license values to bidders during the auction. Therefore, PageNet supports adopting an alternative auction method that is streamlined to minimize cost and complexity, and recommends an ascending bid multiple round methodology.[15]

8. Tri-State claims that the rules mandating single round sealed bidding are deficient from an auction design perspective. Tri-State asserts that these rules are poorly structured to allow bidders to obtain a common frequency across regions, and that under the rules bidders cannot know how to prioritize their bids. Tri-State further claims that the sealed bidding procedures require exceedingly complicated bidding strategies, which necessitate the adoption of a clear reallocation mechanism for defaulted licenses. Alternatively, Tri-State recommends a procedure in which bidders submit sealed bids for a given MTA or BTA without specifying which of the available frequencies the bidder is bidding on. Under Tri-State's recommended approach, winning bidders would be ranked for purposes of

[4] *Third Report and Order* at ¶ 12.

[5] *Id.* at ¶ 13.

[6] *Id.* at ¶ 20.

[7] *Id.*

[8] Id. at ¶ 29.

[9] PageNet Petition at 2; Tri-State Petition at 3.

[10] PageNet Petition at 2; Tri-State Petition at 7.

[11] PageNet Petition at 5; Tri-State Petition at 3.

[12] PageNet Petition at 10; Tri-State Petition at 8.

[13] PageNet Petition at 5.

[14] Opposition of PageNet at 3.

[15] PageNet reserves comment on more specific procedures pending conclusion of the nationwide narrowband PCS and Interactive Video and Data Service (IVDS) auctions. *Id.* at 6.

frequency selection according to the total amount they bid for all the channels on which they hold winning bids. Tri-State claims that this procedure maximizes the number of multiple MTA/BTA bidders who can obtain a common paging response channel in all markets in which they bid.[16] Tri-State argues that its proposed auction procedures will level the playing field between bidders for paging response channels and those for regional and nationwide narrowband PCS authorizations, who do not need to aggregate a common frequency across geographic areas.[17] Tri-State includes a 25 percent bidding credit for minority- and female-owned businesses and small businesses, and states that its plan could be refined by providing that winning bidders pay the highest losing bid for a license.[18] Tri-State asserts that its proposed auction procedures will ensure that the Commission maximizes revenues from paging response license auctions and allow bidders to set priorities more accurately and to adopt relatively simple bidding strategies.[19] AirTouch recommends multiple round simultaneous auctions, and suggests that bids for the response channels be in pool form, such that the highest four bidders would receive a license and could agree among themselves as to the licenses to be held by each.[20] American Paging, Inc. (API) supports multiple-round ascending simultaneous bidding methodologies, at least for the MTA response channel licensing.[21]

9. *Discussion.* Petitioners have convinced us that paging response channel licenses may have more value interdependency, and higher value, than was apparent at the time of the *Third Report and Order.* We also recognize that alternative auction methodologies proposed by petitioners may offer a low-cost auction method with desirable characteristics for auctioning interdependent licenses, and thus may prove superior to the sealed bid approach set forth in the *Third Report and Order.* In addition, the recent nationwide narrowband auction demonstrated that simultaneous multiple round auctions are easier and less expensive to implement than we earlier anticipated, and thus they may prove to be an appropriate procedure for auctioning the response channel licenses. However, we will defer our decision regarding the auction design for the 12.5 kHz MTA and BTA paging response channels until we have gained further experience with simultaneous multiple round auctions. We will announce our final choice of auction design and procedures for the response channels by Public Notice prior to the auction.

B. Minimum Opening Bid

10. In the *Third Report and Order,* we stated that we believe it is necessary to impose a minimum bid increment to ensure that the auctions conclude within a reasonable period of time in narrowband PCS auctions where simultaneous multiple round bidding is used. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round. We stated that we might impose a minimum bid increment of 5 percent or $0.01 per MHz per pop, whichever is greater, in narrowband PCS auctions where multiple round bidding is used. We also retained the discretion to vary the minimum bid increments for individual licenses or groups of licenses over the course of an auction.[22]

11. In order to expedite the auction process further, we also reserve the discretion to establish a suggested opening bid or a minimum opening bid on each license in addition to the minimum bid increment.[23] If we were to adopt minimum opening bids, we anticipate that we would seek expedited comments on any figures proposed. Once a minimum bid is established for a license, initial bids will have to be above that level to be considered valid. The amount of the suggested opening bid or the minimum opening bid, if one is used, will be set forth in the Public Notice announcing the auction. Generally, we will establish suggested opening bids or minimum opening bids in the range of $.03–$.20 per MHz-pop for each license.[24] A suggested opening bid or minimum opening bid will provide bidders with an incentive to start bidding at a substantial portion of the license value, thus ensuring a rapid conclusion to the auction.

C. Activity and Stopping Rules

12. In the *Third Report and Order,* we stated that when we use the three-stage Milgrom-Wilson activity rule, the auction will move from stage I to stage II when, after three rounds of bidding, the high bid has changed on 5 percent or fewer of the licenses (measured in MHz-pops) being auctioned. Stage III will begin when the high bid has changed on 2 percent or fewer licenses over three rounds.[25] We conclude after our experience in conducting the nationwide narrowban auction that we may find it important to move the auctions from one stage to the next at a different pace than would occur under this rule. Accordingly, we retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, (*e.g.,* the percentage of licenses on which there are new bids, the number of new bids, and the percentage increase in revenue). Bidders will be notified at least one round prior to the commencement of the next stage of an auction.

13. We also stated that in stage III, a bidder would have to be active on 100 percent of the MHz-pops for which it wishes to retain eligibility.[26] In order to allow bidders greater flexibility, we think that it may be beneficial in some auctions to reduce this figure slightly, but in no case below 90 percent. We will announce the required activity levels for stage III in a Public Notice in advance of each auction.

14. In the *Third Report and Order,* we stated that where we use the Milgrom-Wilson activity rule we intend to use a simplified waiver procedure whereby bidders will be permitted five automatic waivers from the activity rule during the course of an auction.[27] A waiver permits a bidder to maintain its eligibility at the same level as in the round for which the waiver is submitted, regardless of the bidder's level of bidding activity in that round. Subsequently, we have concluded based on our experience in conducting the nationwide narrowband auction that fewer waivers may be necessary to maintain the pace of the auction and prevent strategic use of waivers. Consequently, we will allow one automatic waiver from the activity rule during each stage of an auction, or one automatic waiver during a number

[16] Tri-State Petition at 12–16.

[17] *Id.* at 17.

[18] *Id.* at 18–20.

[19] *Id.* at 21.

[20] Opposition of AirTouch at 7–8.

[21] Reply of API at 2.

[22] *Third Report and Order* at ¶¶ 30–32.

[23] *See ex parte* submission of Paul Milgrom, May 19, 1994 and *Fifth Report and Order* ¶ 45, in PP Docket 93–253, FCC No. 94–178, 59 FR 37566 (Jul 29, 1994), (*Fifth Report and Order*).

[24] The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. In its September 1993 Mid-Session Review of the 1994 Budget, the Office of Management and Budget estimated that spectrum auctions would generate $12.6 billion from 1994 through 1998. A 1992 report by the Congressional Budget Office assumed that $2 billion would be raised from competitive bidding in services other than PCS. Thus, the approximate value of 120 MHz of PCS spectrum is placed at $10.6 billion according to these estimates, or 35 cents per pop per MHz.

[25] *Third Report and Order* at n. 16.

[26] *See Third Report and Order* ¶¶ 38.

[27] *Third Report and Order* at ¶40.

of bidding rounds specified in a Public Notice. We retain the flexibility, however, to change by Public Notice the number of waivers that will be permitted and the frequency with which they may be exercised by public notice prior to a specific narrowband auction. While we may allow bidders to request proactive waivers that will keep the bidding open, under no circumstances will an automatic waiver prevent an auction from closing.

15. In the *Second Report and Order*, we retained the discretion to declare by announcement at any point during a multiple round auction that the auction will end after a specified number of additional rounds.[28] We want to clarify however, that if this procedure is used, we will accept bids in the final rounds only for licenses on which the highest bid increased in at least one of the preceding three rounds. No new bids will be accepted for other licenses.[29] There are two reasons not to take bids on licenses on which there has been no recent bidding. First, the fact that bidding on an individual license may close will provide an additional incentive to bid actively and thus speed the conclusion of the auction. If bids are accepted on all licenses in the final rounds there is less cost to a bidder in holding back. Second, closing bidding on licenses for which activity has ceased ensures high bidders for those licenses that they will not lose a license without having an opportunity to make a counter-offer.[30] This reduces the uncertainty associated with aggregating licenses that are worth more to a particular bidder as a package than individually. If final bids are accepted on all licenses, a high bidder on an aggregation of licenses may unexpectedly lose a critical part of the aggregation and have no chance to regain it except in the post-auction market, where bargaining or other transaction costs may be high.

D. Release of Bidder Information

16. We note that in the reconsideration of the *Second Report and Order* we reserved additional flexibility with respect to the requirement to release information concerning the identity of bidders, which may affect auctions for narrowband PCS licenses. In the *Second Memorandum Opinion and Order*[31] we reserved the option to release bidder identities on an auction-by-auction basis, and stated that we would announce by Order and Public Notice prior to each auction whether the identities of bidders would be made public in that auction.[32] In this regard, we retain the flexibility in the context of narrowband PCS auctions to determine on an auction-by-auction basis whether or not to release bidder identities during the course of the auction.

E. Filing Procedures

17. *Petition*. Phase One asserts that the Communications Act permits the FCC to employ competitive bidding procedures only where mutual exclusivity exists, and that consequently the FCC is prohibited from establishing specific auction dates until it has determined that a particular application is mutually exclusive with another.[33] Phase One states that the FCC must first notify each qualified applicant of its application processing status in advance of scheduling auctions to allow applicants sufficient time to analyze auction strategies and evaluate the competition.[34] Phase One also states that the FCC is obligated to suspend its auctions until each petition in PP Docket No. 93–253 has been addressed.[35] Phase One states that our contractor, Tradewinds International, Inc. (Tradewinds) must be prevented from promoting FCC auctions. Because there can be no auctions without mutual exclusivity, according to Phase One the advertising by Tradewinds amounts to false and misleading advertising and raises conflict of interest questions because Tradewinds may benefit if auctions are actually held.[36]

18. AirTouch Paging (AirTouch) asserts in opposition that the Communications Act only prohibits auctioning of a license for which no mutually exclusive applications have been accepted for filing, and not the establishment of auction dates. In fact, AirTouch notes that mutually exclusive applications were received for each of the nationwide narrowband PCS licenses.[37] PacBell states that there is no legal basis for Phase One's argument that the Commission must delay announcing auction dates until mutual exclusivity has been established.[38]

19. *Discussion*. The Budget Act provides that if applications are not mutually exclusive no auction will be held.[39] We have found, however, that it is important to begin planning for auctions as early as possible to assure that they will run smoothly. To maintain an expeditious auctioning and licensing schedule it is necessary, for instance, to reserve sites for auctions before all applications have been received. Further, we believe that it is important that we schedule auctions far enough in advance to provide applicants with ample time to attract financing and plan their bidding strategies. In any event, we have previously indicated that we will cancel a scheduled auction if we do not receive mutually exclusive applications.[40] Consequently we believe that our auction schedule and procedures are fully consistent with the provisions of the Budget Act.

20. We find advertising of auctions desirable and in the public interest, even if, because of lack of mutual exclusivity, no auction takes place for some licenses. Among its other beneficial effects, advertising of auctions may be essential for making potential licensees, and in particular designated entities, aware of the opportunities available to them. In order to make service available as rapidly and efficiently as possible, we must ensure that those who value the license most highly, and will offer the services most valued by the public, have an opportunity to bid on them. Mutual exclusivity cannot be established until applications have been received, and at that point advertising will no longer be useful because the purpose of advertising is to inform potential licensees of the opportunity to file applications. Consequently, we retain our existing filing procedures and continue to permit our contractor to advertise auctions even before mutual exclusivity has been established.[41]

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[28] *Second Report and Order* at ¶ 132.

[29] *See* reply comments of PacBell, appendix to attachment by Milgrom and Wilson at 5. *See also Second Report and Order* at ¶ 130, n.106.

[30] Either the auction will close only when bidding ceases on all licenses, so the high bidder will have an opportunity to respond to any new bids, or the Commission will call for final bids but not accept new bids on licenses on which there have been no new bids in the previous three rounds, so no other bidder will have the opportunity to outbid the high bidder in a final round.

[31] *Second Memorandum Opinion and Order* at ¶46, in PP Docket No. 93–253, FCC No. 94–215, released Aug 15, 1994, (*Second Memorandum Opinion and Order*).

[32] *Second Memorandum Opinion and Order* at ¶46, in PP Docket No. 93–253, FCC No. 94–215, released Aug 15, 1994, (*Second Memorandum Opinion and Order*).

[33] Phase One Petition at 2.

[34] *Id.* at 3.

[35] *Id.* at 5.

[36] *Id.* at 5–6.

[37] Opposition of Airtouch at 4.

[38] Opposition of PacBell at 8.

[39] 47 U.S.C. § 309(j)(1).

[40] *See Second Report and Order* at ¶165. In fact, 29 applicants are eligible to bid for nationwide narrowband PCS licenses; at least 24 applicants are eligible to bid on each of the ten licenses. Thus, mutual exclusivity exists for all nationwide narrowband licenses, and Phase One's petition is moot on this point.

[41] In this regard we also note that since we find that advertising auctions is in the public interest,

Continued

F. Application-Processing Rules

21. In the *NPRM* in this proceeding, the Commission stated: In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3–22.45 and 22.917(f), and 22.918–22.945, 47 CFR §§ 22.3–22.45, 22.917(f), and 22.918–22.945. For those PCS applicants who file on Form 574, we believe that §§ 90.113–90.159 of our rules, 47 CFR §§ 90.113–90.159, could be used to process those applications with appropriate modifications.[42]

22. *Petition.* AIDE asserts in its petition for reconsideration of the *Second Report and Order* that the Commission acted improperly in proposing substantive PCS application-processing rules in the *NPRM* because, it argues, such rules are outside the scope of this rulemaking, which is limited to implementation of the competitive bidding requirements of § 309(j) of the Communications Act.[43] AIDE argues that the Commission's proposal of application-processing rules is legally insufficient to constitute a valid notice of proposed rules, and that some of the rules cited have no immediate applicability to PCS service. AIDE asserts that in the *Second Report and Order* the Commission failed to respond to the merits of the arguments concerning filing and processing rules in AIDE's comments on the *NPRM.* AIDE concludes that the Commission needs to issue a supplemental *Notice of Proposed Rulemaking* to adopt license-processing rules for PCS. PacBell states, however, that the Administrative Procedure Act does not prohibit the Commission from issuing more than one order based on a notice and comment period.[44] PacBell also states that there is an exception to the Administrative Procedure Act's notice and comment requirements "when the agency for good cause finds (and incorporates the finding * * * in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[45]

23. *Discussion.* The Commission adopted few filing or processing rules in the *Second Report and Order.* Those rules that the Commission did adopt pertaining to the filing and processing of applications and certifications were clearly proposed in the NPRM.[46] In the *Second Memorandum Opinion and Order* we stated that we would address AIDE's concerns in the reconsiderations of the service-specific Orders in which the application processing rules were adopted. In the Third Report and Order, we adopted the service-specific narrowband PCS application processing rules to which AIDE's petition refers and thus, we address the substance of AIDE's arguments below.

24. The competitive bidding process is a means of assigning licenses, and rules and procedures for processing of license applications are an integral and necessary part of that process. By citing in the NPRM the specific Part 22 and Part 90 application processing rules that we would use as the basis for adopting PCS rules, we provided commenters with exceptionally clear notice and an opportunity to comment on the rules we contemplated adopting for narrowband PCS. The few changes that we made from the proposed rules were necessary to adapt them to auctioning narrowband PCS licenses. For example, we adopted certain technical requirements such as restrictions on station antenna structures.[47] We also deleted any procedures that were related to grants by random selection.[48] The resulting rules are clearly a logical outgrowth of the rules proposed in the NPRM, applied in the context of the use of competitive bidding to assign narrowband PCS licenses. Rules adopted as a logical outgrowth comply with all Administrative Procedure Act requirements.[49]

III. Rules Prohibiting Settlements and Collusion

25. *Petitions and Oppositions.* The collusion rules adopted in the *Third Report and Order* prevent bidders for narrowband PCS licenses from entering into settlement agreements after applications are filed. AIDE asserts that narrowband bidders should be allowed to enter into settlement agreements, as encouraged by § 24.429(b), and asserts that the Commission's decision to avoid post-filing settlements was impermissibly based on consideration of potential revenues. Quentin L. Breen (Breen) urges us to act on AIDE's petition to liberalize treatment of full market settlements. Breen states that the Budget Act does not relieve the Commission of its obligation in the public interest to continue to use means such as negotiation to avoid mutual exclusivity, nor does the Act oblige us to adopt anti-collusion regulations. Instead of permitting applicants to avoid the uncertainties and inefficiencies of the auction process, Breen states that the rules effectively mandate that parties will go to end of the auction without being able to consider settlement.[50] PageNet, conversely, urges the Commission to prohibit any settlement negotiations during the competitive bidding process.[51] According to PageNet, there is no way for mutually exclusive applicants to come to an agreement on settlement without exchanging the same kinds of information that would be exchanged for the formation of collusive strategies in auction bidding. Accordingly, PageNet asserts that settlement discussions should be prohibited prior to selection of a winner from among the Form 175 applicants.[52] Furthermore, PageNet contends, that there is little likelihood of an all-market settlement in any given market, because if any one applicant declines to settle, the settlement is defeated.[53]

26. *Discussion.* As stated in our reconsideration of the *Second Report and Order,* we have decided to retain the existing collusion rules, to the extent that they prevent settlements after applications are filed.[54] These rules were designed to avoid formation of anticompetitive agreements among bidders, although we intend to continue reliance on the antitrust laws as our primary method of avoiding bidder collusion.[55] As we indicated in the *Second Report and Order,* we believe that our rules prohibiting collusion will serve the objectives of the Budget Act by preventing applicants, especially the largest companies, from entering into agreements to use bidding strategies that divide the market to the disadvantage of other bidders.[56] We also seek to ensure that entities will not file applications solely for the purpose of demanding payment from other bidders in exchange for settlement or withdrawal of their applications.

27. Accordingly, to ensure that the bidding process is competitive and to encourage formation of a competitive post-auction market structure, we are retaining the collusion rules in the

no conflict of interest exists between Tradewinds' interests and the Commission's.

[42] NPRM, 58 FR 53489 (Oct. 15, 1993) at ¶ 128.

[43] AIDE Petition at 20–21.

[44] PacBell Opposition at 10.

[45] *Id.* at 11, *citing* 5 U.S.C. § 553(c).

[46] *See Second Report and Order* at ¶¶ 164–168, *NPRM* at ¶¶ 96–101.

[47] 47 CFR 24.416.

[48] 47 CFR 22.33.

[49] *Public Service Commission of the District of Columbia* v. *FCC,* 906 F.2nd 713, 717 (D.C. Cir. 1990).

[50] Breen Opposition at 1–4.

[51] PageNet Opposition at 20–26.

[52] *Id.* at 22 & n.11.

[53] *Id.* at 24.

[54] *See Second Memorandum Opinion and Order* at ¶ 54.

[55] *See Second Report and Order,* ¶¶ 2:1–224.

[56] *Id.*

narrowband PCS context.[57] Furthermore, to make clear that we recognize that these rules effectively prohibit post-filing settlements, we are amending our rules to eliminate Section 24.429(b). We believe that this is the most straightforward approach, given our strong concerns that collusion could have an extremely harmful impact upon competition.

28. However, in order to provide bidders sufficient time and greater flexibility to attract capital, we make several modifications to our collusion rules adopted in the *Third Report and Order*. First, in the *Second Memorandum Opinion and Order*, we clarified the applicability of the collusion rules to cases where an applicant has a common ownership interest with another applicant.[58] In that item we stated that, unless the second applicant is expressly identified as an entity with whom the first applicant has an agreement concerning bidding, we will prohibit these parties from communicating concerning their bidding strategies. This prohibition will hold even if the other bidder is identified on the applicant's short-form application as having a common ownership interest with the applicant.

29. Furthermore, where common non-controlling ownership exists between two or more bidders, those bidders may win more licenses cumulatively than a single entity is entitled to hold. In such cases we will permit divestiture of non-controlling interests to bring the entities into compliance with the license aggregation limits provided such divestiture is completed within 90 days of grant of the license. Such post-auction divestiture will enable investors to finance more than one bidder without risking default penalties if both bidders win licenses which in combination exceed our aggregation limits.

30. In addition, we wish to modify our rules regarding amendments to short-form applications. Section 24.413 of the Commission's rules requires all applicants to list certain ownership information including all partners, subsidiaries, affiliates and all persons holding five percent or more of the stock, warrants, options or debt securities of the applicant. Section 24.422(b) currently prohibits amendments to the short-form application to make ownership changes or changes in the parties to bidding consortia after the application filing deadline has passed. As a result of our experience in the nationwide narrowband PCS auction we believe that it is necessary to allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change in control of the applicant and provided that discussions leading up to such changes do not violate our anti-collusion rules. Such amendments must be made within two business days of any such change. Permitting such amendments will provide bidders with flexibility to seek additional capital after applications have been filed, while ensuring that the real party in interest does not change. Accordingly, we will modify rule 24.422(b) to permit applicants to amend their FCC Form 175 applications to reflect ownership changes that do not result in a change in control of the applicant. Such changes shall not be regarded as major amendments to an application, provided they do not result in a transfer of control of the applicant.

31. In addition, we are modifying our collusion rules, which currently prohibit bidders from communicating with one another after short form applications have been filed regarding the substance of their bids or bidding strategies and which also prohibit bidders from entering into consortia arrangements or joint bidding agreements of any kind after the deadline for short form applications has passed. In order to permit bidders to respond to higher than expected license prices by combining their resources during an auction, we will now permit bidders who have not filed Form 175 applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of an auction. We conclude that where bidders have not applied for any of the same licenses there is little risk of anticompetitive conduct with respect to a single license and therefore we believe that it is appropriate to relax our collusion rules to permit bidders in this context to have greater flexibility to increase their competitiveness in the auction by combining their resources, provided that no change of control of any applicant takes place.

IV. Paging Response Channel Eligibility

32. Mercury submitted a request for clarification that non-incumbent paging licensees will be permitted to apply for only those narrowband paging response channel licenses that remain available after the initial response channel auctions. Eligibility requirements for these channels were adopted in GEN Docket No. 90–314, and therefore we will address this issue as part of the further reconsideration of the narrowband PCS service rules in that docket and in ET Docket No. 92–100.

V. Designated Entity Provisions

33. *Background*. In the 1993 Omnibus Budget Reconciliation Act, Congress amended the Communications Act to require the Commission to ensure that small businesses, rural telephone companies, and businesses owned by women and minority group members (designated entities) would have an opportunity to obtain licenses and participate in offering spectrum-based services.[59] We considered numerous alternatives that might ensure opportunities for these designated entities, including installment payment plans, bidding credits, spectrum set-asides, tax certificates, royalty payments, innovator's preferences, and distress sales to designated entities.[60] After considering the characteristics of the narrowband PCS service, we ultimately adopted installment payments for small businesses acquiring certain regional, MTA or BTA licenses.[61] We also provided that a 25 percent bidding credit would be available to businesses owned by minorities and/or women on certain nationwide, regional, MTA and BTA licenses.[62] Both installment payments and bidding credits were made available to small businesses owned by minorities and/or women. In addition, we provided that tax certificates would be made available to encourage investment in women- and minority-owned businesses.[63] Our rules, however, did not permit rural telephone companies to obtain bidding credits or installment payments unless they also qualified as small businesses or businesses owned by minorities and/or women.[64]

[57] *See id.*, ¶ 223.

[58] *Second Memorandum Opinion and Order* at ¶ 55.

[59] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103–66, Title VI, § 6002(a), 107 Stat. 312, 387–389, (1993) (*Budget Act*) (*adopting* 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(D)).

[60] *See Second Report and Order*, ¶¶ 231–257.

[61] *See Third Report and Order*, ¶¶ 68, 86–89.

[62] *Id.*, ¶ 72.

[63] *Id.*, ¶¶ 68, 70, 72–85.

[64] As discussed further *infra*, these rules were based on the rationale that rural telephone companies do not face special barriers to entry into this service, nor are special accommodations necessary to ensure service in rural areas. *See Third Report and Order*, ¶¶ 71, 76. We concluded in the *Third Report and Order*, that, given the relatively modest construction costs for narrowband PCS, even new entrants may choose to provide service to rural areas, and special provisions are not necessary to ensure that rural telephone companies will have the opportunity to participate in provision of service to rural areas. *Id.*, ¶ 71. We noted that women, minorities, and small businesses, in contrast, may face particular financing obstacles that require additional

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34. *Petitions.* Three petitions assert that provisions made available for various designated entities, such as bidding credits, installment payments and tax certificates, should also be made available to all designated entity groups, and for all narrowband PCS licenses. The Association of Independent Designated Entities (AIDE) suggests that bidding credits, currently available for all businesses owned by minorities and/or women, should be granted to all small businesses and rural telephone companies, for all narrowband PCS licenses.[65] AIDE reasons that even if bidding credits are not appropriate for small businesses applying for nationwide licenses (because small businesses can not afford to construct nationwide narrowband PCS systems), the Commission should nevertheless permit small businesses to obtain bidding credits for the smaller, geographically limited narrowband licenses.[66] AIDE also states that the decision to limit installment payments to certain licenses was impermissibly based on maximizing auction revenues.[67]

35. U.S. Intelco Networks, Inc. (USIN) and the Rural Cellular Association (RCA) assert that the failure to provide any narrowband provisions for rural telephone companies violates the Budget Act[68] and ensures that narrowband PCS will be unavailable in rural areas.[69] RCA states that rural telephone companies should receive bidding credits and tax certificates.[70] RCA bases this assertion on the rationale that providing special bidding provisions for rural telephone companies would increase the likelihood that narrowband PCS licenses will be awarded to entities that will provide service to rural areas.[71] RCA also notes that the Budget Act directs that the auction procedures must ensure that licenses for new technologies are awarded in a manner that promotes their rapid deployment "for the benefit of the public, including those residing in rural areas."[72]

36. *Oppositions.* PageNet states that no additional measures should be taken with respect to participation of rural telephone companies or small businesses in narrowband PCS auctions.[73] As to the availability of provisions for women and minority-owned businesses for only one license per channel grouping, PageNet notes that licenses with bidding credits comprise 37 percent of regional licenses and almost 45 percent of the available narrowband spectrum, thus earmarking a good deal of spectrum for designated entities.[74] PageNet states that small businesses have always had ample opportunities in paging, and thus there is no reason to grant them special consideration.[75] We also request comment on a proposal to redesignate the BTA licenses as regional licenses.

37. *Decision.* We have decided, in response to petitions and to our experience with the nationwide narrowband auction, to expand the provisions for designated entities in future narrowband auctions. First, we will modify the definition of small business to expand eligibility. Second, for the upcoming regional narrowband auctions we will increase the bidding credit for women- and minority-owned businesses.

38. Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[76] To achieve this goal, the statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." Thus, while providing that we may charge for licenses, Congress has ordered that the Commission design its auction procedures to ensure that designated entities have opportunities to obtain licenses and provide service. For that purpose, the law does not mandate the use of any particular procedure but it specifically approves the use of "tax certificates, bidding preferences, and other procedures." The use of any such procedure is, in our view, mandated where necessary to achieve Congress's objective of ensuring that designated entities have the opportunity to participate in narrowband PCS.

39. In addition to this mandate, the statute sets forth various congressional objectives. For example, it provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[77] Further, Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods * * * and combinations of such schedules and methods."

40. To satisfy these statutory mandates and objectives, we established in the *Second Report and Order* eligibility criteria and general rules to govern the special measures for small businesses, and businesses owned by members of minority groups and women. In the *Third Report and Order*, we employed several measures, including installment payments, bidding credits and tax certificates, to enhance opportunities for designated entities bidding on certain narrowband PCS licenses. We stated that we believed that narrowband PCS would provide significant opportunities for all designated entities to provide a wide variety of new services including advanced paging and messaging services. In adopting the particular measures for designated entities, however, we assumed that narrowband PCS would involve relatively low capital entry requirements, and would therefore be well-suited to small entities, which lack access to large amounts of capital.[78] Accordingly, we found that the measures we selected for narrowband PCS auctions were appropriately tailored to the unique characteristics of narrowband PCS and

provisions to ensure that they have an opportunity to participate in providing narrowband PCS. *Id.*, ¶¶ 72, 76.

[65] AIDE Petition at 14–18.

[66] AIDE Petition at 16–17.

[67] *Id.* at 18–19.

[68] The Budget Act names rural telephone companies as one of the groups whose opportunity to participate in auctioned services must be ensured by our auction procedures. *See* Budget Act, § 6002, 107 Stat. 388 (adopting 47 U.S.C. § 309(j)(3)(B) and 309(j)(4)(D)).

[69] *See* USIN Petition at 1–8, RCA Petition at 2–9.

[70] RCA Petition at 9.

[71] RCA Petition at 2.

[72] *Id.* (*quoting* 47 U.S.C. § 309(j)(3)(A)).

[73] PageNet Opposition at 12–15.

[74] *Id.* at 14.

[75] *Id.* at 14–15.

[76] 47 U.S.C. § 309(j)(4)(D).

[77] 47 U.S.C. § 309(j)(3)(B); *see also id.* § 309(j)(4)(C) (requiring the Commission when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women). As noted in the *Second Report and Order*, the statute also requires the Commission to promote the purposes specified in Section 1 of the Communications Act, which include, among other things, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; *Second Report and Order* at n.3.

[78] *Third Report and Order* at ¶ 69.

would therefore "create meaningful incentives for small businesses and businesses owned by minorities and/or women to both bid successfully for available licenses and provide innovative and expeditious service to the public.[79] In this regard we indicated that installment payments would provide a significant means for small businesses to overcome their main barrier to entry: lack of access of financing. And, a 25 percent bidding credit for minority and women-owned businesses together with a tax certificate program would address the additional obstacles faced by those designated entities. We noted, however, that we would continue to assess the effectiveness of the measures adopted for narrowband PCS, and would apply any knowledge gained to subsequent auctions.

41. Our goal in the narrowband personal communications service is to meet fully the statutory mandate of Section 309(j)(4)(D), as well as the objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. As explained more fully below, we believe that it is necessary in some respects to do more to ensure that small businesses and businesses owned by members of minority groups and women have a meaningful opportunity to participate in the provision of narrowband PCS. As a result of our experience in the nationwide narrowband PCS auction, we are concerned that a 25 percent bidding credit and installment payments may not be sufficient to ensure the opportunity of these businesses to compete against the larger, deep pocketed incumbent firms. Therefore, we have decided to expand the provisions for designated entities as described below.

A. Definition of Small Business

42. In the *Third Report and Order* we adopted a definition for small businesses based on the standard definition used by the Small Business Administration (SBA). This definition permits an applicant to qualify for installment payments based on a net worth not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million. 13 CFR 121.802(a)(2).[80] In the *Second Memorandum Opinion and Order*, we removed our generic "small business" definition, which was based on the original SBA size standard and indicated that we would establish a definition for "small businesses" on a service-specific basis.

43. Many commenters, including the Chief Counsel for Advocacy of the SBA, argue that the SBA net worth/net revenue definition is too restrictive and will exclude businesses of sufficient size to survive, much less succeed, in the competitive PCS marketplace. The SBA's Chief Counsel for Advocacy and the Suite 12 Group advocate adoption of a gross revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel for Advocacy recommends that the revenue standard be raised to include firms that (together with affiliates) have less than $40 million in gross revenues. Similarly, Suite 12 suggests a $75 million in annual sales threshold. As another option, the SBA's Chief Counsel for Advocacy suggests that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.[81]

44. We now realize that the cost of acquiring a narrowband PCS license will be significant and bidders may be required to expend millions of dollars to acquire a license and construct a system in PCS markets. Thus, we believe that our current narrowband PCS small business definition is overly restrictive because it would exclude most businesses possessing the financial resources to compete successfully in the provision of narrowband PCS services. Accordingly, we modify our small business definition for narrowband PCS auctions to ensure the participation of small businesses with the financial resources to compete effectively in an auction and in the provision of narrowband PCS services.

45. There is substantial support in the record for a $40 million gross revenue standard. For example, the SBA recommends that for PCS, a small business be defined as one whose average annual gross revenues for its past three years do not exceed $40 million.[82] It states that this definition isolates those companies that have significantly greater difficulty in obtaining capital than larger enterprises. At the same time, the SBA contends that a company with $40 million in revenue is sufficiently large that it could survive in a competitive wireless communications market.[83] Similarly, the SBA Chief Counsel for Advocacy asserts that a $40 million threshold will allow participation by firms "of sufficient size to meet demands in almost all small markets and some medium-size markets without significant outside financial assistance."[84]

46. For purposes of narrowband PCS, we shall therefore define a small business as any firm, together with affiliates and certain large investors, with average gross revenues for the three preceding years of less than $40 million.[85] In addition, an applicant will not qualify as a small business if any one attributable investor in, or affiliate of, the entity has $40 million or more in personal net worth.[86] To ensure that

[79] *Id.* at ¶ 70.

[80] The SBA has recently changed its net worth/net income standard as it applies to its Small Business Investment Company (SBIC) Program. *See* 59 FR 16953, 16956 (April 8, 1994). The new standard for determining eligibility for small business concerns applying for financial and/or management assistance under the SBIC program was increased to $18 million net worth and $6 million after-tax net income. 13 CFR 121.802(a)(3)(i). The change in this size standard was attributable to an adjustment for inflation and changes in the SBIC program "designed to strengthen and expand the capabilities of SBICs to finance small businesses so that they can increase their contribution to economic growth and job creation." 59 FR at 16955.

[81] Some parties recommend using the SBA's alternative 1500 employee standard. *See, e.g.*, comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2, and Iowa Network at 17. A number of other commenters, including the SBA's Chief Counsel for Advocacy, argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria. Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that a entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment mandated by Congress in the Budget Act. *See, e.g.*, comments of SBA Chief Counsel for Advocacy at 8, LuxCel Group, Inc. at 4, Suite 12 Group at 10–11.

[82] *Ex parte* filing of U.S. Small Business Administration, June 24, 1994.

[83] *Id.*

[84] Comments of SBA Office of Advocacy at 10. *Cf.* comments of Iowa Network and Telephone Electronics Corporation (advocating a $40 million annual revenue criterion for telephone companies) and replay comments of North American Interactive Partners and Kingwood Associates (advocating $40 million gross-revenue criterion for applicants for the fifty most-populous BTAs, based on estimated average build-out cost).

[85] The establishment of small business size standards is generally governed by Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 642(a). Recent amendments to that statute provide that small business size standards developed by Federal agencies must be based on the average annual gross revenues of such business over a period of not less than three years. *See* Pub. L. No. 102–366, Title II, § 222(a), 106 Stat. 999 (1992); 15 U.S.C. § 632(a)(2)(B)(ii).

[86] Unlike our proposed eligibility criteria to bid in the entrepreneurs' blocks, described below, the small business definition does not include a total assets standard. We believe that the $40 million gross revenue cap for small businesses should be

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only *bona fide* small businesses in need of government financing are eligible, we will consider the gross revenues of the applicant, its affiliates, as well as those of "attributable" investors on a cumulative basis. The text that follows discusses what interests are attributable for these purposes. In addition, it sets forth exceptions to these attribution rules for minority and women-owned applicants.

47. *Qualified "Small Businesses".* As a general rule, the gross revenues of all investors in, and affiliates of, an applicant are counted on a cumulative, fully-diluted basis for purposes of determining whether the $40 million gross revenue threshold has been exceeded, and on an individual basis regarding the $40 million personal net worth standard.[87] There are two exceptions to this rule, however. First, applicants that meet the definition of a small business may, as discussed below, form consortia of small businesses that, on a aggregate basis, exceed the gross revenue cap. Second, the gross revenues, personal net worth, and affiliations of any investor in the applicant are not considered so long as the investor holds 25 percent or less of the applicant's passive equity. For corporations, we shall use the term passive equity investors to mean investors who hold only non-voting stock or voting stock that includes no more than 15 percent of the voting interests. Where different classes of stock are held, however, the total amount of equity must still be no more than 25 percent to meet this requirement. For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity.[88] The passive investor exception will be available, however, only so long as the applicant remains under the control of one or more entities or individuals (defined as the "control group") and the control group holds at least 25 percent of the applicant's equity and, in the case of corporate applicants, at least 50.1 percent of the voting stock.[89] In the case of partnership applicants, the control group must hold all the general partnership interests. Winning bidders are required to identify on their long-form applications the identity of the members of this control group and the means of ensuring control (such as a voting trust agreement). The gross revenues of each member of the control group and each member's affiliates will be counted toward the $40 million gross revenues threshold and applicants shall certify that each control group member meets the individual $40 million personal net worth standard, regardless of the size of the member's total interest in the applicant.

48. The attribution levels we have selected here are intended to balance the competing considerations that apply in this particular context and may differ from those we have used in other circumstances. As a general matter, the 25 percent limitation on equity investment interests will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue cap. At the same time, it will afford qualified bidders a reasonable measure of flexibility in obtaining needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the eligible bidders. Similarly, the 15 percent threshold for attributing revenues of investors with voting stock in corporate applicants is designed to keep ineligible parties from exerting undue influence over eligible firms. For all of these reasons, we also will attribute the gross revenues of entities, or the personal net worth of individuals, that otherwise constitute "affiliates" of the applicant.[90]

49. *Qualified Woman and Minority-Owned Small Businesses.* The record demonstrates that women and minorities have especially acute problems in obtaining financing, due in part to discriminatory lending practices by private financial institutions. To address these special problems and to afford women and minority-owned small businesses more flexibility in attracting financing, it is necessary to provide these entities with an alternative, somewhat more relaxed option regarding the attribution of revenues of passive investors. Under the alternative standard, we will not attribute to the applicant the gross revenues or net worth of any single investor in a minority or woman-owned small business applicant unless it holds more than 49.9 percent of the passive equity (which is defined to include as much as 15 percent of a corporation's voting stock). To guard against abuses, however, the control group of applicants choosing this option would have to own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 percent of the voting stock.[91] Winning bidders must identify on their long-form applications a control group (this time consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and/or women) and the gross revenues and net worth of each member of the control group and each member's affiliates will be counted toward the $40 million gross revenue threshold or the individual $40 million personal net worth limitation, regardless of the size of the member's total interest in the applicant.

50. Relaxing the attribution standard somewhat in determining the eligibility of woman and minority-owned companies to bid as small businesses directly addresses what most commenters have stated to be the biggest obstacle to entry for these designated entities: obtaining adequate financing. By this measure, women and minorities who are eligible to bid as small businesses (*i.e.*, who otherwise meet the $40 million gross revenue standard) will be required to maintain control of their companies and, at the same time, will have flexibility to attract significant infusions of capital from a single investor. The requirement that the minority and women principals hold 50.1 percent of the company's equity mitigates substantially the danger that a well-capitalized investor with a substantial ownership stake will be able to assume *de facto* control of the applicant.

51. Of course, women and minority-owned firms, like any other small business applicant, may sell a larger portion of their companies' equity, provided that they also abide by the general eligibility requirements for small businesses. Specifically, the gross revenues and net worth of all investors holding more than 25 percent of the company's passive equity (as defined to include 15 percent or more of the voting stock) will be attributed toward the $40 million cap and the $40 million personal net worth standard. In this

sufficient to ensure that only *bona fide* small businesses are able to take advantage of the measures intended for them.

[87] By "fully-diluted," we mean that agreements such as stock options, warrants and convertible debentures will generally be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised.

[88] Applicants must be prepared to demonstrate that the limited partners do not have influence over the affairs of the applicant that is inconsistent with their roles as passive investors. For purposes of our rules, we presume that any general partner has the power to control a partnership. Therefore, each general partner in a partnership will be considered part of the partnership's control group.

[89] So long as the applicant remains under *de jure* and *de facto* control of the control group, we shall not bar passive investors from entering into management agreements with applicants.

[90] The definition of an "affiliate" is described in the Further Notice ¶ 55.

[91] As noted previously, the control group of a partnership applicant must hold all of the general partnership interests.

event, the control group will be required to hold at least 25 percent of the company's equity and 50.1 percent of its voting stock.

52. *De Facto Control Issues.* We shall codify in our rules a provision explaining more explicitly the term "control," so that applicants will have clear guidance concerning the requirement that a control group maintains *de facto* as well as *de jure* control of the firms that are eligible for special treatment under the rules for narrowband PCS. For this purpose, we shall borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business. These SBA rules, which are codified in 13 CFR 121.401, provide several specific examples of instances in which an entity might have control of a firm even though the entity has less than 50 percent of the voting stock of a concern, and thus provide a useful model for our rules. Through reference to circumstances such as those described in the SBA rules, our rules will expressly alert designated entities that control of the applicant through ownership of 50.1 percent of the firm's voting interests may be insufficient to ensure *de facto* control of the applicant if, for example, the voting stock of the eligible control group is widely dispersed. In those and other circumstances, ownership of 50.1 percent of the voting stock may be insufficient to assure control of the applicant. Of course, apart from these structural issues relative to control, eligible entities must not, during the license term, abandon control of their licenses through any other mechanism. As we stated in the *Second Report and Order*, designated entities must be prepared to demonstrate that they are in control of the enterprise.[92]

53. In the *Second Memorandum Opinion and Order*, we concluded that designated entities might be permitted to receive benefits based on their participation in consortium on a service specific basis, but believed generally that such a consortium should not be entitled to qualify for measures designed specifically for designated entities. As a general matter, we shall continue to adhere to that principle. We think, however, that in the narrowband PCS service, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong narrowband PCS competitors. Because of the exceptionally large capital requirements associated with acquiring a license in this service, we agree with the SBA Chief Counsel for Advocacy that, so long as individual members of the consortium satisfy the definition of a small business, the congressional objective of ensuring opportunities for small businesses will be fully met. Individual small entities that join to form consortia, as distinguished from a single entity with gross revenues in excess of $40 million, still are likely to encounter capital access problems and, thus, should qualify for measures aimed at small businesses. We do not believe however, that this congressional goal will be satisfied if special measures are allowed for consortia that are "predominantly" or "significantly" owned and/or controlled by small businesses. This would have the effect of eviscerating our small business definition criteria and would not further the ability of *bona fide* small businesses to participate in PCS services.

54. *Financial Benefits.* To ensure that the control group has a substantial financial stake in the venture, we shall adopt certain additional requirements. As noted previously, we shall require that at least 50.1 percent of the voting stock and at least 25 percent (or 50.1 percent for the alternative option for minority- and women-owned businesses) of the aggregate of all outstanding shares of stock to be unconditionally owned by the control group members. In addition, 50.1 percent of the annual distribution of dividends paid on the voting stock of a corporate applicant concern must be paid to these members. Also, in the event stock is sold, the control group members must be entitled to receive 100 percent of the value of each share of stock in his or her possession. Similarly, in the event of dissolution or liquidation of the corporation, the control group members must be entitled to receive at least 25 percent (or 50.1 percent, as the case may be) of the retained earnings of the concern and 100 percent of the value of each share of the stock in his or her possession, subject, of course, to any applicable laws requiring that debt be paid before distribution of equity.

55. Partnerships and other non-corporate entities will be subject to similar requirements. Indicia of ownership that we will consider in non-corporate cases include (but are not limited to) (a) the right to share in the profits and losses, and receive assets or liabilities upon liquidation, of the enterprise *pro rata* in relationship to the designated entity's ownership percentage and (b) the absence of opportunities to dilute the interest of the designated entity (through capital calls or otherwise) in the venture. As with corporations, our concern is ensuring that the economic opportunities and benefits provided through these rules flow to designated entities, as Congress directed.

56. *Abuses.* As stated above, we intend by these attribution rules to ensure that bidders and recipients of these licenses are *bona fide* in their eligibility, and we intend to conduct random audits both before the auctions and during the 10-year initial license period to ensure that our rules are complied with in letter and spirit. If we find that large firms or individuals exceeding our personal net worth caps are able to assume control of licensees that have received small business provisions or otherwise circumvent our rules, we will not hesitate to force divestiture of such improper interests or, in appropriate cases, issue forfeitures or revoke licenses. In this regard, we reiterate that it is our intent, and the intent of Congress, that women, minorities and small businesses be given an opportunity to participate in narrowband PCS services, not merely as fronts for other entities, but as active entrepreneurs.

57. In addition, in view of our new small business definition and the associated maximum investor limits, we are modifying our unjust enrichment rules to prevent any post-auction circumvention of our financial threshold, and to ensure that the ultimate licensees are *bona fide* designated entities. Accordingly, firms that received installment payments based on their small business status will be subject to repayment if, for example, another entity subsequently purchases an "attributable" interest or becomes a member of the control group and, as a result, the gross revenues of the firm would exceed the $40 million gross revenues cap, or the personal net worth of an individual investor exceeds the $40 million personal net worth threshold.

B. Bidding Credits in Regional Narrowband Auctions

58. In the *Third Report and Order* we established bidding credits of 25 percent for women- and minority-owned businesses on two of the six regional narrowband licenses.[93] In order to increase the opportunities for women and minorities to participate in the provision of narrowband service, we have decided to increase the bidding credit on the same two licenses for

[92] *Second Report and Order* at ¶ 278, citing *Intermountain Microwave*, 24 Rad. Reg. 983, 984 (1963).

[93] *Third Report and Order* at ¶ 68.

women- and minority-owned businesses in the upcoming regional narrowband auction from 25 percent to 40 percent. Our experience with the nationwide narrowband PCS auctions, where very high license values coupled with only a 25 percent bidding credit may have contributed to the failure of women- and minority-owned businesses to win licenses, suggests that a credit of this magnitude may be necessary to overcome the disadvantages of these groups in bidding for licenses representing large populations and large geographic areas.[94] In an *ex parte* filing, Essence Television Productions, Inc. one of the initial participants in the nationwide narrowband PCS auction, argues that designated entities should receive bidding credits of up to 40 percent when competing in auctions against non-designated entities.[95] The increased bidding credit combined with installment payments for firms that meet our revised small business definition should enable minority- and women-owned businesses to attract the capital necessary to compete. In addition, we seek comment on whether additional measures such as an entrepreneur's block should be employed in future auctions (see *infra*.).

C. Rural Telephone Companies

59. In this docket, we established general rules and identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, that we would choose among in establishing rules for auctionable spectrum-based services, on a service-specific basis. In adopting service-specific rules, we have carefully selected provisions to meet the particular needs of each designated entity group, so as to "ensure," pursuant to the statute, that each group has the opportunity to participate in providing spectrum-based services.

60. As we indicated above, it is occasionally necessary to do more to ensure that businesses owned by members of minority groups and women have a meaningful opportunity to participate in provision of personal communications services than is necessary to ensure that other designated entity groups have similar opportunities.[96] The major problem facing minorities and women who seek to offer PCS is lack of access to capital.[97] Small businesses also encounter serious funding problems.[98] In contrast, rural telephone companies that are not small businesses (and are not owned by minorities or women) do not face the same difficulties in obtaining capital. Accordingly, we do not believe that any additional provisions for rural telephone companies are necessary or appropriate in the context of narrowband PCS. Moreover, as we stated in the *Second Report and Order*, limiting installment payments to smaller businesses, including those owned by minorities and women, best comports with the intent of Congress by avoiding auction procedures that tend to favor incumbents with established revenue streams over new companies and entrepreneurs.[99] Therefore, rural telephone companies that are not eligible as small businesses will not receive installment payment assistance.

61. Finally, we believe that special provisions for rural telephone companies that are not smaller entities are not necessary in this context to encourage service to rural areas.[100] Especially in regions where the lack of wireline service makes wireless alternatives desirable, paging service is provided to rural areas by paging companies as well as telephone companies. We therefore believe that many telecommunications companies, and not only rural telephone companies, will pursue ordinary profit incentives to provide narrowband PCS service to outlying areas. Accordingly, we believe that installment payment plans are not necessary to encourage larger rural telephone companies to provide this relatively low-cost service in rural areas.

D. Other Designated Entity Decisions

62. We make two additional decisions concerning designated entities on our own motion. First, we clarify that, for a partnership to qualify for designated entity status, all general partners in the applicant and its "control group" must be eligible entities, consistent with our revised generic eligibility criteria in the *Second Memorandum Opinion and Order* in this proceeding. For the purposes of our rules, we presume that all general partners in a partnership have the power to bind the partnership, and therefore have *de facto* control.[101] Therefore, to ensure that designated entity provisions are made available only to legitimate eligible entities if the partnership is to receive designated entity benefits, all general partners will be required to be designated entities if the partnership is to obtain designated entity status.

63. In addition, we are adopting for narrowband PCS the requirement that all entities claiming a designated entity benefit must substantiate their eligibility for such benefits. In a related action reconsidering the *Second Report and Order* in this proceeding, we are requiring applicants that seek designated entity benefits to document their eligibility for such benefits.[102] For narrowband PCS we therefore require designated entity applicants to describe on their long-form applications how they meet the eligibility criteria for designated entity benefits. Applicants must list and summarize on their long-form application all agreements that affect designated entity status, such as all partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. In addition, we will require that such information be maintained at the licensee's facilities, or by its designated agent, for the term of the license, and that the information be made available to Commission staff upon request. We believe that this provision will prove useful when the Commission conducts its random audits of designated entities providing narrowband PCS to ensure their continuing designated entity status.

VI. Procedural Matters And Ordering Clause

A. Regulatory Flexibility Analysis

64. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis for the

[94] We have already adopted installment payments for small businesses on regional, MTA and BTA licenses. See § 24.309(A).

[95] *Ex parte* filing of Essence Television Productions, Inc., August 2, 1994.

[96] *Fifth Report and Order* at ¶ 96, in PP Docket No. 93–253, FCC 94–178, adopted June 29, 1994, released July 15, 1994, 59 FR 37566 (Jul 29, 1994), (*Fifth Report and Order*).

[97] *Id.; see also, e.g.*, Report of the FCC Small Business Advisory Committee to the FCC Regarding Gen. Docket No. 90–314 (Sept. 15, 1993), *reprinted* at 8 FCC Rcd 7820, 8727 (1993) (SBAC Report); Small Business Credit and Business Opportunity Enhancement Act of 1992, Sections 112(4), 331(a)(4), Pub. Law 102–366, Sept. 4, 1992 (Small Business Credit Act) (finding that minority- and woman-owned businesses encounter particular problems in obtaining capital, and minorities face "extraordinary" obstacles in this regard).

[98] *See Fifth Report and Order* ¶¶ 93–108.

[99] *See Second Report and Order*, ¶¶ 234 & n.179 (*citing* H.R. Rep. No. 103–111 at 255), 237. We note, however, that many more rural telephone companies are considered small businesses under our revised small business definition than was the case previously.

[100] Congress did not instruct us to provide for every designated entity group in every service, and we believe that provisions for this particular group are not necessary for narrowband PCS.

[101] *See, e.g., Fifth Report and Order*, ¶ 158 & n. 134 (making such a presumption and therefore treating each general partner in a partnership applying for broadband PCS licenses as part of the partnership's control group).

[102] *See Second Memorandum Opinion and Order* at ¶ 134; Cook Inlet Petition for reconsideration of *Second Report and Order* at 16.

Memorandum Opinion and Order is as follows:

Memorandum Opinion and Order—Final Analysis

65. *Need for, and Purpose of, this Action.* As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, within the *Notice of Proposed Rule Making* in this proceeding, and published Final Regulatory Flexibility Analyses within the *Second Report and Order* (at ¶¶ 299–302) and the *Third Report and Order* (at ¶¶ 91–94). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

66. *Summary of the Issues Raised by the Public Comments.* In regard to the specific narrowband PCS issues addressed by this *Third Memorandum Opinion and Order*, no comments were submitted in response to our Initial Regulatory Flexibility Analysis.

67. *Significant Alternatives Considered.* Although, as described in (B) above, no comments were received pertaining to narrowband PCS, the *Second Report and Order* and *Third Report and Order* addressed at length the general policy considerations raised as a result of the Commission's new auction authority.

B. Ordering Clause

68. Accordingly, It Is Ordered, That the petitions for reconsideration Are Granted to the extent described above and Denied in all other respects.

69. It Is Further Ordered, that Part 24 of the Commission's Rules Is Amended as set forth in the attached Appendix. It Is Ordered, that the rule changes made herein Will Become Effective 30 days after their publication in the **Federal Register**. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

List of Subjects in 47 CFR Part 24

Administrative practice and procedure, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

LaVera F. Marshall,

Acting Secretary.

Rules

Part 24 of chapter I of title 47 of the Code of Federal Regulations is amended as follows:

PART 24—PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

Authority: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.129 is revised to read as follows:

§ 24.129 Frequencies.

The following frequencies are available for narrowband PCS. All licenses on channels indicated with an (*) will be eligible for bidding credits of 25 percent, and all licenses indicated with an (**) will be eligible for bidding credits of 40 percent, as set forth in § 24.309(b) if competitive bidding is used to award such licenses.

(a) Eleven frequencies are available for assignment on a nationwide basis as follows:

(1) Five 50 kHz channels paired with 50 kHz channels:

Channel 1: 940.00–940.05 and 901.00–901.05 MHz;
Channel 2: 940.05–940.10 and 901.05–901.10 MHz;
Channel 3: 940.10–940.15 and 901.10–901.15 MHz;
Channel 4: 940.15–940.20 and 901.15–901.20 MHz; and,
Channel 5: 940.20–940.25 and 901.20–901.25 MHz:*

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 6: 930.40–930.45 and 901.7500–901.7625 MHz;
Channel 7: 930.45–930.50 and 901.7625–901.7750 MHz; and,
Channel 8: 930.50–930.55 and 901.7750–901.7875 MHz;*

(3) Three 50 kHz unpaired channels:

Channel 9: 940.75–940.80 MHz;
Channel 10: 940.80–940.85 MHz; and,
Channel 11: 940.85–940.90 MHz.*

(b) Six frequencies are available for assignment on a regional basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 12: 940.25–940.30 and 901.25–901.30 MHz; and,
Channel 13: 940.30–940.35 and 901.30–901.35 MHz.**

(2) Four 50 kHz channels paired with 12.5 kHz channels:

Channel 14: 930.55–930.60 and 901.7875–901.8000 MHz;
Channel 15: 930.60–930.65 and 901.8000–901.8125 MHz;
Channel 16: 930.65–930.70 and 901.8125–901.8250 MHz; and,
Channel 17: 930.70–930.75 and 901.8250–901.8375 MHz.**

(c) Seven frequencies are available for assignment on a MTA basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 18: 940.35–940.40 and 901.35–901.40 MHz; and,
Channel 19: 940.40–940.45 and 901.40–901.45 MHz.*

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 20: 930.75–930.80 and 901.8375–901.8500 MHz;
Channel 21: 930.80–930.85 and 901.8500–901.8625 MHz; and,
Channel 22: 930.85–930.90 and 901.8625–901.8750 MHz.*

(3) Two 50 kHz unpaired channels:

Channel 23: 940.90–940.95 MHz; and,
Channel 24: 940.95–941.00 MHz.*

(d) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a BTA basis:

Channel 25: 930.90–930.95 and 901.8750–901.8875 MHz; and,
Channel 26: 930.95–931.00 and 901.8875–901.9000 MHz.*

Note 1: Operations in markets or portions of markets which border other countries, such as Canada and Mexico, will be subject to on-going coordination arrangements with neighboring countries.

§ 24.130 Paging response channels.

3. Section 24.130 is amended by revising paragraphs (b) and (c) to read as follows:

* * * * *

(b) The following four 12.5 kHz unpaired channels are available for assignment on a MTA basis:

A: 901.9000–901.9125 MHz;
B: 901.9125–901.9250 MHz;
C: 901.9250–901.9375 MHz; and
D: 901.9375–901.9500 MHz.

(c) The following four 12.5 kHz unpaired channels are available for assignment on a BTA basis:

E: 901.9500–901.9625 MHz;
F: 901.9625–901.9750 MHz;
G: 901.9750–901.9875 MHz; and
H: 901.9875–902.0000 MHz.

4. Section 24.303 is revised to read as follows:

§ 24.303 Competitive bidding mechanisms.

(a) *Sequencing.* The Commission will establish and may vary the sequence in which narrowband PCS licenses will be auctioned.

(b) *Grouping.* In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) *Reservation Price.* The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) *Minimum Bid Increments.* The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission may also establish by Public Notice a suggested opening bid or a minimum opening bid on each license.

(e) *Stopping Rules.* the Commission may establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(f) *Activity Rules.* The Commission may establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted one activity rule waiver during each stage of an auction, or one automatic waiver during a specified number of bidding rounds. The Commission may change by Public Notice the number and frequency of such automatic activity rule waivers for a specific auction.

(g) *Bidder Identification During Auctions.* The Commission may choose, on an auction-by-auction basis, to release the identity of the bidders associated with bidder identification numbers. The Commission will announce by Public Notice before each auction whether bidder identities will be revealed.

5. Section 24.308 is revised to read as follows:

§ 24.308 License Grant, Denial, Default, and Disqualification.

(a) Unless eligible for installment payments and/or a bidding credit, each winning bidder is required to pay the balance of its winning bid in a lump sum payment within five (5) business days following the award of the license. Grant of the license will be conditioned upon full and timely payment of the winning bid amount.

(b) A bidder who withdraws its bid, defaults on a payment or is disqualified will be subject to the penalties specified in § 1.2109 of this Chapter.

6. Section 24.309 is revised to read as follows:

§ 24.309 Designated Entities.

(a) Designated entities entitled to preferences in the narrowband PCS service are small businesses and businesses owned by members of minority groups and/or women as defined in §§ 24.320(b) and 24.320(c).

(b) Designated entities will be eligible for certain special narrowband PCS provisions as follows:

(1) Installment payments. Small businesses, including small businesses owned by members of minority groups and women, will be eligible to pay the full amount of their winning bid on any regional, MTA or BTA license in installments over the term of the license pursuant to the terms set forth in Section 1.2110(d) of this Chapter.

(2) Bidding Credits. Businesses owned by member of minority groups and women, including small businesses owned by members of minority groups and women, will be eligible for a twenty-five (25) percent bidding credit when bidding on the following licenses: (i) The nationwide licenses on Channel 5, Channel 8 and Channel 11; (ii) All MTA licenses on Channel 19, Channel 22, Channel 24; and (iii) All BTA licenses on Channel 26. This bidding credit will reduce by 25 percent the bid price that businesses owned by members of minority groups and women will be required to pay to obtain a license. Businesses owned by women and/or minorities, including small businesses owned by women and/or minorities will be eligible for a forty (40) percent bidding credit when bidding on all regional licenses on Channel 13 and Channel 17. In § 24.129, the licenses that will be eligible for 25 percent bidding credits are indicated by an (*); the licenses that will be eligible for 40 percent bidding credits are indicated by an (**).

(3) Tax Certificates. Any non-controlling initial investor in a business owned by members of minority groups and/or women and who provides "start-up" financing, which allows such business to acquire a narrowband PCS license(s), and any non-controlling investor who purchases an interest in a narrowband PCS license held by a business owned by members of minority groups and/or women with the first year after license issuance, may, upon the sale of such investment or interest, request from the Commission a tax certificate. Any narrowband PCS licensee who assigns or transfers control of its license to a business owned by members of minority groups and/or women may request that the Commission issue the licensee a tax certificate.

(c) *Short-Form Application Certification; Long-Form Application Disclosure.* (1) All applicants for licenses under the designated entity provisions set forth in this section shall certify on their short-form applications (Form 175) that they are eligible for those preferences pursuant to this section.

(2) In addition to the requirements in subpart I, all designated entity applicants that are winning bidders shall, in an exhibit to their long-form applications—

(i) Identify each member of the applicant's control group, regardless of the size of the member's total interest in the applicant, and each member's minority group or gender classification, if applicable;

(ii) Disclose the gross revenues of the applicant and its affiliates, and other persons that hold interests in the applicant and their affiliates (including all members of the applicant's control group); and

(iii) Certify that the personal net worth of the applicant (if an individual), each affiliate and each person that hold an interest in the applicant is less than $40 million.

(d) *Audits.* Applicants and licensees claiming eligibility under this section shall be subject to random audits by the Commission.

(e) *Definitions.* The terms affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, gross revenues, members of minority groups, passive equity, personal net worth, and small business used in this section are defined in § 24.320.

(f) *Unjust Enrichment.* Designated entities using installment payments, bidding credits or tax certificates to obtain a narrowband PCS license will be subject to the following unjust enrichment provisions:

(1) If a small business paying for a narrowband PCS license in installment payments seeks to transfer a license to a non-small business entity during the term of the license, the remaining principal balance must be repaid as a condition of the license transfer.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensees shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of the change as a condition of approval. Increases in

gross revenues that result from equity investments that are not attributable to the licensee under § 24.320(b)(2)(iv), revenues from operations, business development or expanded service shall not be considered changes in ownership structure under this paragraph.

7. Section 24.320 is added to subpart F to read as follows:

§ 24.320 Definitions.

(a) *Scope.* The definitions in this section apply to §§ 24.309–24.315 of this subpart, unless otherwise specified in those sections.

(b) *Small Business; Consortium of Small Businesses.*

(1) A *small business* is an entity that:

(i) Together with its affiliates has average annual gross revenues that are not more than $40 million for the preceding three calendar years;

(ii) Has no attributable investor or affiliate that has a personal net worth of $40 million or more;

(iii) Has a control group all of whose members and affiliates are considered in determining whether the entity meets the $40 million annual gross revenues and personal net worth standards; and

(iv) Such control group holds 50.1 percent of the entity's voting interest, if a corporation, and at least 25 percent of the entity's equity on a fully diluted basis, except that a business owned by members of minority groups and/or women (as defined in paragraph (c) of this section) may also qualify as a small business if a control group that is 100 percent composed of members of minority groups and/or women holds 50.1 percent of the entity's voting interests, if a corporation, and 50.1 percent of the entity's total equity on a fully diluted basis and no single other investor holds more than 49.9 percent of passive equity in the entity.

(2) *Attribution and Aggregation of Gross Revenues and Personal Net Worth.*

(i) Except as specified in paragraphs (b)(1) (iii) and (iv), the gross revenues of the applicant (or licensee) and its affiliates, and other persons that hold interests in the applicant (or licensee) and their affiliates shall be considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is a small business.

(ii) The personal net worth of individual applicants (or licensees) and other persons that hold interests in the applicant (or licensee), and their affiliates, if less than $40 million, shall not be considered for purposes of determining whether the applicant (or licensee) is eligible to bid as a small business.

(iii) Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business shall not be aggregated.

(iv) The gross revenues and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered so long as:

(A) Such person holds no more than 25 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's or control group; and

(B) The applicant has a control group that owns at least 25 percent of the applicant's total equity and, if a corporation, holds at least 50.1 percent of the applicant's voting interests.

(v) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant shall not be considered so long as:

(A) Such person holds no more than 49.9 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's control group; and

(B) The applicant has a control group that consists entirely of members of minority groups and/or women and that owns at least 50.1 percent of the applicant's total equity and, if a corporation, at least 50.1 percent of the applicant's voting interests.

(3) A *small business corsortium* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definition of a small business.

Note to paragraph (b): Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(c) *Business Owned by Members of Minority Groups and/or Women.* A *business owned by members of minority groups and/or women* is an entity:

(1) That has a control group composed 100 percent of members of minority groups and/or women who are United States Citizens, and

(2) Such control group owns and holds 50.1 percent of the voting interests, if a corporation, and

(i) Owns and holds 50.1 percent of the total equity in the entity, provided that all other investors hold passive interests; or

(ii) Holds 25 percent of the total equity in the entity, provided that no single other investor holds more than 25 percent passive equity interests in the entity. In a partnership, all general partners must be members of minority groups and/or women. Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(d) *Gross Revenues. Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period.

(e) *Personal Net Worth. Personal net worth* shall mean the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owed by the individual in his individual capacity or as a joint obligor.

(f) *Members of Minority Groups. Members of minority groups* includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(g) *Passive Equity. Passive equity* shall mean:

(1) For corporations, non-voting stock or stock that includes no more than fifteen percent of the voting equity;

(2) For partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(h) *Control Group.* A *control group* is an entity, or a group of individuals or entities, that possess *de jure* control and *de facto* control of an applicant or licensee, and as to which the applicant's or licensee's charters, articles of incorporation, bylaws, agreements and any other relevant documents (and amendments thereto) provide:

(1) That the entity and/or its members own unconditionally at least 50.1 percent of the total voting interests of a corporation;

(2) That the entity and/or its members receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock of a corporation;

(3) That, in the event of dissolution or liquidation of a corporation, the entity and/or its members are entitled to receive 100 percent of the value of each share of stock in its possession and a percentage of the retained earnings of the concern that is equivalent to the

amount of equity held in the corporation; and

(4) That the entity and/or its members have the right to receive dividends, profits and regular and liquidating distributions from the business in proportion to its interest in the total equity of the applicant or licensee.

Note to paragraph (h): Voting control does not always assure *de facto* control, such as, for example, when the voting stock of the control group is widely dispersed (*see, e.g.*, § 24.720(e)(2)(iii)).

(i) *Affiliate.* Determinations regarding whether an individual or entity will be considered an *affiliate* of:

(1) An applicant or

(2) A person holding an attributable interest in an applicant under paragraph (b)(2) will be made pursuant to the general affiliation rules set forth in § 24.710(l).

8. Section 24.406 is revised to read as follows:

§ 24.406 Filing of Narrowband PCS applications, fees, and numbers of copies.

(a) As prescribed by §§ 24.305, 24.307, and § 24.409, standard formal application forms applicable to the narrowband PCS may be obtained from either:

(1) Federal Communications Commission, Washington, DC 20554; or

(2) By calling the Commission's Forms Distribution Center, (202) 418–3676.

(b) Applications for the initial provision of narrowband PCS service must be filed on FCC Form 175 in accordance with the rules in § 24.305 and Part 1, Subpart Q of this chapter. In the event of mutual exclusivity between applicants filing FCC Form 175, only auction winners will be eligible to file subsequent long form applications on FCC Form 401 for initial narrowband PCS licenses. Mutually exclusive applications filed on Form 175 are subject to competitive bidding under those rules. Narrowband PCS applicants filing Form 401 need not complete Schedule B.

(c) All applications for Narrowband PCS radio station authorizations (other than applications for initial provision of narrowband PCS service filed on FCC Form 175) shall be submitted for filing to: Federal Communications Commission, Washington, DC 20554, Attention: Narrowband PCS Processing Section. Applications requiring fees as set forth at Part 1, Subpart G of this chapter must be filed in accordance with § 0.401(b) of this chapter.

(d) All correspondence or amendments concerning a submitted application shall clearly identify the name of the applicant, applicant identification number or Commission file number (if known) or station call sign of the application involved, and may be sent directly to the Common Carrier Bureau, Narrowband PCS Processing Section.

(e) Except as otherwise specified, all applications, amendments, correspondence, pleadings and forms (including FCC Form 175) shall be submitted on one original paper copy and with three microfiche copies, including exhibits and attachments thereto, and shall be signed as prescribed by § 1.743 of this chapter. Unless otherwise provided by the FCC, filings of five pages or less are exempt from the requirement to submit on microfiche, as well as emergency filings like letters requesting special temporary authority. Those filing any amendments, correspondence, pleadings, and forms must simultaneously submit the original hard copy which must be stamped "original". In addition to the original hard copy, those filing pleadings, including pleadings under § 1.2108 of this chapter shall also submit 2 paper copies as provided in § 1.51 of this chapter.

(1) Microfiche copies. Each microfiche copy must be a copy of the signed original. Each microfiche copy shall be a 148mm × 105mm negative (clear transparent characters appearing on an opaque background) at 24× to 27× reduction for microfiche or microfiche jackets. One of the microfiche sets must be a silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. The microfiche must be placed in paper microfiche envelopes and submitted in a B6 (125 mm × 176 mm) or 5 × 7.5 inch envelope. All applicants must leave Row "A" (the first row for page images) of the first fiche blank for in-house identification purposes.

(2) All applications and all amendments must have the following information printed on the mailing envelope, the microfiche envelope, and on the title area at the top of the microfiche: (i) The name of the applicant; (ii) The type of application (e.g. nationwide, regional, MTA, BTA, response channel); (iii) The month and year of the document; (iv) Name of the document; (v) File number, applicant identification number, and call sign, if assigned; and (vi) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable). Each microfiche copy of pleadings shall include: (A) The month and year of the document; (B) Name of the document; (C) Name of the filing party; (D) File number, applicant identification number, and call sign, if assigned; (E) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable). Abbreviations may be used if they are easily understood.

9. Section 24.422 is revised to read as follows:

§ 24.422 Amendment of application for Narrowband Personal Communications Service filed on FCC Form 175.

(a) The Commission will provide bidders a limited opportunity to cure defects in FCC Form 175 specified herein except for failure to sign the application and to make certifications. These are defects which may not be cured. See also Section 1.2105 of this chapter.

(b) In the Narrowband PCS, applicants will be permitted to amend their Form 175 applications to make minor amendments to correct minor errors or defects such as typographical errors. Applicants will also be permitted to amend FCC Form 175, to make ownership changes or changes in the identification of parties to bidding consortia, provided such changes do not result in a change in control of the applicant and do not involve another applicant (or parties in interest to an applicant) who has applied for any of the same licenses as the applicant. Amendments which change control of the applicant will be considered major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines. See also § 1.2105 of this chapter.

10. Section 24.429 is amended by removing paragraph (b) and redesignating paragraphs (c) and (d) as (b) and (c), respectively.

11. Section 24.430 is revised to read as follows:

§ 24.430 Opposition to applications.

(a) Petitions to deny (including petitions for other forms of relief) and responsive pleadings for Commission consideration must comply with § 1.2108 of this chapter and must:

(1) Identify the application or applications (including applicant's name, station location, Commission file numbers and radio service involved) with which it is concerned;

(2) Be filed in accordance with the pleading limitations, filing periods, and other applicable provisions of §§ 1.41 through 1.52 of this chapter except where otherwise provided in § 1.2108 of this chapter;

(3) Contain specific allegations of fact which, except for facts of which official

notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest;

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto (unless the Commission otherwise extends the filing deadline); and

(5) Contain a certificate of service showing that it has been mailed to the applicant no later than the date of filing thereof with the Commission.

(b) A petition to deny a major amendment to a previously filed application may only raise matters directly related to the amendment which could not have been raised in connection with the underlying, previously filed application. This does not apply to petitioners who gain standing because of the major amendment.

(c) Parties who file frivolous petitions to deny may be subject to sanctions including monetary forfeitures, license revocation, if they are FCC licensees, and may be prohibited from participating in future auctions.

[FR Doc. 94–21016 Filed 8–25–94; 8:45 am]

BILLING CODE 6712–01–M

Proposed Rules

Federal Register
Vol. 59, No. 165
Friday, August 26, 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 1001, 1002, 1004, 1005, 1006, 1007, 1011, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1075, 1076, 1079, 1093, 1094, 1096, 1099, 1106, 1108, 1124, 1126, 1131, 1134, 1135, 1137, 1138, and 1139

[Docket Nos. AO-14-A67, etc.; DA-94-02]

Milk in the New England and Other Marketing Areas; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments to Tentative Marketing Agreements and to Orders

7 CFR part	Marketing area	AO Nos.
1001	New England	AO–14–A67
1002	New York-New Jersey	AO–71–A82
1004	Middle Atlantic	AO–160–A70
1005	Carolina	AO–388–A7
1006	Upper Florida	AO–356–A31
1007	Georgia	AO–366–A37
1011	Tennessee Valley	AO–251–A38
1012	Tampa Bay	AO–347–A34
1013	Southeastern Florida	AO–286–A41
1030	Chicago Regional	AO–361–A32
1032	Southeastern Illinois-Eastern Missouri	AO–313–A41
1033	Ohio Valley	AO–166–A64
1036	Eastern Ohio-Western Pennsylvania	AO–179–A59
1040	Southern Michigan	AO–225–A46
1044	Michigan Upper Peninsula	AO–299–A29
1046	Louisville-Lexington-Evansville	AO–123–A65
1049	Indiana	AO–319–A42
1050	Central Illinois	AO–355–A29
1064	Greater Kansas City	AO–23–A62
1065	Nebraska-Western Iowa	AO–86–A51
1068	Upper Midwest	AO–178–A49
1075	Black Hills, South Dakota	AO–248–A33
1076	Eastern South Dakota	AO–260–A33
1079	Iowa	AO–295–A45
1093	Alabama-West Florida	AO–386–A15
1094	New Orleans-Mississippi	AO–103–A57
1096	Greater Louisiana	AO–257–A44
1099	Paducah, Kentucky	AO–183–A48
1106	Southwest Plains	AO–210–A55
1108	Central Arkansas	AO–243–A47
1124	Pacific Northwest	AO–368–A24
1126	Texas	AO–231–A63
1131	Central Arizona	AO–271–A33
1134	Western Colorado	AO–301–A24
1135	Southwestern Idaho-Eastern Oregon	AO–380–A14
1137	Eastern Colorado	AO–326–A28
1138	New Mexico-West Texas	AO–335–A39
1139	Great Basin	AO–309–A33

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document recommends adopting a proposal to have the Class II milk price in all Federal orders be the basic formula price for the second preceding month plus a fixed differential of $0.30. The Class II price would, like the Class I price in all Federal orders, be announced on or before the fifth day of the month and apply to milk marketed during the following month. This recommended decision would also eliminate the "add-back" provision that requires that the difference between the Class II price and the Class III price be added to a subsequent month's Class II price when the Class II price for the month falls below the Class III price.

DATES: Comments are due on or before September 26, 1994.

ADDRESSES: Comments (six copies) should be filed with the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Gino M. Tosi, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 690-1366.

SUPPLEMENTARY INFORMATION: This administrative action is governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. The amendments would promote more orderly marketing of milk by producers and regulated handlers.

The amendments to the rules proposed herein have been reviewed under Executive Order 12778, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in

accordance with the law and requesting a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Prior document in this proceeding:

Notice of Hearing: Issued December 14, 1993; published December 21, 1993 (58 FR 67380).

Preliminary Statement

Notice is hereby given of the filing with the Hearing Clerk of this recommended decision with respect to proposed amendments to the tentative marketing agreements and the orders regulating the handling of milk in the New England and other marketing areas. This notice is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

Interested parties may file written exceptions to this decision with the Hearing Clerk, U.S. Department of Agriculture, Washington, DC 20250, by the 30th day after publication of this decision in the **Federal Register**. Six copies of the exceptions should be filed. All written submissions made pursuant to this notice will be made available for public inspection at the office of the Hearing Clerk during regular business hours (7 CFR 1.27(b)).

The proposed amendments and findings and conclusions set forth below are based on the record of a public hearing held at Ramada Hotel-Old Town, 901 N. Fairfax Street, Alexandria, Virginia, on January 6 and 7, 1994, pursuant to a notice of hearing issued December 14, 1993, and published in the **Federal Register**, December 21, 1993 (58 FR 67380).

The material issues on the record of the hearing relate to:

1. Replacing the current Class II pricing formula used to establish the Class II milk price in all Federal milk orders.

2. Determining whether emergency marketing conditions exist that would warrant omission of a recommended decision under the rules of practice and procedure (7 CFR 900.12(d)).

Findings and Conclusions

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. Class II milk price. A proposal to replace the Class II milk price formula with the basic formula price for the second preceding month plus a fixed differential of $0.30 should be adopted. Further, this price will be announced by the fifth day of the preceding month. Thus, for example, the Class II price delivered by producers in September would be announced on August 5, and would be the M–W price for July plus $0.30. Adoption of this proposal will result in the Class II milk price and the Class I milk price being announced at the same time and being applicable for all Federal milk orders. Adoption of this proposal would eliminate the need to retain in Federal milk orders the section providing for the basic Class II formula price. Adoption of this proposal also eliminates the "add-back" provision of current Class II pricing where, for a given month, if the Class II price is less than the Class III price for the same month, the difference between these prices are "added-back" in computing the second succeeding month's Class II price.

For most Federal milk orders, the current Class II milk price is the Minnesota-Wisconsin (M–W) price for the second preceding month as adjusted by an "updating" product price formula (the basic Class II formula price provisions of those orders), plus an amount by which the simple average of the basic formula prices (M–W prices) for the most recent 12-month period, plus ten cents, exceeds the same 12-month period's average of the basic Class II formula prices. The Class II milk price is announced by the 15th of the previous month. However, if the announced Class II price for a given month is less than the Class III price for the same month, the difference between these prices is "added-back" in computing the second succeeding month's Class II price. This feature is often referred to as the "add-back" provision.

The purpose of the basic Class II formula price (Section 51a in most orders) is to provide a mechanism for updating the M–W price for the second preceding month so that the Class II price for the current month can be based on the M–W price but still reflect more current marketing conditions that might indicate forthcoming changes in the M–W price. This updating is done by comparing movements of wholesale prices for butter, nonfat dry milk, and Cheddar cheese during the first 15 days of the preceding month with such prices during the same period a month earlier.

The current Class II differential, which is included in the Class II milk price, in most orders is 10 cents. A 15-cent differential applies under the three Florida orders, and a 25-cent differential applies under the Pacific Northwest order.

The proposal recommended for adoption was proposed by the Milk Industry Foundation and International Ice Cream Association (MIF/IICA) and the National Milk Producers Federation (NMPF), Proposal One as published in the hearing notice. The MIF/IICA are national trade associations for processors of fluid milk, cultured dairy products, and manufacturers of frozen desert products. The MIF comprises some 220 member companies who operate nearly 500 plants nationwide and process about 80 percent of all the Class II cultured dairy products in the United States. The IICA comprises some 186 member companies who operate about 350 plants nationwide that manufacture, as well as distribute, approximately 85 percent of the ice cream and related frozen products consumed in the United States. The NMPF is the national farm commodity organization that represents dairy producers and the dairy cooperative marketing associations they own and operate. The Federation's members produce a substantial majority of the U.S. milk supply and market milk in all Federal milk order areas.

A second proposal, Proposal Two as published in the hearing notice, was offered by Friendship Dairies, Inc. Like the proposal recommended for adoption, this proposal would replace the Class II price formula with the basic formula price for the second preceding month, but would add a fixed differential of $0.10 instead of $0.30. Announcement of the Class II milk price under this proposal would also be by the fifth day of the preceding month. Friendship Dairies, Inc. (Friendship), is a family owned and operated cultured dairy products manufacturer regulated under the New York-New Jersey (Order 2) marketing area and processes most of the 250 million pounds of milk which it receives annually from about 175 independent producers and milk marketing cooperatives in Class II products such as cottage cheese and yogurt.

A third proposal, Proposal Three as published in the hearing notice, was offered by Women Involved in Farm Economics (WIFE). This proposal would replace the Class II price formula with the basic formula plus a fixed

differential of $0.50. No witness from WIFE testified. However, testimony was received by a witness from the National Farmers Organization (NFO) in support of a $0.50 Class II differential. The NFO represents about 4,000 member dairy farmers and others who market their milk through NFO in at least 13 Federal milk orders.

A fourth proposal, Proposal Four as published in the hearing notice, would replace the Class II price formula with a Class II price of $0.60 above the Class III or Class III-A price, whichever was higher. This proposal received no evidence or testimony at the hearing and is considered abandoned.

The fifth proposal, Proposal Five as published in the hearing notice, proposed including the "add-back" provision in the Class II price calculation. Retention of the "add-back" provision was proposed by the Central Milk Producers Cooperative (CMPC), a federation of milk cooperatives with operations in the Chicago Regional (Order 30) marketing area. Its membership includes: Associated Milk Producers, Inc., Bongards Creameries, Inc., Golden Guernsey Dairy Cooperative, Independent Milk Producers Cooperative, Land O'Lakes, Inc., Manitowoc Milk Producers Cooperative, Mid-America Dairymen, Inc., Midwest Dairymen's Company, Milwaukee Cooperative Milk Producers, National Farmers Organization, Southern Milk Sales, Inc., Wisconsin Dairies Cooperative, Wisconsin Milk Producers Cooperative, Inc., and the Woodstock Progressive Milk Producers Association. Members of CMPC supply milk to bottlers with Class I and Class II utilization in Federal Orders 30, 32, 40, 50, 68, and 79. They also supply milk to primarily "stand alone" Class II plants in Federal Orders 30, 33, and 49. Certain CMPC members also operate plants processing Class I and Class II products.

Testimony in support of adopting Proposal One, which would replace the Class II price formula with the basic formula price for the second preceding month plus a fixed differential of $0.30 and be announced by the fifth day of the preceding month, included:

a. The proponents MIF/IICA and NMPF;

b. Prairie Farms Dairy, a large regional dairy cooperative that processes and distributes a full line of Grade A dairy products, wholly owns 15 dairy plants, manages one plant for Mid-America Dairymen, Inc., and jointly owns 11 plants with other cooperatives;

c. The Kroger Company, which operates seven fluid distributing plants regulated under six Federal Orders. Kroger Company also operates two nonpool ice cream manufacturing plants that distribute dairy products in 22 Federal orders;

d. Crowley Foods, a major dairy products manufacturer that operates six plants in Federal Orders 1, 2, and 4, four of which are involved in the manufacture of Class II products; and

e. Dean Foods Company, which operates 34 fluid milk plants in 17 Federal orders, processing in excess of 4.5 billion pounds of milk per year.

Except for supporting the fifth proposal, which would retain the "add-back" provision, the CMPC offered testimony in support of replacing the Class II price formula with the basic price formula for the second preceding month plus a fixed differential of $0.30, with this price being announced by the fifth day of the preceding month.

Testimony offered by the proponent witness for the MIF/IICA cited that price volatility in Federal order markets in the past few years has resulted in the movement of Class II prices in a magnitude and direction too often in the opposite direction of Class I and Class III prices. The witness indicated that these more volatile and opposite-moving price relationships have acted to severely limit Class II processors in their ability to sell products on a forward contract basis and have caused confusion to their customers who possess a relatively limited knowledge of milk procurement and pricing. This witness maintains that for efficient marketing and efficient pricing of milk, both Class I and Class II prices should be reflecting movements in the M–W price at the same time, in the same magnitude, and in the same direction.

The MIF/IICA proponent witness offered testimony that revisited a proposal that they submitted at the National Hearing in the fall of 1990 to change the method for establishing advance notice of the price paid for Class II milk under Federal orders. At that hearing, the proposal offered was to establish a Class II price by using the M–W price for the second preceding month plus a fixed differential of $0.15, explaining that the rationale for establishing a 15-cent differential was based on a comparison of the Class II price with the basic formula price over the decade of the 1980's. The proponent witness observed that for the 10-year period of 1980 through 1990 the Class II price averaged about $0.15 above the M–W price.

The witness also testified that because of the Food Security Act of 1985, and the subsequent 1990 Farm Bill, the groundwork was laid for basing milk prices on market forces more than had been done in the past. The MIF/IICA witness contends that the result has been more volatile milk pricing which has rendered the current Class II price formula ineffective in tracking the Class I price, and that the spread between the Class II and the M–W price has increased from its longer-term average.

The proponent witness testified that the Class II price has on average approximated the basic formula price for the second preceding month plus 30 cents. It is on this basis that, according to the proponent witness, they are endorsing a Class II price based on the basic formula price for the second preceding month plus a 30-cent fixed differential. They maintain that this approach has the advantage of being easily understood and is revenue-neutral when compared to the current Class II price computation. They noted that it also allows for the announcement of the Class II price for the month to be made a full ten days earlier than under the current Class II pricing and announcement structure.

From an economic point of view, the MIF/IICA proponent witness stressed that while revising the price computation for determining the Class II price is certainly needed, it is imperative not to have a Class II price which would increase the probability of reducing an already declining market for Class II product sales. Because the Class II price has averaged nearly 30 cents above the basic formula price for the second preceding month over the past six years, the witness asserted that the level of the Class II price for raw milk to both processors and producers would be maintained. The witness offered and cited Federal order statistics that supported their position that Class II product sales are steady-to-declining. The witness said this underscores the economic need to maintain the cost of Class II milk at its current level relative to the basic formula price.

Lastly, the MIF/IICA proponent witness testified that the changing cost structure of milk components under Federal orders reinforces their position of a fixed 30-cent differential added to the second preceding month's basic formula price in determining the Class II milk price. The witness noted that since 1990, the butter price has been reduced under the Federal price support program while the cost of nonfat dry milk has risen. Noting also that the butterfat differential computation was changed in mid-1990, these two developments have significantly increased the cost structure for Class II products, particularly for lower to nonfat Class II products.

The NMPF witness offered testimony and evidence in support of the testimony of the MIF/IICA position. The witness compared the actual Class II price each month under the Chicago Regional order with what the Class II price would have been under their alternative proposal for the six-year period from 1988 to 1993. These comparisons on average, the witness said, would neither have increased handler's costs nor have changed prices received by dairy farmers. This proponent witness maintained that this alternative proposal would have generated more stable prices over the past six years and that the range between monthly high and low prices would have been less than the actual Class II price range. According to the witness, their proposal assures that monthly fluctuations in Class I and Class II prices will be identical. Also, according to the NMPF witness, under the current Class II pricing formula, Class I and Class II prices could, and often did, move in opposite directions in the same month. They maintained that consistent movements in Class I and Class II prices would lessen confusion and mitigate marketing problems that arise when Class I and Class II prices move in opposite directions in the same month.

The NMPF proponent witness testified that their proposed alternative for determining the Class II milk price is simple, easy to understand, and can be calculated as soon as the basic formula price is announced by the USDA. In addition to joining the MIF/IICA position in support of Proposal One, this witness asserted that based on data for the past six years, adoption of their proposal would result in no changes in either Class II prices paid by handlers or prices received by producers. Additionally, this witness observed that there would be little overall price impact, but prices would be more stable, and market conditions would improve.

A joint brief filed by the MIF/IICA and the NMPF reiterated their testimony calling for adoption of Proposal One.

The witness for Prairie Farms Dairy, Inc., offered testimony in support of the need to adopt the MIF/IICA and NMPF's Class II pricing proposal. This witness offered testimony supporting the proponents' observations of the pricing problems and business impacts that occur when Class I and Class II prices move in different directions in the same month. This witness attributes, in part, the decline in sales of Class II products to the wide price swings of the Class II price and how retailers have reacted to these swings. The Prairie Farms witness asserted that adoption of the MIF/IICA and NMPF proposal would not negatively affect farmers, that returns to processors would be more constant, and that consumers would see a more stable average price on Class II products, which might result in increased sales.

The Prairie Farms witness viewed the 10-cent differential as a "nuisance" differential and summarized their opinion in four major points in support of Proposal One: (1) that the proposal is supported by the majority of the dairy industry; (2) the proposal would result in a 10-day earlier announcement of the Class II price along with the Class I price, which would simplify price changes to customers in a more timely manner; (3) that Class I and Class II prices will move in the same direction and at the same magnitude; and (4) that Class II price swings will be more moderate, resulting in more stable consumer prices that hopefully will increase Class II product sales.

The witness representing Kroger Company testified to their support for the MIF/IICA and NMPF proposal, offering that adoption of the proposal will enable processors to intelligently inform their customers of changes in costs for Class I and Class II products simultaneously. This witness similarly expressed concern of a declining Class II products market. In support of the fixed 30-cent differential feature for Class II pricing, the Kroger witness maintained that the value of Class II milk to dairy farmers is greater than the intended target differential of ten cents contained in the current Class II pricing formula. This witness also asserted that it is important to establish a pricing level which recognizes these market realities. He maintained that a 30-cent Class II differential added to the basic formula price recognizes the increased value of Class II milk and establishes a competitive price level for Class II products. The Kroger witness testified that this proposal would, over time, establish revenue neutrality with the current Class II pricing method.

The witness for Crowley Foods, testifying in support of the MIF/IICA and NMPF proposal, voiced identical concerns about Class I and Class II price relationships and went further to mention that the 30-cent fixed differential also offers a happy medium between the price concerns of producers and processors. Additionally, the Crowley Foods witness said that announcing the Class II price an additional ten days in advance of the current Class II price announcement would afford improved promotional planning and ensure that Class II prices move in tandem with fluid prices.

Testimony by the witness for Dean Foods offered his organization's support for the MIF/IICA and NMPF proposal.

The witness representing the CMPC offered testimony in support of Proposal One. However, CMPC sees the need to retain the "add-back" feature of Class II milk pricing. Hence, their support as proponents for Proposal Five.

The CMPC witness emphasized the role of Class II products in the market place, offering evidence that customers demand the same basic product and equal service levels (and costs) for their Class II milk as with Class I milk. However, this witness testified, the current Class II pricing system does not generate adequate returns to pay for the costs of service so closely associated with Class I.

This witness offered evidence in support for a 30-cent differential, indicating it is the minimum justifiable differential level. However, the witness tempered support for this level with concern that in no event should such apparent increase in the Class II differential be permitted to result in no real price increase, hence their support for the fifth proposal for retention of the "add-back." The impetus for retaining the add-back provision offered by the CMPC witness drew from the Recommended Decision of October 31, 1989 (54 FR 33709) that concluded that Class II milk should not be less than the value for Class III milk. Although the CMPC witness acknowledged that a Class II differential increase without an add-back feature would lessen the risk of loss to producers, they continue to assert that the add-back provision provides the necessary guaranty against such loss.

The brief filed by CMPC elaborated further on their support for retention of the add-back provision. In their view, the add-back provides the month-to-month guaranty against lost revenue to producers. This is necessary to retain, stated the CMPC brief, because producer and handler prices are computed on a month-to month basis and not on the basis of annual, or three year or six year average prices.

Support for Proposal One was offered in a brief filed on behalf of the Southern Foods Group, Inc. (SFG), and Anderson-Erickson Dairy Company (AE). The SFG owns and operates six fluid processing plants in Texas and Louisiana and processes Class II products. The AE operates a fluid processing plant and an ice cream plant in Des Moines, Iowa. In the opinion of SFG/AE, only Proposal One provides the changes necessary to correct the problems currently associated with Class II milk pricing.

The SFG/AE brief points to producer and handler agreement that Class II pricing needs to move in the same direction and at the same rate as Class I prices and that advance pricing of Class II milk is critical to the ability of the industry to sell finished Class II products. They also point out that there is universal agreement that the existing Class II price formula is unacceptable and that Class II pricing should be based on the Minnesota–Wisconsin (M–W) price series. On the basis of the record, the SFG/AE concludes that the Class II price must be based on the second prior month's M–W plus a differential of not more than thirty cents without an add-back.

Testimony offered in support of Proposal Two, which would establish the Class II price as the basic formula price for the second preceding month plus a fixed differential of $0.10 and have this price announced by the fifth day of the preceding month, was received from:

a. The proponent, Friendship Dairies, Inc.;

b. Kraft General Foods, a large handler of producer milk that operates plants that process Class II and Class III products in many states; and

c. Galloway Company, a regulated handler under Federal Order 30 that primarily produces sweetened condensed milk, and ice cream mixes.

The proponent witness representing Friendship Dairies, Inc., offered testimony on the need for the Class II differential to be set at ten cents, and for the "add-back" provision of current Class II milk pricing to be eliminated. The testimony offered in support of their proposal rested largely on prior decisions issued by the Department which had determined that ten cents above the basic formula price was the appropriate price (differential) level for Class II milk. Additionally, this proponent witness agreed with other testimony that eliminating the Class II product price formula and using the second preceding month's basic formula price would more accurately reflect the true direction or magnitude in the movement of the Class III price and simplify the pricing of Class II milk. This witness emphasized that this distortion was most attributable to the "add-back" provision.

The Friendship witness offered testimony that demonstrated that the add-back provision resulted in price enhancement of the Class II price above the intended 10-cent target differential. Additionally, this witness testified that when the Class II price is dramatically higher than the Class III–A price, the economic incentive exists for using nonfat dry milk (NFDM) in place of fresh fluid milk. According to this witness, while increasing the price of Class II milk may increase the blend price producers receive in the short term, the long-term effect will be to promote the use of NFDM for manufacturing Class II products.

Even if the Class II price had not increased, said the Friendship witness, the decreasing value placed on butterfat has had the effect of increasing the cost of a hundredweight of Class II skim milk. Because the cost of milk is the single most significant factor affecting the price of most finished Class II products, especially cottage cheese, this absolute increase in cost is staggering and sales have declined, said the witness. According to the witness, any resulting decline in the use of milk for skim-based Class II products would yield a lower price to dairy farmers and would compound the continuing shift of milk value from the fat to skim component.

While the Friendship witness applauded the advance pricing feature of Class II milk, he asserted that the add-back provision of current Class II pricing effectively obliterates any benefits of advance pricing, citing that prices have become volatile. This volatility has caused confusion in the marketplace because Class II prices too often move completely independent of the Class III and Class I price, according to this witness. The result of this confusion, said the witness, is manufacturers attempting to quote a price based upon a forecast, only to rescind because of a large movement in prices due to the add-back feature of current Class II milk pricing. This reality, said the witness, has implications at the consumer level because special featured prices on products that are offered to supermarket chains to promote sales must be guaranteed well in advance so that advertising and related promotional business can be planned. The witness sees the result of current pricing practices as lower Class II product sales and lower returns to dairy farmers.

The Friendship witness testified that their proposal achieves the Department's intent that the Class II price be Class III plus ten cents. The witness said that adoption of any other proposal would deviate from this intent. Further, said the witness, supply and demand conditions, at least in Order 2, do not warrant any increase in the Class II price.

Support for the 10-cent differential level for Class II milk was offered from Kraft General Foods (Kraft). The Kraft witness testified that current Class II pricing has not achieved the targeted Class II differential of ten cents above the Class III price. Rather, it has exceeded the intended differential, and the difference has been compounded in recent years. On a month-to-month basis, said Kraft, the advance Class II price formula has resulted in gross distortions between the Class II and Class III price in the amount of difference and the direction of price movements.

The Kraft witness expressed disagreement with the MIF/IICA and NMPF proposal only from the view that the appropriate differential level should be ten cents and not thirty cents. The witness noted that current Class II pricing has resulted in an effective Class II differential level of almost thirty cents. This is not what should be adopted as the Class II differential because the effective thirty cents is a result of the failure of the formula used to compute the Class II price, he said. According to the Kraft witness, it is one thing to achieve enhancement of the minimum regulated price by mistake and quite another to do so by design. Like the Friendship witness, the Kraft witness drew heavily on previous decisions that reiterated that the appropriate Class II price be the Class III price plus ten cents. This witness was of the opinion that supply and demand conditions did not warrant any increase in the current target differential.

Like the Friendship witness, the Kraft witness joined in the concern that if the Class II differential level is increased above the current intended 10-cent level, there would likely be increased substitution of NFDM for fluid milk in Class II products. Kraft also agreed with Friendship that the add-back provision should be eliminated.

The witness from Galloway Company offered testimony in support of Proposal Two. Much of this witness's testimony supported testimony of the Friendship and Kraft witnesses and further elaborated on the concern for the substitution of NFDM for fluid milk in the manufacture of Class II products. Noting the wide price disparity between Class III–A and Class II, this witness said that processors will make their ingredient selection based on arbitrary and capricious pricing regulations if the Class II price is increased. Increasing the Class II price would not enhance producer revenue because of the ability to substitute lower-priced ingredients in the manufacture of Class II products.

A brief filed on behalf of Friendship, Kraft, Galloway Company, and the Sorrento Cheese Company, Buffalo, New York, expressed opposition to the 30-cent differential of Proposal One. This

brief maintained that the appropriate differential should be ten cents and that placing the differential at thirty cents would be undue price enhancement of the Class II price and would only institutionalize an unintended aberration from the target differential. They contend that testimony of the proponents of Proposal One is flawed because it is based on the Class II prices that prevailed in 1990 when the M–W price recorded some of its lowest prices in a decade and because of the effects of the add-back provision.

This brief cites past decisions that affirm that the current target 10-cent differential is appropriate, although because of the add-back provision, the target differential could not be met and this resulted in high Class II prices. It further revisits past decisions wherein concern was expressed that producer milk may not be made available for Class II use if the price falls below the Class III price. While experience has not borne this out, they say, caution still needs to be exercised in the relationship of Class II prices to Class III-A prices and substitution of powder for producer milk in the manufacture of Class II products. Increasing the differential would only provide additional stimulus to reduce handler purchases of producer milk. This brief also counters arguments on the role of over-order premiums, maintaining that such payments reflect the cost of services incurred by producers (such as balancing and transportation) and not the value of milk. They contend that such premiums should not be relevant to the raw product value of milk.

Lastly, the brief asserts that Proposal One's differential of thirty cents is an undue enhancement of the Class II price and has no basis from an economic point-of-view. The view presented is that thirty cents represents a differential of convenience between divergent views and is not arrived at on the basis of supply and demand considerations which, they say, any price change must be predicated upon.

In support of Proposal Three, a witness representing NFO testified that in addition to supporting a 50-cent Class II differential, they were also supporting the CMPC proposal that the add-back provision of current Class II pricing be retained. This witness testified that the record of the previous 43-day National Hearing in 1990 clearly supported a Class II differential of at least fifty cents. The witness indicated that if the classified pricing structure of Federal orders is to be of value, then there has to be meaningful price differences between classes. A class price break of only ten cents between Class III and Class II was not meaningful in the view of this witness. Additionally, said the NFO witness, handlers are already paying much more than the effective 30-cent Class II differential to secure Class II milk supplies, perhaps as much as $0.70 to $0.80 cents above Class III is regularly being paid. According to this witness, this indicates that the value of Class II milk is worth at least 50 cents over the Class III price. The NFO brief further emphasized that 50 cents establishes a differential level which is at least minimally significant in a classified price sense. Since Federal milk orders have three classes, then there should be a difference in the use value among the three categories of products sufficient enough to justify separate classes, said NFO.

Another reason offered by the NFO witness for a 50-cent Class II differential is the devaluation of butterfat relative to the nonfat component of milk. Because Class II products have a significant butterfat content when viewed across all Class II products, Class II milk producers have suffered losses in milk used in this class, and this represents a reduction in costs to processors. This argument was reiterated in their brief.

The NFO witness testified that even though they would like to see a $1.00 Class II differential, a 50-cent level should be sufficient, provided that the add-back be retained to maintain the intent that Class II prices be equal to or above Class III prices. If the differential level were set at $1.00, the NFO witness testified that this would negate the need for an add-back because of the unlikelihood that the Class III price would exceed the Class II price.

In their brief, the NFO revisited past decisions that affirmed the establishment and intended role of the add-back provision. The NFO reasserted that the add-back provides reinforcement to the principle that Class II prices by definition should not be less than Class III prices. The culprit in the volatility of Class II prices, according to NFO, is the basic Class II formula price and not the add-back. However, NFO did acknowledge that the add-back does play a role, albeit a minor one, in Class II price volatility.

Opponents to retaining the add-back provision argued in submitted briefs that it should be eliminated for a number of reasons. All opponents agreed that if the Class II milk pricing method adopts using the second preceding month's basic formula price and adding a fixed differential, then the add-back can only serve to enhance the Class II price.

The SFG/AE brief dismisses concern that producers won't deliver milk for Class II use if the Class II price falls below the Class III price. In addition to this not happening in the marketplace, SFG/AE points out, it is also a function of when the price is announced. Producers don't know until the month is over that the Class II price was below the Class III price. Therefore, no purpose beyond price enhancement is served by an add-back provision.

This theme is further developed in a brief filed on behalf of Friendship. While CMPC views a "loss" to producer revenues without retaining the add-back, there is in effect no "loss" Friendship argues. Class II prices below Class III prices arise only during months in which the cheese-driven M–W price is increasing, said Friendship. In periods of falling M–W prices, the Class II differential will exceed the target differential. Producers will not be denied the benefit of the Class II differential—rather its payment is delayed by two months, they said. In periods of M–W price volatility, the fact that Class I and Class II differentials would be added to the M–W prices for the second preceding month will actually serve to restrain, they said, the extent to which such volatility is reflected in producer prices. Further, the Friendship brief finds it inconsistent to call Class II prices below Class III prices a "loss" because it is not balanced against any concept of gain or a "pay-back" in months of a declining M–W and the effective Class II differential at windfall levels above the M–W.

It is clear from the record that there is universal endorsement for changing how Class II milk is priced under Federal orders. The record supports the conclusion that the basic Class II price formula that "updates" the second preceding month's M–W in establishing the Class II price is not functioning as intended; is no longer necessary and contributes, in part, to price volatility; and results in a distorted relationship with other class prices. The record is also clear on the unanimous support for retaining the advance-pricing of Class II milk and that the Class II price should be announced at the same time as Class I prices by using the second preceding month's M–W price and adding a fixed differential. The only issues of disagreement regarding Class II milk pricing are what is the appropriate Class II differential and whether or not the "add-back" provision should be retained.

Class II Differential

Most handlers and producers agree that the appropriate differential value for Class II milk is at least thirty cents

above the Class III price. The record testimony and evidence supports this conclusion on the basis that this differential value is representative of the additional value of milk used in this class; that it has been the effective differential paid for Class II milk on average since 1987; and that handlers regularly pay over-order premiums to secure milk for Class II uses above and beyond the service feature of over-order premiums.

Past decisions regarding the pricing of Class II milk concluded that the basic Class II formula price and target differential of ten cents should not be changed. The most recent past decision concluded that the target differential of ten cents should be maintained because supply and demand conditions revealed that there were adequate reserves of Class III milk to meet Class II needs. That decision on the 43-day National Hearing of 1990 recognized that many in the industry believed that Class II prices should move in the same magnitude and direction as Class I. That decision and this hearing clearly reveal that Class I and Class II products are frequently processed together and marketed by handlers in common distribution channels. However, with a basic differential of ten cents, the decision on the 1990 43-day National Hearing continued the existing theory of coordinating the Class II price with the current month's Class III price because Class III products could be used as a source of ingredients for Class II products. In this regard, the need to coordinate the Class II price with the Class III price was the operative principle in the pricing of Class II milk. It was for these reasons that the updating product price formula (represented by the basic Class II formula price) was intended and retained.

This decision makes a clear break from the past in that Class II milk pricing will function in a manner consistent with Class I pricing largely in recognition of the similarity of the distribution and marketing channels shared by milk used in both classes. The record testimony and evidence in this hearing support the conclusion that current Class II pricing results in prices that do not always move in the same direction and magnitude as Class I prices even though both products tend to move in the same marketing channels. Linking the Class II pricing method to that of Class I should better reflect and respond to market conditions as well as simplify the procedure.

As indicated in the brief by CMPC, the Class II price is driven largely by changes in the basic formula price—the M-W price. As this price changes through movements in the hard product price markets, so will the Class II price. Therefore, any change in the Class II price is due primarily to hard product market forces, and not due to the level of the differential which will not change from month-to-month.

By establishing the Class II milk price at the second preceding month's M-W and adding a fixed differential, as with Class I prices, the intent of providing coordination with Class I prices is achieved. Additionally, a consistent and predictable relationship between Class I and Class II prices is also achieved. However, because of the need to retain advance pricing for orderly marketing, there may be times when the current month's Class III price will be greater than the Class II price. Inversely, it is also true, that there may be times when the Class II price is more than 30-cents greater than the current month's Class III price. Nevertheless, the intended target differential is maintained, as with Class I pricing, albeit with a lag as exists with Class I pricing. This is a reality that both producers and handlers must accept with the retention of advanced pricing and have accepted with regard to the Class I price for many years.

The record on this hearing expressed concern for the substitution of NFDM for fresh producer milk used to make Class II products because the price relationship between the Class II price and, for most Federal orders, the Class III-A price, may provide the economic incentive to do so. In this regard, there was a call on one hand to have the Class II price be coordinated with the movement in Class I price and at the same time have the Class II price also be coordinated with lower-class prices. The impossibility of this is clear. In addition, both handlers and producers will know, in advance, the prices for both Class I and Class II milk at the same time. Delivery, procurement, and processing decisions can be made with surety of what prices will be. However, the Class III or Class III-A price will not be known until after the month has ended. It would seem that without knowing what the Class III or Class III-A price will be in advance, the argument that NFDM will substitute for producer milk is weakened. This is not to say that substitution will not occur, because the record reveals that it does. Substitution may occur if a handler predicts the future price relationship between the Class II price and Class III or Class III-A price, and predicts that the future relationship will provide the economic incentive for substitution. Economic prediction, in and of itself, is not a proper basis for determining the appropriate value the milk has in Class II uses.

Significantly different conclusions were reached between the proponents of retaining the current 10-cent target differential, the proponents for a 30-cent differential, and the proponents for a 50-cent differential on the basis of the changing value of milk components. The 10-cent proponents argue that the increasing value of skim to butterfat effectively has raised the costs of Class II products. The 30-cent proponents argue that the changing cost structure provides, in part, the rationale for maintaining what the recent past's average differential has been. The proponents for a 50-cent differential argue that because the utilization of butterfat to manufacture Class II products is relatively high, processors enjoy a price decrease. The arguments presented on the changing cost structure of milk components is not an issue for the purposes of establishing the Class II price. Rather, it is a butterfat differential issue that has already been decided upon in other rulemaking decisions.

As indicated in the brief submitted by SFG/AE, Federal order statistics reveal that there is an abundant supply of milk for all class uses of producer milk. As indicated in this brief, and in the brief filed on behalf of Friendship, Kraft, Sorrento Cheese Company, and Galloway Company, a price increase must be predicated upon supply and demand considerations. Establishing the Class II differential for any given month at thirty cents above the second preceding month's basic formula price is not intended to effectuate a price increase or a price decrease for Class II milk. Rather it is a recognition of the effective differential that has been functioning for a long period of time. The record provides no evidence on any difficulty in procuring milk for Class II use under the current pricing structure. However, the record does indicate that the pricing structure creates problems regarding the timing and certainty of prices, in part, because of its reliance on the basic Class II pricing formula used to update the M–W.

An analysis of the record evidence and officially noticed materials does point to the fact that the Class II price has averaged nearly thirty cents above the basic formula price for the second preceding month since 1987. Additionally, an analysis of the effective differential (the difference between the current month's Class III price and Class II price since adoption of the add-back provision) for the four-year period of 1990 through 1993 indicates that the Class II differential has averaged thirty cents above the Class III price. It is

because of these market realities that there exists so strong an agreement between producers and processors that the true differential level of thirty cents for Class II milk is warranted. Some describe this differential level as the appropriate level, some the minimum justifiable differential, and by some, a differential level that represents the maximum that can be called for on the basis of supply and demand considerations.

The Add-Back Provision

Only two proponents, CMPC who supported a 30-cent differential, and NFO, who advocated a 50-cent differential, called for retention of the add-back provision. The add-back provision of current Class II milk pricing was established in December 1989 as part of a decision to have true advanced pricing for Class II milk. Prior to that time, the Class II milk price that was announced was a tentative price which could be retroactively updated when the Class III price for the month was greater than the tentative Class II price. In this way, the Class II price was "floored" by the Class III price. The intent of the add-back provision was to maintain in principle this relationship between Class II and Class III prices.

The decision on the 43-day National Hearing of 1990 recognized that, at the time of the hearing, the effective Class II differential had averaged about 4 cents higher than the intended differential of ten cents per hundredweight. This decision also affirmed the intent of the add-back was to ensure that producers not receive less than the Class III value for Class II milk in the blend price when the basic formula price exceeded the announced Class II price so that returns to producers would not be reduced. In this way, the Class II price was coordinated with the current month's Class III price.

Now that there exists much more pricing data under the current Class II pricing method, it is clear that the effect of the add-back provision resulted in a Class II price that can never achieve the intended target differential. While the goal of the add-back was to provide a degree of coordination with the Class III price, it did not attempt price coordination with the Class III price in months when the effective Class II differential was well above the targeted differential. Retention of the add-back feature for any proposal presented at this hearing would have similar results.

The add-back provision similarly does not balance prices paid by handlers in months when producers receive more (and at times much more) than the intended target differential. In this view, the add-back feature only works to the price advantage of the producer who, because of the unintended effect of a pricing provision, enjoys all protection from market price changes that handlers do not.

To retain the add-back provision under the proposal recommended for adoption herein could only result in increasing the minimum Class II milk price. An analysis of what the Class II price would have been with and without an add-back provision reveals that in 1990 the add-back would have enhanced the effective Class II differential by 19 cents; for 1991 it would have enhanced the Class II differential by 24 cents; for 1992 it would have enhanced the Class II differential by 15 cents; and for 1993 the Class II differential would have been enhanced by 34 cents. Additionally, because this decision makes a clear break from the past in that Class II prices are more importantly coordinated with the Class I price, there remains no rational argument for its retention. The need for advance pricing, as well as the need for coordination with Class I price movements, means moving away from price coordination with the current month's Class III price. Both objectives can not be simultaneously satisfied.

2. Need for Emergency Action. On the basis of the record evidence and testimony, no emergency conditions could be ascertained that would warrant the omission of a recommended decision.

Rulings on Proposed Findings and Conclusions

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions, and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

General Findings

The findings and determinations hereinafter set forth supplement those that were made when the New England and other orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, marketing agreements upon which a hearing has been held; and

(d) All milk and milk products handled by handlers, as defined in the tentative marketing agreements and the orders as hereby proposed to be amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products.

Recommended Marketing Agreements and Orders Amending the Orders

The recommended marketing agreements are not included in this decision because the regulatory provisions thereof would be the same as those contained in the orders, as hereby proposed to be amended. The following order amending the orders, as amended, regulating the handling of milk in the New England and other marketing areas is recommended as the detailed and appropriate means by which the foregoing conclusions may be carried out.

List of Subjects in 7 CFR Parts 1001, 1002, 1004, 1005, 1006, 1007, 1011, 1012, 1013, 1030, 1032, 1033, 1036, 1040, 1044, 1046, 1049, 1050, 1064, 1065, 1068, 1075, 1076, 1079, 1093, 1094, 1096, 1099, 1106, 1108, 1124, 1126, 1131, 1134, 1135, 1137, 1138, 1139

Milk marketing orders.

For the reasons set forth in the preamble, the following provision(s) in Title 7, Parts 1001 through 1139 are amended as follows:

1. The authority citation for 7 CFR Parts 1001 through 1139 continues to read as follows:

Authority: Sec. 1–19, 48 Stat 31, as amended; 7 U.S.C. 601–674.

PART 1001—MILK IN THE NEW ENGLAND MARKETING AREA

§ 1001.211 [Removed and Reserved]

1. Section 1001.21 is removed and reserved.

2. Section 1001.50 is amended by revising paragraph (b) to read as follows:

§ 1001.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

3. Section 1001.51 is amended by revising the section heading, removing the paragraph designation "(a)" without revising the text of the paragraph, and by removing paragraph (b), to read as follows:

§ 1001.51 Basic formula price.

* * * * *

4. Section 1001.54 is revised to read as follows:

§ 1001.54 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I and Class II prices for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1002—MILK IN THE NEW YORK-NEW JERSEY MARKETING AREA

§ 1002.19 [Removed]

1. Section 1002.19 is removed and reserved.

2. Section 1002.50 is amended by revising paragraph (c) to read as follows:

§ 1002.50 Class prices.

* * * * *

(c) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

3. Section 1002.51 is amended by revising the section heading, removing the paragraph designation "(a)" without revising the text of the paragraph, and by removing paragraph (b), to read as follows:

§ 1002.51 Basic formula price.

* * * * *

4. Section 1002.56 is amended by revising the introductory text, removing the introductory text of paragraph (a), redesignating paragraph (a)(1) as paragraph (a), revising paragraph (b), redesignating paragraph (a)(2) as paragraph (c), redesignating paragraph (a)(3) as paragraph (d), redesignating paragraph (a)(4) as paragraph (e), redesignating paragraph (a)(5) as paragraph (f), and redesignating paragraph (a)(6) as paragraph (g), to read as follows:

§ 1002.56 Announcement of class prices and butterfat differential.

* * * * *

The market administrator shall announce publicly on or before the fifth day of each month, the following:

* * * * *

(b) The Class II price for the following month applicable at the 201–210 mile zone and at the 1–10 mile zone.

* * * * *

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

§ 1004.21 [Removed]

1. Section 1004.21 is removed and reserved.

2. Section 1004.50 is amended by revising paragraph (b) to read as follows:

§ 1004.50 Class and component prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

3. Section 1004.51 is amended by revising the section heading, removing the paragraph designation "(a)" without revising the text of the paragraph, and by removing paragraph (b), to read as follows:

§ 1004.51 Basic formula price.

* * * * *

4. Section 1004.53 is amended by revising the introductory text, removing the introductory text of paragraph (a), redesignating paragraph (a)(1) as paragraph (a), revising paragraph (b), redesignating paragraph (a)(2) as paragraph (c), and redesignating paragraph (a)(3) as paragraph (d) to read as follows:

§ 1004.53 Announcement of class prices and component prices.

The market administrator shall announce publicly on or before the fifth day of each month, the following:

* * * * *

(b) The Class II price for the following month;

* * * * *

PART 1005—MILK IN THE CAROLINA MARKETING AREA

§ 1005.20 [Removed]

1. Section 1005.20 is removed.

2. Section 1005.50 is amended by revising paragraph (b) to read as follows:

§ 1005.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1005.52 [Removed and Reserved]

3. Section 1005.52 is removed and reserved.

4. Section 1005.54 is revised to read as follows:

§ 1005.54 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1006—MILK IN THE UPPER FLORIDA MARKETING AREA

§ 1006.19 [Reserved]

1. Section 1006.19 is removed and reserved.

2. Section 1006.50 is amended by revising paragraph (b) to read as follows:

§ 1006.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1006.51a [Removed]

3. Section 1006.51a is removed.

4. Section 1006.53 is revised to read as follows:

§ 1006.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the basic formula price for the preceding month.

PART 1007—MILK IN THE GEORGIA MARKETING AREA

§ 1007.20 [Removed and Reserved]

1. Section 1007.20 is removed and reserved.

2. Section 1007.50 is amended by revising paragraph (b) to read as follows:

§ 1007.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1007.51a [Removed and Reserved]

3. Section 1007.51a is removed.

4. Section 1007.53 is revised to read as follows:

§ 1007.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1011—MILK IN THE TENNESSEE VALLEY MARKETING AREA

§ 1011.20 [Removed]

1. Section 1011.20 is removed.

2. Section 1011.50 is amended by revising paragraph (b) to read as follows:

§ 1011.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1011.51a [Removed]

3. Section 1011.51a is removed.

4. Section 1011.53 is revised to read as follows:

§ 1011.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A price for the preceding month.

PART 1012—MILK IN THE TAMPA BAY MARKETING AREA

§ 1012.19 [Removed and Reserved]

1. Section 1012.19 is removed and reserved.

2. Section 1012.50 is amended by revising paragraph (b) to read as follows:

§ 1012.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1012.51a [Removed]

3. Section 1012.51a is removed.

4. Section 1012.53 is revised to read as follows:

§ 1012.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the basic formula price for the preceding month.

PART 1013—MILK IN THE SOUTHEASTERN FLORIDA MARKETING AREA

§ 1013.19 [Removed and Reserved]

1. Section 1013.19 is removed and reserved.

2. Section 1013.50 is amended by revising paragraph (b) to read as follows:

§ 1013.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1013.51a [Removed]

3. Section 1013.51a is removed.

4. Section 1013.53 is revised to read as follows:

§ 1013.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III price for the preceding month.

PART 1030—MILK IN THE CHICAGO REGIONAL MARKETING AREA

§ 1030.20 [Removed and Reserved]

1. Section 1030.20 is removed and reserved.

2. Section 1030.50 is amended by revising paragraph (b) to read as follows:

§ 1030.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1030.51a [Removed]

3. Section 1030.51a is removed.

4. Section 1030.53 is revised to read as follows:

§ 1030.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1032—MILK IN THE SOUTHERN ILLINOIS-EASTERN MISSOURI MARKETING AREA

§ 1032.20 [Removed]

1. Section 1032.20 is removed.

2. Section 1032.50 is amended by revising paragraph (b) to read as follows:

§ 1032.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1032.51a [Removed]

3. Section 1032.51a is removed.

4. Section 1032.53 is revised to read as follows:

§ 1032.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III price for the preceding month.

PART 1033—MILK IN THE OHIO VALLEY MARKETING AREA

§ 1033.20 [Removed and Reserved]

1. Section 1033.20 is removed and reserved.

2. Section 1033.50 is amended by revising paragraph (b) to read as follows:

§ 1033.50 Class and component prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

3. Section 1033.51 is amended by revising the section heading, removing the paragraph designation "(a)" without revising the text of the paragraph, and by removing paragraph (b), to read as follows:

§ 1033.51 Basic formula price.

* * * * *

4. Section 1033.53 is amended by revising the introductory text, removing the introductory text of paragraph (a), redesignating paragraph (a)(1) as paragraph (a), revising paragraph (b), redesignating paragraph (a)(2) as paragraph (c), redesignating paragraph (a)(3) as paragraph (d), redesignating paragraph (a)(4) as paragraph (e) and redesignating paragraph (a)(5) as paragraph (f), to read as follows:

§ 1033.53 Announcement of class and component prices.

The market administrator shall announce publicly on or before the fifth day of each month, the following:

* * * * *

(b) The Class II price for the following month;

* * * * *

PART 1036—MILK IN THE EASTERN OHIO-WESTERN PENNSYLVANIA MARKETING AREA

§ 1036.20 [Removed and Reserved]

1. Section 1036.20 is removed and reserved.

2. Section 1036.50 is amended by revising paragraph (b) to read as follows:

§ 1036.50 Class and component prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1036.51a [Removed]

3. Section 1036.51a is removed.

4. Section 1036.53 is amended by revising the introductory text, removing the introductory text of paragraph (a), redesignating paragraph (a)(1) as paragraph (a), revising paragraph (b), redesignating paragraph (a)(2) as paragraph (c), redesignating paragraph (a)(3) as paragraph (d), redesignating paragraph (a)(4) as paragraph (e) and redesignating paragraph (a)(5) as paragraph (f), to read as follows:

§ 1036.53 Announcement of class and component prices.

The market administrator shall announce publicly on or before the fifth day of each month, the following:

* * * * *

(b) The Class II price for the following month;

* * * * *

PART 1040—MILK IN THE SOUTHERN MICHIGAN MARKETING AREA

§ 1040.20 [Removed]

1. Section 1040.20 is removed.

2. Section 1040.50 is amended by revising paragraph (b) to read as follows:

§ 1040.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1040.51a [Removed]

3. Section 1040.51a is removed.

4. Section 1040.53 is revised to read as follows:

§ 1040.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1044—MILK IN THE MICHIGAN UPPER PENINSULA MARKETING AREA

§ 1044.20 [Removed and Reserved]

1. Section 1044.20 is removed and reserved.

2. Section 1044.22 is amended by revising paragraph (i)(1)(i) and removing paragraph (i)(3), to read as follows:

§ 1044.22 Additional duties of the market administrator.

* * * * *

(i) * * *

(1) * * *

(i) The Class I price and Class II price for the following month;

* * * * * *

3. Section 1044.50 is amended by revising paragraph (b) to read as follows:

§ 1044.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

4. Section 1044.51 is amended by revising the section heading, removing the paragraph designation "(a)" without revising the text of the paragraph, and by removing paragraph (b), to read as follows:

§ 1044.51 Basic formula price.

* * * * *

PART 1046—MILK IN THE LOUISVILLE-LEXINGTON-EVANSVILLE MARKETING AREA

§ 1046.201 [Removed]

1. Section 1046.20 is removed.

2. Section 1046.50 is amended by revising paragraph (b) to read as follows:

§ 1046.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1046.51a [Removed]

3. Section 1046.51a is removed.

4. Section 1046.53 is revised to read as follows:

§ 1046.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1049—MILK IN THE INDIANA MARKETING AREA

§ 1049.20 [Removed]

1. Section 1049.20 is removed.

2. Section 1049.50 is amended by revising paragraph (b) to read as follows:

§ 1049.50 Class and component prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1049.51a [Removed]

3. Section 1049.51a is removed.

4. Section 1049.53 is amended by revising the introductory text, removing the introductory text of paragraph (a), redesignating paragraph (a)(1) as paragraph (a), revising paragraph (b), redesignating paragraph (a)(2) as paragraph (c), redesignating paragraph (a)(3) as paragraph (d), redesignating paragraph (a)(4) as paragraph (e) and redesignating paragraph (a)(5) as paragraph (f), to read as follows:

§ 1049.53 Announcement of class and component prices.

The market administrator shall announce publicly on or before the fifth day of each month, the following:

* * * * *

(b) The Class II price for the following month;

* * * * *

PART 1050—MILK IN THE CENTRAL ILLINOIS MARKETING AREA

§ 1050.20 [Removed]

1. Section 1050.20 is removed.

2. Section 1050.50 is amended by revising paragraph (b) to read as follows:

§ 1050.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1050.51a [Removed]

3. Section 1050.51a is removed.

4. Section 1050.53 is revised to read as follows:

§ 1050.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III price for the preceding month.

PART 1064—MILK IN THE GREATER KANSAS CITY MARKETING AREA

§ 1064.20 [Removed]

1. Section 1064.20 is removed.

2. Section 1064.50 is amended by revising paragraph (b) to read as follows:

§ 1064.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1064.51a [Removed]

3. Section 1064.51a is removed.

4. Section 1064.53 is revised to read as follows:

§ 1064.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III price for the preceding month.

PART 1065—MILK IN THE NEBRASKA-WESTERN IOWA MARKETING AREA

§ 1065.20 [Removed]

1. Section 1065.20 is removed.

2 Section 1065.50 is amended by revising paragraph (b) to read as follows:

§ 1065.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1065.51a [Removed]

3. Section 1065.51a is removed.

4. Section 1065.53 is revised to read as follows:

§ 1065.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1068—MILK IN THE UPPER MIDWEST MARKETING AREA

§ 1068.20 [Removed]

1. Section 1068.20 is removed.

2. Section 1068.50 is amended by revising paragraph (b) to read as follows:

§ 1068.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1068.51a [Removed]

3. Section 1068.51a is removed.

4. Section 1068.53 is revised to read as follows:

§ 1068.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1075—MILK IN THE BLACK HILLS, SOUTH DAKOTA MARKETING AREA

§ 1075.20 [Removed]

1. Section 1075.20 is removed.

2. Section 1075.50 is amended by revising paragraph (b) to read as follows:

§ 1075.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

3. Section 1075.51 is amended by revising the section heading, removing the paragraph designation "(a)" without revising the text of the paragraph, and by removing paragraph (b), to read as follows:

§ 1075.51 Basic formula price.

* * * * *

4. Section 1075.53 is revised to read as follows:

§ 1075.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III price for the preceding month.

PART 1076—MILK IN THE EASTERN SOUTH DAKOTA MARKETING AREA

§ 1076.20 [Removed]

1. Section 1076.20 is removed.

2. Section 1076.50 is amended by revising paragraph (b) to read as follows:

§ 1076.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

1076.51a [Removed]

3. Section 1076.51a is removed.

4. Section 1076.53 is revised to read as follows:

§ 1076.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III price for the preceding month.

PART 1079—MILK IN THE IOWA MARKETING AREA

§ 1079.20 [Removed]

1. Section 1079.20 is removed.

2. Section 1079.50 is amended by revising paragraph (b) to read as follows:

§ 1079.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1079.51a [Removed]

3. Section 1079.51a is removed.

4. Section 1079.53 is revised to read as follows:

§ 1079.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1093—MILK IN THE ALABAMA–WEST FLORIDA MARKETING AREA

§ 1093.20 [Removed]

1. Section 1093.20 is removed.

2. Section 1093.50 is amended by revising paragraph (b) to read as follows:

§ 1093.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1093.51a [Removed]

3. Section 1093.51a is removed.

4. Section 1093.53 is revised to read as follows:

§ 1093.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A price for the preceding month.

PART 1094—MILK IN THE NEW ORLEANS–MISSISSIPPI MARKETING AREA

§ 1094.20 [Removed]

1. Section 1094.20 is removed.

2. Section 1094.50 is amended by revising paragraph (b) to read as follows:

§ 1094.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1094.51a [Removed]

3. Section 1094.51a is removed.

4. Section 1094.53 is revised to read as follows:

§ 1094.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1096—MILK IN THE GREATER LOUISIANA MARKETING AREA

§ 1096.20 [Removed]

1. Section 1096.20 is removed.

2. Section 1096.50 is amended by revising paragraph (b) to read as follows:

§ 1096.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1096.51a [Removed]

3. Section 1096.51a is removed.

4. Section 1096.53 is revised to read as follows:

§ 1096.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1099—MILK IN THE PADUCAH, KENTUCKY MARKETING AREA

§ 1099.20 [Removed]

1. Section 1099.20 is removed.

2. Section 1099.50 is amended by revising paragraph (b) to read as follows:

§ 1099.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1099.51a [Removed]

3. Section 1099.51a is removed.

4. Section 1099.53 is revised to read as follows:

§ 1099.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1106—MILK IN THE SOUTHWEST PLAINS MARKETING AREA

§ 1106.20 [Removed]

1. Section 1106.20 is removed.

2. Section 1106.50 is amended by revising paragraph (b) to read as follows:

§ 1106.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1099.51a [Removed]

3. Section 1106.51a is removed.

4. Section 1106.53 is revised to read as follows:

§ 1106.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1108—MILK IN THE CENTRAL ARKANSAS MARKETING AREA

§ 1108.20 [Removed]

1. Section 1108.20 is removed.

2. Section 1108.50 is amended by revising paragraph (b) to read as follows:

§ 1108.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1108.51a [Removed]

3. Section 1108.51a is removed.

4. Section 1108.53 is revised to read as follows:

§ 1108.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

1. Section 1124.19 is revised to read as follows:

§ 1124.19 Butterfat differential.

The butterfat differential is the number that results from subtracting the computation in paragraph (b) of this section from the computation in paragraph (a) of this section and rounding to the nearest one-tenth cent:

(a) Multiply 0.138 times the monthly average Chicago Mercantile Exchange Grade A (92-score) butter price as reported by the Dairy Division;

(b) Multiply 0.0028 times the average price per hundredweight, at test, for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month.

2. Section 1124.50 is amended by revising paragraph (b) to read as follows:

§ 1124.50 Class and component prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

3. Section 1124.51 is amended by revising the section heading, removing the paragraph designation "(a)" without revising the text of the paragraph, and by removing paragraph (b), to read as follows:

§ 1124.51 Basic formula price.

* * * * *

4. Section 1124.53 is amended by revising paragraph (a), removing paragraph (b), and redesignating paragraph (c) as paragraph (b), to read as follows:

§ 1124.53 Announcement of class and component prices.

* * * * *

(a) On or before the 5th day of each month, the Class I price and the Class II price for the following month, and the Class III and Class III–A price for the preceding month.

* * * * *

PART 1126—MILK IN THE TEXAS MARKETING AREA

§ 1126.20 [Removed and Reserved]

1. Section 1126.20 is removed and reserved.

2. Section 1126.50 is amended by revising paragraph (b) to read as follows:

§ 1126.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1126.51 [Removed]

3. Section 1126.51a is removed.

4. Section 1126.53 is revised to read as follows:

§ 1126.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1131—MILK IN THE CENTRAL ARIZONA MARKETING AREA

§ 1131.20 [Removed and Reserved]

1. Section 1131.20 is removed and reserved.

2. Section 1131.50 is amended by revising paragraph (b) to read as follows:

§ 1131.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1131.51a [Removed]

3. Section 1131.51a is removed.

4. Section 1131.53 is revised to read as follows:

§ 1131.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

PART 1134—MILK IN THE WESTERN COLORADO MARKETING AREA

§ 1134.9 [Removed and Reserved]

1. Section 1134.19 is removed and reserved.

2. Section 1134.50 is amended by revising paragraph (b) to read as follows:

§ 1134.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1134.51a [Removed]

3. Section 1134.51a is removed.

4. Section 1134.53 is revised to read as follows:

§ 1134.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III price for the preceding month.

PART 1135—MILK IN THE SOUTHWESTERN IDAHO-EASTERN OREGON MARKETING AREA

1. Section 1135.19 is revised to read as follows:

§ 1135.19 Butterfat differential.

The *butterfat differential* is the number that results from subtracting the computation in paragraph (b) of this section from the computation in paragraph (a) of this section and rounding to the nearest one-tenth cent:

(a) Multiply 0.138 times the monthly average Chicago Mercantile Exchange Grade A (92-score) butter price as reported by the Dairy Division;

(b) Multiply 0.0028 times the average price per hundredweight, at test, for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month.

2. Section 1135.50 is amended by revising paragraph (b) to read as follows:

§ 1135.50 Class and component prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

3. Section 1135.51 is amended by revising the section heading, removing the paragraph designation "(a)" without revising the text of the paragraph, and by removing paragraph (b), to read as follows:

§ 1135.51 Basic formula prices.

* * * * *

4. Section 1135.53 is amended by revising paragraph (a), removing paragraph (b), and redesignating paragraph (c) as paragraph (b), to read as follows:

§ 1135.53 Announcement of class and component prices.

* * * * *

(a) On or before the 5th day of each month, the Class I price and the Class II price for the following month, and the Class III and Class III–A prices for the preceding month.

* * * * *

PART 1137—MILK IN THE EASTERN COLORADO MARKETING AREA

§ 1137.19 [Removed and Reserved]

1. Section 1137.19 is removed and reserved.

2. Section 1137.50 is amended by revising paragraph (b) to read as follows:

§ 1137.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1137.51 [Removed]

3. Section 1137.51a is removed.

4. Section 1137.53 is revised to read as follows:

§ 1137.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III price for the preceding month.

PART 1138—MILK IN THE NEW MEXICO-WEST TEXAS MARKETING AREA

1138.20 [Removed and Reserved]

1. Section 1138.20 is removed and reserved.

2. Section 1138.50 is amended by revising paragraph (b) to read as follows:

§ 1138.50 Class prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

§ 1138.52 [Removed and Reserved]

3. Section 1138.52 is removed and reserved.

4. Section 1138.54 is revised to read as follows:

§ 1138.54 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price and the Class II price for the following month, and the Class III and Class III–A price for the preceding month.

PART 1139—MILK IN THE GREAT BASIN MARKETING AREA

§ 1139.19 [Removed and Reserved]

1. Section 1139.19 is removed and reserved.

2. Section 1139.50 is amended by revising paragraph (b) to read as follows:

§ 1139.50 Class prices and component prices.

* * * * *

(b) *Class II price.* The Class II price shall be the basic formula price for the second preceding month plus $0.30.

* * * * *

3. Section 1139.51 is amended by revising the section heading, removing the paragraph designation "(a)" without revising the text of the paragraph, and by removing paragraph (b), to read as follows:

§ 1139.51 Basic formula price.

* * * * *

4. Section 1139.53 is amended by revising paragraph (a), removing paragraph (b), and redesignating

paragraph (c) as paragraph (b), to read as follows:

§ 1139.53 Announcement of class and component prices.

* * * * *

(a) The 5th day of each month, the Class I price and the Class II price for the following month.

* * * * *

Dated: August 22, 1994.

Lon Hatamiya,

Administrator.

[FR Doc. 94–20990 Filed 8–25–94; 8:45 am]

BILLING CODE 3410-02-P

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7 CFR Part 1036

[DA–94–20]

Milk in the Eastern Ohio-Western Pennsylvania Marketing Area; Proposed Temporary Revision of Certain Provisions of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed temporary revision of rule.

SUMMARY: This document invites written comments on a proposal to revise the supply plant shipping standards under the Eastern Ohio-Western Pennsylvania order for the months of September 1994 through February 1995. The proposal would reduce shipping percentages for pool supply plants by 10 percentage points for each month during the requested period. The temporary revision was requested by Brewster Dairy, Inc., a proprietary handler who operates a pool supply plant. The handler contends that the action is necessary to prevent inefficient and uneconomic movements of milk.

DATES: Comments are due no later than September 2, 1994.

ADDRESSES: Comments (two copies) should be sent to USDA/AMS/Dairy Division, Order Formulation Branch, room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456.

FOR FURTHER INFORMATION CONTACT: Constance M. Brenner, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456 (202) 720–2357.

SUPPLEMENTARY INFORMATION: The Regulatory Flexibility Act (5 U.S.C. 601–612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this proposed rule would not have a significant economic impact on a substantial number of small entities. This rule would lessen the regulatory impact of the order on certain milk handlers and would tend to ensure that dairy farmers would continue to have their milk priced under the order and thereby receive the benefits that accrue from such pricing.

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

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

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with the Secretary a petition stating that the order, any provisions of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of an order or to be exempted from the order. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act and the provisions of § 1036.7(f) of the order, the temporary revision of certain provisions of the order regulating the handling of milk in the Eastern Ohio-Western Pennsylvania marketing area is being considered for the months of September 1, 1994, through February 28, 1995.

All persons who desire to submit written data, views or arguments about the proposed revision should send two copies of their views to USDA/AMS/Dairy Division, Order Formulation Branch, room 2971, South Building, P.O. Box 96456, Washington, DC 20090–6456 by the 7th day after publication of this notice in the **Federal Register**. The period for filing comments is limited to 7 days because a longer period would not provide the time needed to complete the required procedures and include September 1994 in the temporary revision period.

All written submissions made pursuant to this notice will be made available for public inspection in the Dairy Division during regular business hours (7 CFR 1.27(b)).

Statement of Consideration

The provisions proposed to be revised are the supply plant shipping percentages for the months of September 1994 through February 1995. The proposed action would reduce the amount of milk that supply plants must ship to pool distributing plants by 10 percentage points.

Currently, the order provides that for a supply plant to be considered a pool plant, a minimum percentage of the total quantity of milk received at the supply plant must be transferred or diverted to and physically received at pool distributing plants regulated under the order. The minimum percentages are: 40 percent for September, October, and November; 30 percent for December; and 35 percent for January and February.

The Eastern Ohio-Western Pennsylvania order provides that the Director of the Dairy Division may increase or decrease the percentage delivery requirement by up to 10 percentage points if the Director finds that such revision is necessary to obtain needed shipments or to prevent uneconomic shipments.

The revision was requested by Brewster Dairy, Inc. (Brewster), a proprietary handler who operates a pool supply plant regulated under the order. Brewster contends that in Fall 1993 the plant was unable to accept surplus distributing plant milk associated with Order 36 and still meet supply plant qualifications. Consequently, milk from a distributing plant located 10 miles from Brewster had to be diverted to a manufacturing facility 92 miles away. At the same time, Brewster had to procure surplus milk from greater distances to fulfill manufacturing obligations. Brewster contends that this situation represents inequitable and inefficient movements of milk for both supply and distributing plants, undertaken to meet order shipping requirements. Brewster asserts that the same inequitable and inefficient movements of milk are expected again for Fall 1994. Thus, Brewster contends, a reduction of supply plant shipping percentages is necessary to prevent uneconomic and inefficient shipments of milk.

In view of the current supply and demand relationship, it may be

necessary to reduce the supply plant shipping percentage requirements as proposed to provide for the efficient and economic marketing of milk during the months of September 1, 1994, through February 28, 1994.

List of Subjects in 7 CFR Part 1036

Milk marketing orders.

PART 1036—[AMENDED]

The authority citation for 7 CFR Part 1036 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

Dated: August 22, 1994.

Silvio Capponi, Jr.,

Deputy Director, Dairy Division.

[FR Doc. 94–21080 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–02–P

Food Safety and Inspection Service

9 CFR Part 381

[Docket No. 94–022N]

Use of the Term "Fresh" on the Labeling of Raw Poultry Products; Notice of Public Hearings

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of public hearings.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing three public hearings on the use of the term "fresh" on the labeling of raw poultry products. These hearings will provide an opportunity for interested persons to present their views on the term "fresh" as used on the labeling of raw poultry products, and will assist FSIS in developing policy.

DATES: The public hearings will be held on September 12, 16, and 20, 1994, from 9 a.m. to 4 p.m. Written notices of participation in the hearings should be filed by September 6, 1994.

ADDRESSES: The public hearings will be held at the following locations:

September 12: Holiday Inn Hollidome, 1612 Sisk Road, Modesto, CA

September 16: Radisson Hotel, 165 Courtland Street, Atlanta, GA

September 20: Loews L'Enfant Plaza Hotel, 480 L'Enfant Plaza SW., Washington, DC.

Transcripts of the public hearings and copies of data and information submitted during the hearings will be available for review at the office of the FSIS Docket Clerk, Room 3171, South Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC., under Docket Number 94–022N.

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

SUPPLEMENTARY INFORMATION: The Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*) authorizes the Secretary of Agriculture to establish and maintain an inspection program designed to assure consumers that poultry and poultry products distributed in commerce or within designated States are wholesome, not adulterated, and are properly marked, labeled, and packaged. Under this authority, FSIS regulates the labeling of poultry and poultry products and has established a policy on the use of the term "fresh" on the labeling of poultry products. The current U.S. Department of Agriculture (USDA) policy permits poultry kept at or below 40° F and above 0° F to be labeled as "fresh." This policy is based on Federal regulations that set temperatures, and chilling and freezing procedures for poultry products, and the labeling of such products.

The State of California enacted a State law (Section 26661 of the California Food and Agriculture Code) restricting the use of the term "fresh" on the labels of poultry that has ever been kept at or below 25° F. Three trade organizations filed suit to prevent enforcement of the California law, claiming, among other things, that it was preempted by the PPIA. Federal preemption authority granted in the PPIA prohibits States from imposing requirements on the labeling of poultry products that are in addition to, or different than, Federal labeling requirements. On April 8, 1994, a United States District Judge ruled that the labeling provision in the California law was preempted by Federal law and permanently enjoined the State from enforcing its law. The USDA, at the judge's request, filed an *amicus curiae* brief on the Federal preemption issue. A Federal appellate court, which heard argument on the appeal, has not yet ruled.

As a result of issues raised by the California law and the litigation, the Secretary of Agriculture directed FSIS to reexamine its policy for the use of the term "fresh" on the labeling of raw poultry products. The Secretary stated that the current labeling policy in this area should be reexamined to ensure that it "is reasonable and meets today's consumer expectations." The Secretary also directed FSIS to "make sure that any policy change does not open the door to problems like the growth of bacteria that could cause foodborne illness."

FSIS is actively pursuing the Secretary's objective to consider both the scientific bases for the policy and the consumer's expectations and perceptions of the term "fresh" as applied to raw poultry. To ensure that consumers, as well as all other interested parties, have a voice in establishing the Department's "fresh" policy, FSIS is holding three public hearings. These hearings will provide consumers, processors, producers, industry, State and local government officials, health officials, and all other interested parties the opportunity to present oral and written views on this issue.

FSIS has scheduled 1-day public hearings at Modesto, CA; Atlanta, GA; and Washington, DC (see locations and schedules under **"DATES"** and **"ADDRESSES"** above). These public hearings will focus on specific issues regarding the industry's practices and controls, and consumer expectations and perceptions of the term "fresh" on the labeling of raw poultry. Participants should be prepared to respond to those issues which are identified below. Participants may comment on other issues relating to the labeling of poultry as "fresh" that have not been identified by FSIS.

Industry's Practices and Controls

1. What are the current practices and controls used by industry (e.g., processors, wholesalers) for packaging storing, and transporting raw poultry products labeled as or to be labeled as "fresh"?

2. What are the current practices and controls used by retailers for packaging, storing, and handling raw poultry products labeled as or to be labeled as "fresh"?

3. Typically, how much time elapses between slaughter and the sale to consumers of raw poultry products labeled as "fresh"?

Consumer Expectations/Perceptions

1. What is the consumer's expectation when purchasing "fresh" poultry?

2. Do consumers consider previously frozen poultry to be "fresh"?

3. Would it be useful to consumers to have an informative statement, such as "previously frozen for your protection," on the labeling of poultry products that have been previously frozen?

4. What quality characteristics (e.g., tenderness, appearance, etc.) do consumers associate with the term "fresh"?

5. What are the sensory differences (e.g., taste, texture, etc.), if any, between

frozen poultry and poultry which has never been frozen?

6. Would it be useful to consumers to combine the term "fresh" with other descriptive terms (e.g., "fresh chilled," "fresh deep-chilled," "cryo-fresh," "fresh frozen," or "fresh-super chilled") on the labeling of poultry products that have been held at temperatures slightly above 0°F?

The presiding officer at the three hearings will be the FSIS Deputy Administrator for Regulatory Programs. The presiding officer will be accompanied by a panel of FSIS employees with relevant expertise on the issues.

Persons who wish to participate are requested to submit a written request to Mr. Charles R. Edwards, Director, Product Assessment Division, Regulatory Programs, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. The written request should contain the name, address, telephone number, facsimile number, affiliation (if applicable) of the participant, location of hearing where participation is requested, and a brief summary of the presentation. FSIS asks groups that have similar interests to consolidate their comments. FSIS will allocate the time available for the hearings among the persons who have properly submitted a request for participation. If time permits, FSIS may allow other interested persons attending the hearings who did not submit a request for participation, in advance, to make an oral presentation prior to the conclusion of the hearings. FSIS hopes that a broad spectrum of the private and public sectors will participate in these hearings.

FSIS will schedule each appearance after reviewing the notices of participation and accompanying information, and notify each participant by mail, telephone, or FAX of when the time allotted to the person's oral presentation is scheduled to begin. Presentations will be limited to 5 to 10 minutes depending on the number of participants. The hearing schedule will be available at the hearing, and, after the hearing, it will be placed on file with the Docket Clerk (address above) under Docket Number 94–022N.

FSIS is holding these public hearings to gather information and opinions on the use of the term "fresh" as applied to raw poultry and how it is currently perceived when used on the labeling of raw poultry products. FSIS will use this information to determine if and how the Department's current policy on "fresh" should be changed.

Done at Washington, DC, on: August 23, 1994.

Michael R. Taylor,

Administrator, Food Safety and Inspection Service.

[FR Doc. 94–21159 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

Bureau of Economics Analysis

15 CFR Part 806

[Docket No. 940828–4228]

RIN 0691–AA22

Direct Investment Surveys: BE–10, Benchmark Survey of U.S. Direct Investment Abroad—1994

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: Section 4(b) of the International Investment and Trade in Services Survey Act requires that a benchmark survey of U.S. direct investment abroad be conducted covering 1982, 1989, and every fifth year thereafter. These proposed rules set forth reporting requirements for the survey covering 1994 and replace the rules for the last benchmark survey covering 1989. The major change in the reporting requirements to be implemented in these proposed rules is the raising of the exemption level for determining whether a long form or a short form must be filed for nonbank foreign affiliates of nonbank U.S. parent companies.

DATES: Comments on these proposed rules will receive consideration if submitted in writing on or before October 11, 1994.

ADDRESSES: Comments may be mailed to the Office of the Chief, International Investment Division (BE–50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230, or hand delivered to Shipping and Receiving, Section M–100, 1441 L Street, NW., Washington, DC 20005. Comments will be available for public inspection in Room 7006, 1441 L Street, NW., between 8:30 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Betty L. Barker, Chief, International Investment Division (BE–50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; phone (202) 606–9800.

SUPPLEMENTARY INFORMATION: These proposed rules set forth the reporting requirements for the BE–10, Benchmark Survey of U.S. Direct Investment Abroad—1994. This survey is to be conducted by the Bureau of Economic Analysis, U.S. Department of Commerce, under the International Investment and Trade in Services Survey Act (Pub. L. 94–472, 90 Stat. 2059, 22 U.S.C. 3101–3108, as amended) hereinafter, "the Act." Section 4(b) of the Act, as amended, requires that with respect to United States direct investment abroad, the President shall conduct a benchmark survey covering year 1982, a benchmark survey covering year 1989, and benchmark surveys covering every fifth year thereafter. In conducting surveys pursuant to this subsection, the President shall, among other things and to the extent he determines necessary and feasible—

(1) identify the location, nature, and magnitude of, and changes in total investment by an parent in each of its affiliates and the financial transactions between any parent and each of its affiliates;

(2) obtain (A) information on the balance sheet of parents and affiliates and related financial data, (B) income statements, including the gross sales by primary line of business (with as much product line detail as is necessary and feasible) of parents and affiliates in each country in which they have significant operations; and (C) related information regarding trade, including trade in both goods and services, between a parent and each of its affiliates and between each parent or affiliate and any other person;

(3) collect employment data showing both the number of United States and foreign employees of each parent and affiliate and the levels of compensation, by country, industry, and skill level;

(4) obtain information on tax payments by parents and affiliates by country; and

(5) determine, by industry and country, the total dollar amount of research and development expenditures by each parent and affiliate, payments or other compensation for the transfer of technology between parents and their affiliates, and payments or other compensation received by parents or affiliates from the transfer of technology to other persons.

The responsibility for conducting benchmark surveys of U.S. direct investment abroad has been delegated by the President to the Secretary of Commerce, who has redelegated by the President to the Secretary of Commerce, who has redelegated it to the Bureau of Economic Analysis (BEA).

The benchmark surveys are BEA's censuses, intended to cover the universe of U.S. direct investment abroad in

value terms. U.S. direct investment abroad is defined as the ownership or control, directly or indirectly, by one U.S. person of 10 percent or more of the voting securities of an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise, including a branch.

The purpose of he benchmark survey is to obtain comprehensive data on the overall operations of U.S. parent companies and their foreign affiliates, and on positions and transactions between them. The survey is mandated by Congress to provide a factual framework for addressing the concerns of policymakers and the general public about the effects of direct investment abroad on the U.S. and foreign economies. The data from the survey are needed to record the size of U.S. direct investment abroad, measure changes in such investment, and assess its impact. The data will provide benchmarks for deriving current universe estimates of direct investment from sample data collected in other BEA surveys in nonbenchmark years. In particular, they will serve as benchmarks for the quarterly direct investment estimates included in the U.S. international transactions and the national income and product accounts, and for annual estimates of the U.S. direct investment position abroad and of the operations of U.S. parent companies and their foreign affiliates.

The benchmark surveys are the most comprehensive of BEA's surveys in terms of subject matter in order that they obtain the detailed information on U.S. direct investment abroad needed for policy purposes. As specified in the Act, policy areas of particular interest include, among other things, trade in both goods and services, employment and employment compensation, taxes, and technology.

As proposed, the survey will consist of an instruction booklet, a claim for not filing the BE-10, and the following report forms:

1. Form BE-10A for reporting by a U.S. Reporter that is not a bank;

2. Form BE-10A BANK for reporting by a U.S. Reporter that is a bank;

3. Form BE-10B(LF) (Long Form) for reporting nonbank foreign affiliates of nonbank U.S. parents with assets, sales, or net income greater than $50 million (positive or negative);

4. Form BE-10B(SF) (Short Form) for reporting nonbank foreign affiliates of nonbank U.S. parents with assets, sales, or net income greater than $3 million, but not greater than $50 million (positive or negative); and

5. Form BE-10B BANK for reporting foreign affiliates that are banks with assets, sales, or net income greater than $3 million (positive or negative).

Although the proposed survey is intended to cover the universe of U.S. direct investment abroad, in order to minimize the reporting burden, foreign affiliates with assets, sales, and net income each to or less than $3 million (Positive or negative) are exempt from being reported on Form BE-10B(SF) or BE-10B BANK (but must be listed on Form BE-10A SUPPLEMENT or BE-10A BANK SUPPLEMENT).

In designing the survey, BEA made substantial efforts to consult with data users outside the Bureau and survey respondents to obtain their views on the proposed benchmark survey, including the availability and need for the data, the data items to be reported, and the clarity of instructions.The proposed draft incorporates comments received from users and respondents. In reaching decisions on what questions to include in the survey, BEA considered the Government's need for the data, the burden imposed on respondents, the quality of the likely responses (e.g., whether the data are readily available on respondents' books), and BEA's experience in previous benchmark surveys.

The major change from the last (1989) survey to the 1994 survey that is reflected in these proposed rules is the raising, from $15 million to $50 million, of the exemption level for reporting foreign affiliates on the more complex long form. In the 1994 survey, nonbank foreign affiliates for which assets, sales, or net income is greater than $50 million (positive or negative) will be required to be reported on Form BE-10B(LF) (Long Form); nonbank foreign affiliates for which assets, sales, or net income is greater than $3 million (positive or negative), but for which no one of these items is greater than $50 million (positive or negative), will be required to be reported on Form BE-10B(SF) (Short Form). In the 1989 benchmark survey, the long-form exemption level was $15 million. This proposed change means that approximately 6,000 foreign affiliates that previously would have been reported on the long form will now be reported instead on the short form, thus reducing both reporting and editing burden from what it would otherwise have been.

Other proposed changes in the survey from 1989 to 1994 include revision of the instructions—primarily for purposes of clarification—and modification, addition, deletion, or combination of some items on the forms. These changes do not require changes to the rules.

A copy of the proposed survey forms may be obtained from: Office of the Chief, Direct Investment Abroad Branch, International Investment Division (BE-69(A)), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; phone (202) 606-5566.

Executive Order 12612

These proposed rules do not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under E.O. 12612.

Executive Order 12866

These proposed rules have been determined to be not significant for purposes of E.O. 12866.

Paperwork Reduction Act

These proposed rules contain a collection of information requirement subject to the Paperwork Reduction Act. A request for review of the forms has been submitted to the Office of Management and Budget under section 3504(h) of the Paperwork Reduction Act.

The public reporting burden for this collection of information is estimated to vary from 14 to 8,500 hours per response, with an average of 159.4 hours 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. Comments from the public regarding the burden estimate or any other aspect of this collection of information should be addressed to: Director, Bureau of Economic Analysis (BE-1), U.S. Department of Commerce, Washington, DC 20230; and to the Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for the Department of Commerce.

Regulatory Flexibility Act

The General Counsel, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration, under the provisions of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the proposed rules will not have a significant economic impact on a substantial number of small entities. The exemption level is set in terms of the size of a U.S. company's foreign affiliates. If an affiliate is owned 10 percent or more by the U.S. company and has assets, sales, or net income greater than $3 million (positive or negative), it must be reported. Usually,

the U.S. parent company (the one required to file the report) is many times larger. Also, to minimize the reporting burden on smaller U.S. businesses, nonbank foreign affiliates with assets, sales, and net income all below $50 million will be reported on the abbreviated BE–10B(SF), or short form, rather than the BE–10B(LF), or long form.

List of Subjects in 15 CFR Part 806

Balance of payments, Economic statistics, U.S. investment abroad, Penalties, Reporting and recordkeeping requirements.

Dated: August 5, 1994.

Carol S. Carson,

Director, Bureau of Economic Analysis.

For the reasons set forth in the preamble, BEA proposes to amend 15 CFR Part 806 as follows:

PART 806—DIRECT INVESTMENT SURVEYS

1. The authority citation for 15 CFR Part 806 continues to read as follows:

Authority: 5 U.S.C. 301; 22 U.S.C. 3101–3108; and E.O. 11961 (3 CFR, 1977 Comp., p. 86), as amended by E.O. 12013 (3 CFR, 1977 Comp., p. 147), E.O. 12318 (3 CFR, 1981 Comp., p. 173), and E.O. 12518 (3 CFR, 1985 Comp., p. 348).

2. Section 806.16 is revised to read as follows:

§ 806.16 Rules and regulations for BE–10, Benchmark Survey of U.S. Direct Investment Abroad—1994.

A BE–10, Benchmark Survey of U.S. Direct Investment Abroad will be conducted covering 1994. All legal authorities, provisions, definitions, and requirements contained in §§ 806.1 through 806.13 and § 806.14 (a) through (d) are applicable to this survey. Specific additional rules and regulations for the BE–10 survey are given in paragraphs (a) through (e) of this section.

(a) *Response required.* A response is required from persons subject to the reporting requirements of the BE–10, Benchmark Survey of U.S. Direct Investment Abroad—1994, contained herein, whether or not they are contacted by BEA. Also, a person, or their agent, who is contacted by BEA about reporting in this survey, either by sending them a report form or by written inquiry, must respond in writing pursuant to § 806.4. They may respond by:

(1) Certifying in writing, within 30 days of being contacted by BEA, to the fact that the person had no direct investment within the purview of the reporting requirements of the BE–10 survey;

(2) Completing and returning the "BE–10 Claim for Not Filing" within 30 days of receipt of the BE–10 survey report forms; or

(3) Filing the properly completed BE–10 report (comprising Form BE–10A or BE–10A BANK and Forms BE–10B(LF), BE–10B(SF) and/or BE–10B BANK) by May 31, 1995, or June 30, 1995, as required.

(b) *Who must report.* (1) A BE–10 report is required of any U.S. person that had a foreign affiliate—that is, that had direct or indirect ownership or control of at least 10 percent of the voting stock of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise—at any time during the U.S. person's 1994 fiscal year.

(2) If the U.S. person had no foreign affiliates during its 1994 fiscal year, a "BE–10 Claim for Not filing" must be filed within 30 days of receipt of the BE–10 survey package; no other forms in the survey are required. If the U.S. person had any foreign affiliates during its 1994 fiscal year, a BE–10 report is required and the U.S. person is a U.S. Reporter in this survey.

(3) Reports are required even though the foreign business enterprise was established, acquired, seized, liquidated, sold, expropriated, or inactivated during the U.S. person's 1994 fiscal year.

(c) *Forms for nonbank U.S. Reporters and foreign affiliates.* (1) *Form BE–10A (Report for the U.S. Reporter).* A BE–10A report must be completed by a U.S. Reporter that is not a bank. If the U.S. Reporter is a corporation, Form BE–10A is required to cover the fully consolidated U.S. domestic business enterprise.

(i) If a nonbank U.S. Reporter had any foreign affiliates, whether held directly or indirectly, for which any one of the following three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for foreign income taxes—was greater than $3 million (positive or negative) at any time during the affiliate's 1994 fiscal year, the U.S. Reporter must file a complete Form BE–10A and, as applicable, a BE–10A SUPPLEMENT listing each, if any, exempt foreign affiliate. It must also file a Form BE–10B(LF), BE–10B(SF), or BE–10B BANK, as appropriate, for each nonexempt foreign affiliate.

(ii) If a nonbank U.S. Reporter had no foreign affiliates for which any one of the three items listed in paragraph (c)(1)(i) of this section was greater than $3 million (positive or negative) at any time during the affiliate's 1994 fiscal year, then only items 1–4 of Form BE–10A and the BE–10A SUPPLEMENT, listing all exempt foreign affiliates, must be completed.

(2) *Form BE–10B(LF) or (SF) (Report for foreign affiliate).*

(i) A BE–10B(LF) (Long Form) must be filed for each nonbank foreign affiliate of a nonbank U.S. Reporter, whether held directly or indirectly, for which any one of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for foreign income taxes—was greater than $50 million (positive or negative) at any time during the affiliate's 1994 fiscal year.

(ii) A BE–10B(SF) (Short Form) must be filed.

(A) For each nonbank foreign affiliate of a nonbank U.S. Reporter, whether held directly or indirectly, for which any one of the three items listed in (c)(2)(i) above was greater than $3 million, but for which no one of these items was greater than $50 million (positive or negative), at any time during the affiliate's 1994 fiscal year, and

(B) For each nonbank foreign affiliate of a U.S. bank Reporter, whether held directly or indirectly, for which any one of the three items listed in (c)(2)(i) above was greater than $3 million (positive or negative) at any time during the affiliate's 1994 fiscal year.

(iii) Notwithstanding paragraphs (c)(2)(i) and (c)(2)(ii) of this section, a Form BE–10B(LF) or (SF) must be filed for a foreign affiliate of the U.S. Reporter that owns another nonexempt foreign affiliate of that U.S. Reporter, even if the foreign affiliate parent is otherwise exempt, i.e., a form BE–10B(LF), (SF), or BANK must be filed for all affiliates upward in a chain of ownership.

(d) *Forms for U.S. Reporters and foreign affiliates that are banks or bank holding companies.*

(1) For purposes of the BE–10 survey, "banking" covers a business entity engaged in deposit banking or closely related functions, including commercial banks, Edge Act corporations engaged in international or foreign banking, foreign branches and agencies of U.S. banks whether or not they accept deposits abroad, savings and loans, savings banks, and bank holding companies, i.e., holding companies for which over 50 percent of their total income is from banks that they hold. If the bank or bank holding company is part of a consolidated business enterprise and the gross operating revenues from nonbanking activities of this consolidated entity are more than 50 percent of its total revenues, then the consolidated entity is deemed *not* to be

a bank even if banking revenues make up the largest single source of all revenues. (Activities of subsidiaries of a bank or bank holding company that may not be banks but that provide support to the bank parent company, such as real estate subsidiaries set up to hold the office buildings occupied by the bank parent company, are considered bank activities.)

(2) *Form BE-10A BANK (Report for a U.S. Reporter that is a bank).* A BE-10A BANK report must be completed by a U.S. Reporter that is a bank. For purposes of filing Form BE-10A BANK, the U.S. Reporter is deemed to be the fully consolidated U.S. domestic business enterprise and all required data on the form shall be for the fully consolidated domestic entity.

(i) If a U.S. bank had *any* foreign affiliates at any time during its 1994 fiscal year, whether a bank or nonbank and whether held directly or indirectly, for which *any one* of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for foreign income taxes—was greater than $3 million (positive or negative) at any time during the affiliate's 1994 fiscal year, the U.S. Reporter must file a complete Form BE-10A BANK and, as applicable, a BE-10A BANK SUPPLEMENT listing each, if any, exempt foreign affiliate, whether bank or nonbank. It must also file a Form BE-10B(SF) for *each* nonexempt nonbank foreign affiliate and a Form BE-10B BANK for *each* nonexempt foreign bank affiliate.

(ii) If the U.S. bank Reporter had no foreign affiliates for which *any one* of the three items listed in paragraph (d)(2)(i) of this section was greater than $3 million (positive or negative) at any time during the affiliate's 1994 fiscal year, then only items 1–4 of Form BE-10A BANK and the BE-10A BANK SUPPLEMENT, listing all exempt foreign affiliates, should be completed.

(3) *Form BE-10B BANK (Report for a foreign affiliate that is a bank).*

(i) A BE-10B BANK report must be filed for each foreign bank affiliate of a bank or nonbank U.S. Reporter, whether directly or indirectly held, for which *any one* of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for foreign income taxes—was greater than $3 million (positive or negative) at any time during the affiliate's 1994 fiscal year.

(ii) Notwithstanding paragraph (d)(3)(i) of this section, a Form BE-10B BANK must be filed for a foreign bank affiliate of the U.S. Reporter that owns another *nonexempt* foreign affiliate of that U.S. Reporter, even if the foreign affiliate parent is otherwise exempt, i.e., a Form BE-10B(LF), (SF), or BANK must be filed for all affiliates upward in a chain of ownership. However, a Form BE-10B BANK is not required to be filed for a foreign bank affiliate in which the U.S. Reporter holds only an indirect ownership interest of 50 percent or less and that does not own a reportable nonbank foreign affiliate, but the indirectly owned bank affiliate must be listed on the BE-10A BANK SUPPLEMENT.

(e) *Due date.* A fully completed and certified BE-10 report comprising Form BE-10A or 10A BANK, BE-10A SUPPLEMENT (as required), and Form(s) BE-10B(LF), (SF), or BANK (as required) is due to be filed with BEA not later than May 31, 1995 for those U.S. Reporters filing less than 50, and June 30, 1995 for those U.S. Reporters filing 50 or more, Forms BE-10B(LF), (SF), or BANK.

[FR Doc. 94-20975 Filed 8-25-94; 8:45 am]

BILLING CODE 3510-EA-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 416

[Regulations No. 16]

RIN 0960-AD36

Supplemental Security Income For the Aged, Blind, and Disabled; Income and Resources; Victims' Compensation Payments and Relocation Assistance Exclusions

AGENCY: Social Security Administration, HHS.

ACTION: Proposed rules.

SUMMARY: These proposed regulations will exclude from income and resources under the supplemental security income (SSI) program, payments received by an individual (or spouse) from a fund established by a State to aid victims of crime and certain relocation assistance received from a State or local government. These amendments are being proposed in order to reflect sections 5031 and 5035 of the Social Security Act.

DATES: To be sure that your comments are considered, we must receive them no later than October 25, 1994.

ADDRESSES: Comments should be submitted in writing to the Commissioner of Social Security, Department of Health and Human Services, P.O. Box 1585, Baltimore, MD 21235, sent by telefax to (410) 966-0869, or delivered to the Office of Regulations, Social Security Administration, 3-B-1 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, between 8:00 a.m. and 4:30 p.m. on regular business days. Comments received may be inspected during these same hours by making arrangements with the contact person shown below.

FOR FURTHER INFORMATION CONTACT: Harry J. Short, Legal Assistant, 3-B-1 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965-6243.

SUPPLEMENTARY INFORMATION: Section 1612(b) of the Social Security Act (the Act), as amended by sections 5031 and 5035 of Pub. L. 101-508, effective May 1, 1991, excludes from income under the SSI program payments received by an individual (or spouse) from a fund established by a State to aid victims of crime, and relocation assistance provided by a State or local government which is comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Sections 5031 and 5035 also amended section 1613(a) of the Act to exclude these payments and assistance from resources for a period of 9 months beginning with the month following the month in which they are received. However, with respect to victims' compensation payments under section 5031, the resource exclusion applies to the extent that the payments were made as compensation for expenses incurred or losses suffered as a result of a crime. In addition, section 5031 amended section 1631(a) of the Act to provide that benefits under title XVI shall not be denied to any individual solely by reason of the refusal of the individual to accept an amount offered as compensation for a crime of which the individual was a victim. Section 13732 of Public Law 103-66 (the Omnibus Budget Reconciliation Act of 1993) amended section 5035 of Pub. L. 101-508 by making permanent the exclusion of relocation assistance which originally was set to expire on April 30, 1994.

These proposed regulations would amend §§ 416.210(b), 416.1124, and 416.1210 and create new §§ 416.1229 and 416.1239 to reflect these statutory changes. These proposed rules would also amend § 416.1161 to apply these same income exclusions when victims' compensation payments and State and local government relocation assistance are received by the ineligible spouse or ineligible parent of an eligible individual or child in order that the

deeming rules not reduce the SSI payment of, or render ineligible, the individual or child. The proposed amendments to § 416.1210 would result in the application of the resource exclusions to these deemors. Not to apply the exclusions in such cases could thwart the Congressional intent underlying sections 5031 and 5035 that State victims' compensation payments and relocation assistance not be treated as income and resources and thus not adversely affect SSI eligibility. For this same reason, the proposed resource exclusions would apply to victims' compensation payments and relocation assistance received by an alien's sponsor whose resources are deemed to an eligible alien. Under section 1621(b)(1) of the Act, income exclusions are not applicable in determining the amount of a sponsor's income that will be deemed to an alien. Therefore, the proposed income exclusions for victims' compensation payments and relocation assistance would not apply to such payments received by a sponsor whose income is deemed to an alien. Section 416.1204 would be updated to reflect the inclusion of the resource exclusion for victims' compensation payments and relocation assistance as well as the other resource exclusions applicable to the resources of a sponsor.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget and determined that these rules do not meet the criteria for a significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act

We certify that these proposed rules will not have a significant economic impact on a substantial number of small entities since these rules affect only individuals. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96–354, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

These proposed regulations, if promulgated, will impose no additional reporting and recordkeeping requirements subject to Office of Management and Budget clearance.

(Catalog of Federal Domestic Assistance: Program No. 93.807—Supplemental Security Income)

List of Subjects in 20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental Security Income (SSI), Reporting and Recordkeeping Requirements.

Dated: June 27, 1994.

Shirley Chater,

Commissioner of Social Security.

Approved: August 11, 1994.

Donna E. Shalala,

Secretary of Health and Human Services.

For the reasons set out in the preamble, Part 416 of Chapter III of Title 20 of the Code of Federal Regulations is amended as follows:

PART 416—[AMENDED]

1. The authority citation for Subpart B of Part 416 continues to read as follows:

Authority: Secs. 1102, 1110(b), 1602, 1611, 1614, 1615(c), 1619(a), 1631, and 1634 of the Social Security Act; 42 U.S.C. 1302, 1310(b), 1381a, 1382, 1382c, 1382d(c), 1382h(a), 1383, and 1383c; secs. 211 and 212 of Pub. L. 93–66, 87 Stat. 154 and 155; sec. 502(a) of Pub. L. 94–241, 90 Stat. 268; and sec. 2 of Pub. L. 99–643, 100 Stat. 3574.

2. Section 416.210 is amended by revising paragraph (b) to read as follows:

§ 416.210 You do not apply for other benefits.

* * * * *

(b) *What other benefits includes. Other benefits* includes any payments for which you can apply that are available to you on an ongoing or one-time basis of a type that includes annuities, pensions, retirement benefits, or disability benefits. For example, *other benefits* includes veterans' compensation and pensions, workers' compensation payments, Social Security insurance benefits and unemployment insurance benefits. *Other benefits* for which you are required to apply do not include payments that you may be eligible to receive from a fund established by a State to aid victims of crime. (See § 416.1124(c)(16) of this part.)

* * * * *

3. The authority citation for Subpart K of Part 416 continues to read as follows:

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

4. Section 416.1124 is amended by replacing the periods after paragraphs (c)(9), (c)(14)(v), and (c)(15) with a semicolon, by removing the word "and" at the end of paragraph (c)(15), and by adding new paragraphs (c)(17) and (c)(18) to read as follows:

§ 416.1124 Unearned income we do not count.

* * * * *

(c) * * *

(17) Payments received by you from a fund established by a State to aid victims of crime; and

(18) Relocation assistance provided you by a State or local government that is comparable to assistance provided under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 that is subject to the treatment required by section 216 of that Act.

5. Section 416.1161 is amended by removing the "or" following paragraph (a)(14), replacing the periods after paragraphs (a)(17), (a)(18), (a)(19), and (a)(20) with semicolons, and by adding new paragraphs (a)(21) and (a)(22) to read as follows:

§ 416.1161 Income of an ineligible spouse, ineligible parent, and essential person for deeming purposes.

* * * * *

(a) * * *

(21) Payments from a fund established by a State to aid victims of crime (see § 416.1124(c)(17)); and

(22) Relocation assistance, as described in § 416.1124(c)(18).

6. The authority citation for Subpart L of Part 416 continues to read as follows:

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

7. Section 416.1204 is amended by revising paragraph (a) to read as follows:

§ 416.1204 Deeming of resources of the sponsor of an alien.

* * * * *

(a) *Exclusions from the sponsor's resources.* Before we deem a sponsor's resources to an alien, we exclude the same kinds of resources that are excluded from the resources of an individual eligible for SSI benefits. The applicable exclusions from resources are explained in § 416.1210 (paragraphs (a) through (i), (k), and (m) through (q)) through § 416.1239. For resources excluded by Federal statutes other than the Social Security Act, as applicable to the resources of sponsors deemed to aliens, see the appendix to subpart K, Income. We next allocate for the sponsor or for the sponsor and spouse (if living together). (The amount of the allocation is the applicable resource limit described in § 416.1205 for an eligible individual and an individual and spouse.)

* * * * *

8. Section 416.1210 is amended by removing "and" from the end of paragraph (h), by removing the periods from the end of paragraphs (1), (m), (n), and (o) and inserting semicolons in their places, and by adding new paragraphs (p) and (q) to read as follows:

§ 416.1210 Exclusions from resources; general.

* * * * *

(p) Payments received as compensation for expenses incurred or losses suffered as a result of a crime as provided in § 416.1229; and

(q) Relocation assistance from a State or local government as provided in § 416.1239.

9. A new § 416.1229 is added to read as follows:

§ 416.1229 Exclusion of payments received as compensation for expenses incurred or loss suffered as a result of a crime.

(a) In determining the resources of an individual (and spouse, if any), any amount received from a fund established by a State to aid victims of crime is excluded from resources for a period of 9 months beginning with the month following the month of receipt.

(b) To be excluded from resources under this section, the individual (or spouse) must demonstrate that any amount received was compensation for expenses incurred or losses suffered as the result of a crime.

10. A new § 416.1239 is added to read as follows:

§ 416.1239 Exclusion of State or local relocation assistance payments.

In determining the resources of an individual (or spouse, if any), relocation assistance provided by a State or local government (as described in § 416.1124(c)(18)) is excluded from resources for a period of 9 months beginning with the month following the month of receipt.

[FR Doc. 94–20634 Filed 8–25–94; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–19–1–5736b; FRL–5029–5]

Approval and Promulgation of Implementation Plan: Texas Emission Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action approves a revision to the Texas State Implementation Plan (SIP) to include revisions to the Texas Air Control Board, Part III, Chapter 101, *General Rules*, section 101.10, *Emission Inventory Requirements*. These revisions are for the purpose of implementing an emission statement program for stationary sources within the ozone nonattainment areas. The implementation plan was submitted by the State to satisfy the Federal requirements for an emission statement program as part of the SIP for Texas.

In the final rules section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rule. If the EPA receives adverse comments, the direct final rule will be withdrawn, and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time.

DATES: Comments on this proposed rule must be received in writing by September 26, 1994.

ADDRESSES: Written comments on this action should be addressed to Mr. Thomas H. Diggs, Chief, Planning Section, at the EPA Regional Office listed below. Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

U.S. Environmental Protection Agency, Region 6, Air Programs Branch (6T-A), 1445 Ross Avenue, suite 700, Dallas, Texas 75202–2733.

Texas Natural Resource Conservation Commission, Office of Air Quality, Emissions Inventory Branch, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Herbert R. Sherrow, Jr., Planning Section (6T-AP), Air Programs Branch, USEPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 655–7237.

SUPPLEMENTARY INFORMATION: See the information provided in the direct final action of the same title which is located in the rules section of the **Federal Register**.

Dated: July 27, 1994.

Allyn M. Davis,

Acting Regional Administrator.

[FR Doc. 94–21013 Filed 8–25–94; 8:45 am]
BILLING CODE 6560–50–F

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40 CFR Part 131

[OW-FRL–5058–2]

Water Quality Standards for Surface Waters of the Sacramento River, San Joaquin River, and San Francisco Bay and Delta of the State of California: Notice of Availability

AGENCY: Environmental Protection Agency.

ACTION: Notice of Availability.

SUMMARY: This notice announces the availability of two documents entitled, respectively, "Alternative Formulation of the Salmon Smolt Survival Index Criteria", and "Setting Goals for Salmon Smolt Survival in the Delta". The first of these documents presents EPA's proposed alternative formulation of the salmon smolt survival index criteria. The second document is a summary of the 3 scientific workshops held on June 9, 17, and 29, 1994, and prepared by the independent workshop facilitator. This notice also requests comments on EPA's alternative formulation of the salmon smolt survival index criteria. EPA is not soliciting any additional comments outside the scope of this notice.

DATES: Copies of these documents are available beginning on August 26, 1994. Written comments on the specific issues raised in this document pertaining to the salmon smolt survival index criteria will be accepted until September 26, 1994.

ADDRESSES: Copies of the above documents can be obtained from, and comments on these documents should be submitted to: Patrick Wright, Bay/Delta Section Chief, W–2–4, Water Management Division, Environmental Protection Agency, 75 Hawthorne Street, San Francisco, California, 94105.

FOR FURTHER INFORMATION CONTACT: Patrick Wright, Bay/Delta Section Chief, W–2–4, Water Management Division, Environmental Protection Agency, 75 Hawthorne Street, San Francisco, California, 94105. Telephone: (415) 744–1993.

SUPPLEMENTARY INFORMATION:

I. Background

On January 6, 1994, EPA published in the **Federal Register** a Proposed Rule for water quality standards in the Sacramento River, San Joaquin River,

and San Francisco Bay and Delta of California (Bay/Delta) (59 FR 810). The purpose of the rule would be to establish certain water quality criteria for the Bay/Delta as authorized and required by section 303 of the Clean Water Act (CWA). The federally-proposed rule would replace portions of the State of California's water quality standards that were disapproved by EPA on September 3, 1991. Under the proposed regulations, three new sets of criteria would be established: salinity criteria protecting the Estuarine Habitat and other designated fish and wildlife uses, a second set of salinity criteria (measured in electrical conductivity) to protect the Fish Spawning designated use in the lower San Joaquin River, and a set of salmon smolt survival index criteria to protect the Fish Migration and Cold Fresh-Water Habitat designated uses in the estuary.

EPA held public hearings on the Proposed Rule during the weeks of February 21, 1994 and February 28, 1994, and the comment period closed on March 11, 1994. Subsequent to the close of the comment period, a number of scientific workshops on the salmon smolt criteria were sponsored and facilitated by a group of water users (including the California Urban Water Users) and environmental organizations (including the Bay Institute). The purpose of these workshops was to consider and evaluate both the Proposed Rule and the major comments received by EPA during the comment period. The workshop sponsors invited EPA to attend the workshops, and EPA staff participated in workshops on June 9, 17, and 29, 1994. The discussions at these workshops are summarized in the August 10, 1994 document entitled "Setting Goals for Salmon Smolt Survival in the Delta" by Wim Kimmerer. After reviewing the oral and written comments and the discussions at these workshops, EPA has developed a proposed alternative formulation of the salmon smolt survival index criteria.

In its Proposed Rule, EPA proposed salmon smolt survival index criteria to protect certain of the designated uses. The survival index quantifies and predicts the survival of salmon migrating through the Delta. These survival indices are based on models developed by the U.S. Fish and Wildlife Service (USFWS), and are based in large part on experiments measuring and comparing smolt survival under a number of different physical conditions of varying migration pathways, water temperatures, flow rates, and rates of exports from the Delta.

The actual criteria in the Proposed Rule consisted of target salmon smolt survival index values for the Sacramento and San Joaquin River systems, varying according to the type of water year (critically dry, dry, below normal, above normal, and wet). Success in attaining the target values was to be predicted by using the USFWS models.

II. Alternative Formulation

EPA continues to believe that the USFWS models represent the best available tools to analyze the success of migration of salmon through the Delta, and provide an adequate scientific basis for establishing water quality criteria that will protect the Fish Migration and Cold Fresh-Water Habitat uses. However, as a result of its review of comments on the Proposed Rule and its consideration of the discussions at the scientific workshops described above, EPA is proposing an alternative formulation of the salmon smolt survival index criteria.

Continuous function. The first major conceptual change in the alternative formulation of the salmon smolt survival index criteria is the use of continuous functions to describe the target index values. The proposed rule had different target values for each of the five water year types. This meant that, for example, all critically dry years would have the same target index value, even though the hydrological conditions within a critically dry year category could vary substantially. A "continuous function" or "sliding scale" approach would recognize this intra-category variability by providing a target index value that changes simultaneously with changes within underlying hydrological conditions. For example, the target index value in a "wet" critically dry year would be higher than the value for a "dry" critically dry year.

EPA received comment on both the proposed estuarine habitat standard and the salmon smolt survival index criteria to the effect that a continuous function relating the target values to a given condition was more flexible than the use of five water year categories, while still protecting the designated uses of the waterbodies. Accordingly, the salmon smolt survival index criteria for both the Sacramento River system and the San Joaquin River system have been restated as continuous functions. On the Sacramento River system, the target index values have been correlated to water temperature. On the San Joaquin River system, the target index values have been correlated to unimpaired water flow.

Performance standard. The second major proposed change in the alternative formulation of the salmon smolt survival index criteria is to move away from using the model to predict attainment, and instead to measure attainment of the criteria using actual experimental data. In the Proposed Rule, the criteria included the actual USFWS models for the two river systems. Attainment of the criteria would be predicted by evaluating the variables included in the model itself. That is, the state could attain the criteria only by manipulating the variables contained in the model equations such that target index values were obtained. Although EPA believes the model contains the substantial majority of the factors necessary for migrating smolt survival, EPA has restated the criteria to be a true performance standard. The proposed alternative formulation states an index value as the target criteria (correlated, as indicated above, to either temperature or unimpaired river flow). Attainment with the criteria, however, would no longer be determined by manipulating the variables contained in the model, but instead be based on real-time field monitoring to determine whether a given set of implementation measures have actually attained the target values in the criteria. This reformulation gives the state maximum latitude to develop implementation measures that attain the target index value. Further, the reformulation minimizes any statistical deficiencies that may exist in the model by measuring actual measured success in meeting the target, rather than modeled or predicted success.

EPA believes that the model will continue to be critically important to the standards process, in that it is the best mechanism for developing and evaluating potential implementation measures. However, by not formally including the model itself as a part of the criteria, the alternative formulation gives those implementing the standard maximum latitude to develop implementation approaches that achieve the target index values.

More detailed discussion of the conceptual basis for the proposed changes is found in the workshop summary entitled "Setting Goals for Salmon Smolt Survival in the Delta". The specific proposed criteria developed by EPA are contained and described in the document entitled "Alternative Formulation of the Salmon Smolt Survival Index Criteria."

III. Public Participation

EPA desires full public participation in arriving at its final decisions, and therefore solicits comments on all aspects of this notice from all interested parties. However, EPA requests that

comments be limited to the specific issues raised by the two documents about the salmon smolt survival index criteria. EPA does not intend to respond to late comments submitted at this time which concern other aspects of the Proposed Rule. Ample opportunity for such comment was already provided at the public hearings and during the comment period that followed publication of the Proposed Rule, and EPA is committed to signing a final rule by December 15th, 1994. For those submitting comments, whenever applicable, full supporting rationale, data, and detailed analysis should be submitted to allow EPA to make maximum use of the comments.

List of Subjects in 40 CFR Part 131

Environmental protection. Water pollution control. Water quality standards. Water quality criteria.

Dated: August 18, 1994.

Robert Perciasepe,

Assistant Administrator for Water.

[FR Doc. 94–20953 Filed 8–25–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 412, 413, and 414

[BPD–763–P]

RIN 0938–AG20

Medicare Program; End Stage Renal Disease (ESRD) Payment Exception Requests and Organ Procurement Costs

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

SUMMARY: These proposed regulations specify the criteria HCFA would use to determine if a facility furnishing dialysis services to patients with end stage renal disease qualifies for a higher payment under an exception to the prospectively determined payment rate.

These regulations are intended to inform providers of the procedures HCFA uses to evaluate payment exception requests. They implement existing authority in section 1881 (b)(2) and (b)(7) of the Social Security Act (the Act).

These regulations would also revise the way we compute acquisition costs for hearts and livers that are transplanted into Medicare beneficiaries.

DATES: Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on October 25, 1994.

ADDRESSES: Mail comments (an original and three copies) to the following address:

Health Care Financing Administration, Department of Health and Human Services, Attention: BPD–763–P, P.O. Box 26676, Baltimore, MD 21207.

If you prefer, you may deliver your written comments to one of the following addresses:

Room 309–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or

Room 132, East High Rise Building, 6325 Security Boulevard, Baltimore, MD 21207.

Due to staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code BPD–763–P. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 309–G of the Department's offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone: (202) 690–7890).

If you wish to submit comments on the information collection requirements contained in this proposed rule, you may submit comments to:

Allison Herron, HCFA Desk Officer, Office of Information and Regulatory Affairs, Room 3002, New Executive Office Building, Washington, DC 20503.

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FOR FURTHER INFORMATION CONTACT: Michael Powell, (410) 966–4557

SUPPLEMENTARY INFORMATION:

I. Background

End Stage Renal Disease Payment Exception Requests

In accordance with section 1881(b)(2) and (b)(7) of the Act, a facility that furnishes dialysis services to Medicare patients with end stage renal disease is paid a prospectively determined rate for each dialysis treatment furnished. This rate is a composite that includes all costs associated with furnishing dialysis services except for the costs of physician services and certain laboratory tests and drugs, which are billed separately. The composite rate may be adjusted periodically to reflect actual facility costs.

When a facility incurs higher costs, HCFA may, under certain conditions, grant the facility an exception to its composite rate and set a higher prospective rate. The facility must show, on the basis of projected cost and utilization trends, that it will have an allowable cost per treatment higher than its prospective payment rate and that the excess costs are attributable to one or more specific circumstances. These conditions are specified in existing regulations at 42 CFR 413.170 and are discussed in greater detail in Chapter 27 of HCFA's Provider Reimbursement Manual (PRM).

A facility may incur excess costs when it furnishes dialysis services to a patient population with a greater number of pediatric patients or sick patients, such as those with heart disease or unstable medical conditions, which require special equipment, procedures, supplies or staff trained in treating these patients. This is referred to as "atypical service intensity" or "patient mix." A facility may also incur increased costs when it is the only supplier of dialysis services in its geographical area (an isolated essential facility), and its patients are unable to obtain dialysis services elsewhere without considerable hardship. Such an isolated facility may find it difficult to find trained staff, may have to pay employees additional wages or travel allowances, or may have to pay additional costs to have supplies shipped to the area.

A facility may also incur excess costs as a result of a fire, earthquake, flood, or other natural disaster (extraordinary circumstances). However, we do not recognize those costs when a facility did not maintain adequate insurance, did not file a claim for losses covered by

insurance, or did not use its self-insurance program.

Increased training costs may also be associated with a facility's self-dialysis training program. A facility may train patients to perform self-dialysis with little or no professional assistance in the facility or at home. It may also train other individuals to assist patients in performing self-dialysis or home dialysis. A facility that has training costs greater than its composite training rate may apply for an exception, but must prove that the costs are reasonable and allowable.

Typically, a patient undergoes dialysis three times a week. A facility may furnish a substantial number of treatments to patients who dialyze less frequently than three times a week. As a result, the facility typically has higher per treatment cost because the treatments involve increased labor or supplies. When this occurs, a facility may apply for an exception to the composite rate.

Organ Acquisition Costs

Under § 412.113, Medicare pays for heart, kidney, and liver acquisition costs incurred by transplant centers on a reasonable cost basis. Currently, Medicare-certified transplant centers compute Medicare acquisition costs for hearts and livers on Supplemental Worksheet D–6 of the Hospital Cost Report (Form HCFA–2552). The average acquisition costs of hearts and livers transplanted in patients other than Medicare beneficiaries are deducted from the total acquisition costs for all hearts and livers. Medicare reimburses the remaining balance as program costs for these organs. Based on recent cost analyses, we are concerned about the very high Medicare costs associated with acquiring a small number of hearts and livers. As a result, we propose to change the method of computing heart and liver acquisition costs to more accurately determine the costs of acquiring organs transplanted in Medicare recipients. The method we propose for computing acquisition costs for hearts and livers conforms to the method used for kidneys because the kidney formula more fairly accounts for Medicare's portion of such costs, including organ wastage. The kidney formula is specified in § 413.202.

II. Proposed Revisions

End Stage Renal Disease Payment Exception Requests

On several occasions, we have denied exception requests based on application of the criteria contained in our PRM, and the facilities have appealed the denials; subsequently some denials have been overturned by the Provider Reimbursement Review Board (PRRB) because the PRRB is not bound by the guidelines in the PRM. Therefore, we are proposing to place in regulations the specific requirements for determining exceptions. We are proposing the conditions contained in the PRM, with explanations in this preamble, that a facility must meet to qualify for a payment exception and the criteria that we use to evaluate whether the facility meets the conditions.

We propose to revise 42 CFR Part 413, Subpart H, Payment for ESRD Services. Currently, all our rules for payment for covered outpatient maintenance dialysis treatments are in § 413.170. We propose to reorganize the content of Subpart H and divide existing § 413.170 into several smaller sections so that readers can more easily locate specific topics.

Following is a list of the new sections:

New section	Old section
413.170 Scope	413.170(a)
413.172 Principles of Prospective Payment	413.170(b)
413.174 Prospective rates for hospital based and independent ESRD facilities	413.170(c)
413.176 Amount of payments	413.170(d)
413.178 Bad debts	413.170(e)
413.180 Procedures for requesting exceptions to payment rates	413.170(f)
413.182 Criteria for approval of exception requests	413.170(g)
413.184 Payment exception: Atypical service intensity (patient mix)	413.170(g)(1)
413.186 Payment exception: Isolated essential facility	413.170(g)(2)
413.188 Payment exception: Extraordinarycircumstances	413.170(g)(4)
413.190 Payment exception: Self-dialysistraining costs	413.170(g)(5)
413.192 Payment exception: Frequency of dialysis	413.170(g)(6)
413.194 Appeals	413.170(h)
413.196 Notification of changes in rate-setting methodologies and payment rates	413.170(i)
413.198 Recordkeeping and cost reporting requirements for outpatient maintenance dialysis	413.174
413.200 Payment of independent organ procurement organizations and histocompatibility laboratories	413.178
413.202 Organ procurement organizations' (OPOs') or transplant centers' costs for kidneys sent to foreign countries or transplanted in patients other than Medicare beneficiaries.	413.179

Below we discuss the proposed content of Subpart H.

Section 413.180 Procedures for Requesting Exceptions to Payment Rates

We would redesignate the content of § 413.170(f), Procedures for requesting exceptions to payment rates, as new § 413.180. In § 413.180(d), we propose to expand this item to provide that a facility must request an exception to its payment rate within 180 days of:

- The effective date of its new prospective payment rate(s);
- The effective date that HCFA opens the exceptions process; or
- An extraordinary cost-increasing event, as described in § 413.188.

In determining the 180-day period in which HCFA issues new prospective payment rates or opens the exceptions process, HCFA counts the effective date as the first day of the 180-day period because payment for ESRD services under the new composite rates or an approved exception begins that day. An exception request with all required documentation must be filed with the intermediary by the 180th day. Delivery of the request must be accomplished through a method that documents the date of receipt during the intermediary's regular business hours. A postmark or other similar mark does not serve as documentation of the date of receipt.

Initially, when the ESRD prospective payment rate regulations were promulgated, HCFA intended to annually review composite rates. However, when HCFA determined that updated rates could not be issued in the near future, it opened the exceptions process without issuing new rates. This allowed ESRD facilities additional

opportunities (other than when new rates are issued) to file for exceptions to their payment rates. HCFA has opened the exceptions process twice, permitting facilities that had received partial approvals, new facilities or facilities that had been previously denied exceptions the chance to file for an exception.

In § 413.180(f), we propose to require that the facility applying for an exception request compare its most recently completed cost report with those of prior years. Such comparisons may reveal significant changes that may indicate errors or problems with the cost or statistical data and, thus, the need for HCFA to more intensively review the applicable area. Any changes to cost or statistical data (for example, treatments) must be explained and the explanation included with the documentation supporting the exception request.

In §§ 413.180(f)(3) and 413.182, we would require that ESRD facilities provide documentation showing that their excessive costs are specifically or directly attributable to one or more of the exception criteria. As an example, for an atypical service intensity request, the facility should be able to document the excessive costs of furnishing care to sicker patients. After submitting evidence that it treats sicker patients, to document higher labor costs, the facility should submit records to show that either a more experienced and better trained nursing staff is required to treat these patients, or additional nursing staff time is needed, or both. An example of the type of records that a provider should submit to document its higher nursing costs could consist of staffing schedules, indicating staff and patients per shift. The facility could indicate (on the schedules) the sicker patients treated and the more experienced or additional staff needed to treat them. The monthly staffing schedules should represent 12 months and coincide with the actual cost reporting period of the cost report submitted with the exception request.

For a hospital facility, if the direct cost of nursing staff in the dialysis department increased, the administrative and general (A & G) costs allocated to that department would automatically increase. This is the result of hospital cost reporting accounting protocol, which requires A & G costs to be allocated on the basis of the accumulated costs of the other departments. The accounting protocol used for cost reporting is separate and distinct from identifying the actual A & G costs that are directly attributable to the additional nursing staff costs. Since the total A & G costs represent costs allocated to the dialysis department, they do not accurately reflect the actual A & G costs incurred as a result of the additional nursing staff costs. The facility must separately identify the A & G costs directly attributable to the additional nursing staff costs.

In § 413.180(g), we propose to codify in regulations section 1881(b)(7) of the Act by providing that unless HCFA disapproves a composite rate exception request within 60 working days after it is filed with its intermediary, the exception is deemed approved. We believe the Congress viewed the 60 days as beginning when we have a fully documented exception request. Therefore, the first day for counting the 60 working days is the date that the exception request is filed with all required documentation with the intermediary, not the date it was mailed nor the date postmarked on the package. For this reason, facilities are advised to send their requests by a method that documents the date of receipt during the intermediary's regular business hours. We would require that intermediaries review and process all exception requests within 15 working days, and we would process the exceptions within 45 working days. If we fail to process a composite rate exception request timely, we would deem the renal facility's rate request approved.

Section 413.182 Criteria for Approval of Exception Requests

We propose to redesignate the content of § 413.170(g), criteria for approval of exception requests, as § 413.182. In this section we would list the criteria that may be the basis of a rate exception. These criteria are: Atypical service intensity (patient mix), as specified in a new § 413.184; Isolated essential facility (new § 413.186); Extraordinary circumstances (new § 413.188); Self-dialysis training costs (new § 413.190); or Frequency of dialysis (new § 413.192).

HCFA occasionally receives one-month time studies from facilities attempting to show that they are entitled to an exception. HCFA does not require one-month time studies and has not considered a one-month time study as adequate documentation to justify an exception. In the event that a time study is used, an applicant should refer to the general Medicare principles regarding the adequacy of periodic time sampling described in chapter 23 of the Provider Reimbursement Manual (HCFA Publication 15–1).

Section 413.184 Payment Exception: Atypical Service Intensity (Patient Mix)

In new § 413.184, paragraph (a) would repeat the content of existing § 413.170(g)(1). We would specify in a new paragraph (b) the documentation required of a facility requesting a rate exception under this provision.

We would require that a facility submit a list of all outpatient dialysis patients (including all home patients) treated during the most recently completed fiscal or calendar year showing:

- Patients who received transplants, including the date of transplant;
- Patients awaiting a transplant who are medically able, have given consent, and are on an active transplant list, and projected transplants;
- Home patients;
- Infacility patients, staff assisted or self-dialysis;
- Individual patient diagnoses;
- Diabetic patients;
- Patients isolated because of a contagious disease;
- Age of patients;
- Mortality rate broken out by age and diagnosis;
- Number of patient transfers, reasons for transfers and any related information; and
- Total number of hospital admissions for the facility's patients, reason for, and length of stay for, each admission.

When adjudicating exception requests, to determine if a substantial proportion of the facility's outpatient maintenance dialysis treatments involve more intense dialysis services and special dialysis procedures, HCFA will compare the above data submitted by providers to data contained in HCFA's Patient Profile Tables. The information in the Tables is developed annually and represents information on persons with end-stage renal disease covered by Medicare. While the number of treatments is used when determining whether a facility furnishes a substantial proportion of treatments to atypical patients, it is the typical or the atypical patient mix that generates the total treatment count used in this determination. In determining whether a facility's patients are atypically sick, each patient category is individually compared to its corresponding specific norm (national average). Various combinations of factors might lead to a determination that a facility has an atypical patient mix. For example, a facility might qualify for an exception for atypical patient mix if the percentage of its diabetic patients, older patients, and mortality rate were significantly higher than the national averages.

By its very nature, an exceptions process addresses situations that are not anticipated, and, because of the myriad combinations of factors that are possible, we cannot articulate a single specific standard that encompasses all of these situations. Instead, HCFA will evaluate each request on a case-by-case basis to determine if the characteristics of the patient population are such that it might be beyond the facility's control to incur higher costs. (Facilities will still have to demonstrate that the atypical patient mix, in fact, caused higher costs.)

We would also require that a facility submit the following documentation on nursing personnel (registered nurses (RNs), licensed practical nurses (LPNs), technicians and aides) costs incurred during the most recently completed fiscal or calendar year cost report showing:

- Amount of remuneration of each employee;
- Number of personnel;
- Amount of time spent in the dialysis unit; and
- Staff to patient ratio based on total hours, with an analysis of productive and nonproductive hours.

The facility must demonstrate that its nursing personnel costs have been allocated properly between each mode of care, and that the additional nursing hours per treatment are not the result of an excess number of employees in the outpatient maintenance renal dialysis department. Normally, when determining whether there is an excess number of employees assigned to a facility's dialysis department, HCFA uses staff to patient ratios. However, in addition to the staff to patient ratios, we might also consider staffing schedules, as previously discussed.

When adjudicating exception requests, HCFA will utilize the above data to determine if the facility's patients received significantly more nursing hours per treatment than patients would receive in other facilities and whether the facility's higher per treatment costs were necessitated by the special needs of the patients.

We would also require that a facility submit documentation on supply costs incurred during the most recently completed fiscal or calendar year cost report showing:

- By modality, a complete list of supplies used routinely in a dialysis treatment; and
- The make and model number of dialyzer and component cost of each dialyzer.

The facility must demonstrate that excess supply cost per treatment is caused by the special needs of the patients and is not the result of inefficiency. The facility must submit documentation to demonstrate that it prudently purchases items and services (for example, uses bulk purchase discounts when available).

When adjudicating exception requests, HCFA will utilize the above data to determine if the facility's patients received supplies that are medically necessary to meet special medical needs of the facility's patients.

Section 413.186 Payment Exception: Isolated Essential Facility

We would redesignate § 413.170(g)(2) as new § 413.186, retain the existing content of § 413.170(g)(2) and add documentation requirements for facilities to use when applying for a payment rate exception based on being an isolated essential facility.

Isolated Facility

To be considered "isolated," a facility must document that it is located outside an established Metropolitan Statistical Area and provides dialysis to a permanent patient population, as opposed to a transient patient population.

Essential Facility

To be considered essential, the facility must document that a substantial number of its patients cannot obtain dialysis services elsewhere without substantial additional hardship and the additional hardship the patients will incur, generally, will be in travel time and cost.

Cost per Treatment

The facility must document that its cost per treatment is reasonable and explain how the facility's cost per treatment in excess of its composite rate relates to the isolated essential facility criteria. For example, if a facility incurs higher supply costs, it will need to identify the additional costs incurred on a per treatment basis and then relate that additional cost per treatment to the exception criteria.

Additional Information

The facility must also furnish, in a format that concisely explains the facility's cost and patient data to support its request, the following information:

- A list of current and requested payment rates for each modality.
- An explanation of how the facility's costs in excess of its composite rate payment are attributable to the isolated essential facility criteria specified above in this section.
- An explanation of any unusual geographic conditions in the area surrounding the facility.
- A copy of the latest filed cost report and a budget estimate for the next 12 months on cost report forms.
- An explanation of unusual costs reported on the facility's actual or budgeted cost reports and any significant changes in budgeted costs and data compared to actual costs and data reported on the latest filed cost report.
- The name, location of, and distance to, the nearest ESRD facility.
- A list of patients, treatment modality, commuting distance and commuting time to current and next nearest ESRD facility.
- The historical and projected patient to staff ratios and number of machines used for maintenance dialysis treatments.
- A computation of the facility's treatment capacity, computed by dividing the maintenance treatments actually furnished by the total maintenance treatments that could have been furnished (in other words, total stations multiplied by the number of hours of operation divided by the average length of dialysis) for the year.
- The geographic boundaries and population size of the facility's service area.

Section 413.188 Payment Exception: Extraordinary Circumstances

We would redesignate § 413.170(g)(4) as § 413.188 with no changes except for the addition of internal paragraph coding.

Section 413.190 Payment Exception Self-Dialysis Training Costs

In new § 413.190, paragraph (a) would repeat the content of existing § 413.170(g)(5). To that we would add the documentation that we would require of a facility requesting a rate exception under this provision. We would require that a facility justify its exception request by separately identifying those elements contributing to its costs in excess of the composite training rate. We consider the facility's total costs, cost finding and apportionment, including its allocation methodology, to determine if costs are properly reported by treatment modality. Exception requests for a higher training rate will be granted only with respect to those cost components relating to training such as technical staff, medical supplies, and the special costs of education (manuals and education material). Overhead and other indirect costs do not generally form a basis for granting an exception.

The facility must provide the following information to support its exception request:

- A copy of the facility's training program.
- Computation of the facility's cost per treatment for maintenance and training sessions including an explanation of the cost difference between the two modalities.
- Class size and patients' training schedules.
- Number of training sessions required, by treatment modality, to train patients.
- Number of patients trained for the current year and the prior 2 years on a monthly basis.
- Projection for the next 12 months of future training candidates.
- The number and qualifications of staff at training sessions.

Accelerated Training Exception

An ESRD facility may bill Medicare for a dialysis training session only when a patient receives a dialysis treatment (which normally is three times a week). If an ESRD facility elects to train all its patients using a particular modality more often than during each dialysis treatment and, as a result, the number of its billable training dialysis sessions is less than its actual training sessions, the facility may request a composite rate limited to the lesser of the facility's projected training cost per treatment (CPT) or the CPT the facility would have received in training a patient. For example, facility x trains patients 5 days a week for a 3-week training period (15 training sessions). Facility Y trains patients only during a dialysis session, 3 per week, but for a 5-week training period. Both facilities' composite training rates were determined to be $150 per treatment. Facility X's payment would be adversely affected, since its payment would be limited to the number of billable training sessions. Facility X's payment would be $1,350 (3 weeks × 3 treatments per week × $150) compared to facility Y's $2,250 payment (5 weeks × 3 treatments per week × $150). To correct this situation, an exception may be approved (assuming the facility documents costs) to increase facility X's rate not to exceed $250 per treatment ($2,250 ÷ 9).

An ESRD facility may bill a maximum per patient of 25 training sessions for hemodialysis training and 15 training sessions for continuous cycling peritoneal dialysis (CCPD) and continuous ambulatory peritoneal dialysis (CAPD) training. To ensure adequate patient training, HCFA presumes a minimum number of training sessions per patient in calculating exception rates, 15 for hemodialysis and 5 for CAPD and CCPD, where the renal facility's actual experience is less than the minimum number of training sessions. The minimum and maximum numbers are based on HCFA's national data and general program statistics. These numbers represent the minimum and maximum number of treatments necessary to adequately train a patient and have been established to avoid paying any additional costs associated with over-training as well as assuring that quality of care is not jeopardized by not adequately training a patient.

For example, a facility trains all its CAPD and CCPD patients in 3 training sessions, and its composite training rate is determined to be $150. To calculate a facility's training exception rate, the facility's training rate is multiplied by 15 (the maximum training sessions per patient) and then divided by the facility's actual training sessions, unless the actual sessions are less than the minimum. Using the facility's actual training sessions, the exception training rate would be $750 ($150 × 15 = $2,250 ÷ 3). However, based on using the minimum of 5 training sessions, the approved training rate would be $450 ($150 × 15 = $2250 ÷ 5).

To justify an accelerated training exception request, an ESRD facility must document that all training sessions provided under a particular modality are to be provided during the shorter but more condensed period. The facility must submit with the exception request a list of patients, by modality, trained during the most recent cost report period, and the list must include each beneficiary's name, age, and training status (completed, not completed, being retrained, or in the process of being trained). The total treatments from the patient list must agree with the total treatments reported on the cost report filed with the request. We propose to deny exception requests that a facility submits without the above documentation.

Section 413.192 Payment Exception Frequency of Dialysis

We would redesignate paragraph (g)(6) of § 413.170 as § 413.192 and add the following provisions.

Existing § 412.170(g)(6) specifies that, to qualify for an exception to the prospective payment rate based on frequency of dialysis, the facility must have a substantial portion of outpatient maintenance dialysis treatments furnished to patients who dialyze less frequently than three times per week. A facility that furnishes a substantial portion of outpatient maintenance dialysis services to patients who dialyze less frequently than three times per week typically has higher costs per treatment because the treatments that are furnished to these patients last longer and involve higher labor and supply costs. For a facility to qualify as having a substantial portion of outpatient maintenance dialysis treatments furnished to patients who dialyze less frequently than three times per week, a facility must be able to document that it has a decrease in treatments in excess of 15 percent, and cost increases due to frequency. Because the facility is only dialyzing patients twice a week instead of three times, if 100 percent of their patients dialyze twice a week, the facility would lose 33.3 percent of treatments on an annual basis. HCFA has determined that 15 percent of lost treatments is substantial.

The percentages calculated above, and HCFA's determination of what is substantial is explained below. If a facility had 200 patients and all the patients dialyzed twice a week, then the facility would be losing 200 billable treatments a week or 33.3 percent. This calculation is as follows:

200 patients×3 times a week=600 treatments a week;
200 patients×2 times a week=400 treatments a week;
Lost treatments=200 treatments a week.
Lost treatments÷total treatments=percentage of lost treatments (200÷600=33.3 percent).

To arrive at a reasonable determination of substantial, we concluded that slightly less than half a facility's treatments would have to be furnished to patients who dialyze less frequently than three times a week. This calculation is as follows:

200 patients×3 times a week=600 treatments a week;
100 patients×2 times a week=200 treatments a week;
100 patients×3 times a week=300 treatments a week;
Total treatments furnished=500 treatments a week.
Lost treatments=100 treatments (100÷600=16.67 percent).

We propose to require that, in order to document that it furnishes a substantial number of dialysis treatments at a frequency less than three times per week, a facility submit the following information. The facility must submit a list of patients who received outpatient dialysis treatments for the latest historical cost report that is being filed with the request. The list must indicate—

- Whether the patients are permanent, transient or temporary;

• The medically prescribed frequency of dialysis; and

• The number of dialysis treatments that each patient received on a weekly and yearly basis and an explanation of any discrepancy between that calculation and the number of treatments reported on the facility's cost report.

The facility must also submit a list of patients used to project treatments. The list must indicate—

• Whether the patients are permanent, transient or temporary;

• The medically prescribed frequency of dialysis;

• The number of dialysis treatments that each patient is projected to receive on a weekly and yearly basis, an explanation of any discrepancy between that calculation and the number of treatments reported on the facility's projected cost report, and an explanation for any change between prior actual and projected data.

In order for HCFA to determine if the facility meets the 15 percent requirement discussed above, the following information must be submitted:

• A schedule showing the number of treatments to be furnished twice a week and the number of treatments that would have been furnished if each beneficiary were dialyzed three times a week, including a computation of the facility's projected cost per treatment using projected treatments based on the twice a week calculation and the three times a week calculation.

• A schedule showing the computation of the percentage decrease in the number of treatments, which must be at least 15 percent to be deemed substantial for approval of an exception.

Section 413.194 Appeals

Existing § 413.170(h) would be redesignated as § 413.194. In new § 413.194, in addition to coding and editorial changes, we would make clear that exhaustion of administrative remedies is a prerequisite for judicial review.

Section 413.196 Notification of Changes in Rate-Setting Methodologies and Payment Rates

Existing § 413.170(i) would be redesignated as § 413.196 with only coding and editorial changes.

Section 413.198 Recordkeeping and Cost Reporting Requirements for Outpatient Maintenance Dialysis

Existing § 413.174 would be redesignated as § 413.198.

Section 413.200 Payment of Independent Organ Procurement Organizations and Histocompatibility Laboratories

Existing § 413.178 would be redesignated as § 413.200. In new § 413.200(b), we would revise the definition of "Freestanding." We would provide that an organ procurement organization (OPO) or a histocompatibility laboratory is freestanding unless it—

• Is subject to the control of the hospital with regard to the hiring, firing, training and paying of employees; and

• Is considered as a department of the hospital for insurance purposes (including malpractice insurance, general liability insurance, worker's compensation insurance, and employee retirement insurance).

We would remove from the definition of "freestanding" the requirement that hospital-based OPOs service a single transplant center. Section 4009(g) of the Omnibus Budget Reconciliation Act of 1987 (Public Law 100–203) required that OPOs be designated by Medicare to include no more than one OPO per service area. As the certification process limited only one to an area and some of the OPOs were hospital-based, limiting the OPO's responsibility to a single transplant center became impractical. An OPO (whether independent or hospital-based) is required to service all transplant centers in its area. Accordingly, it would be very rare when a hospital-based OPO would service a single transplant center.

Section 413.202 Organ Procurement Organizations' (OPOs') or Transplant Centers' Costs for Kidneys Sent to Foreign Countries or Transplanted in Patients Other Than Medicare Beneficiaries

Existing § 413.179 would be redesignated as § 413.202 with changes discussed below.

Organ Acquisition Costs

To ensure that there is a more reasonable and accurate determination of the Medicare program's share of heart and lung acquisition costs, we propose to pay transplant hospitals using the same method that we use to determine Medicare's share of the cost of acquiring kidneys. As noted earlier, organ acquisition costs are paid to Medicare-certified transplant centers as cost passthroughs (§ 412.113(d)). The cost of acquiring kidneys for transplant is determined by using a formula specified in § 413.179. Existing § 413.179 (redesignated as § 413.202 in this proposed rule) requires that transplant hospitals compute Medicare kidney acquisition costs based on the ratio of the number of usable kidneys transplanted into Medicare beneficiaries to the total number of usable kidneys applied to reasonable costs. We propose to expand the applicability of redesignated § 413.202 to include hearts and livers by making it apply to "organs" instead of "kidneys." We believe that this revision would result in a more reasonable determination of Medicare heart and liver acquisition costs because the kidney formula more fairly accounts for Medicare's portion of such costs, including organ wastage. We would cross refer § 412.113 to § 413.202 to ensure proper cost determination.

By making this change, we would ensure that acquisition costs of organs transplanted in non-Medicare recipients are excluded from Medicare payment. Section 1861(v)(1)(A) of the Act requires that the cost of services be borne by the appropriate payor. Accordingly, the cost associated with organs not used by Medicare beneficiaries must be borne by the responsible individual or third party payor. The law precludes Medicare from paying any costs associated with organs not used by Medicare beneficiaries.

Consequently, we would require that Medicare-certified transplant centers and organ procurement organizations (OPOs) separate costs associated with organs transplanted in non-Medicare recipients from Medicare allowable costs prior to final settlement by the Medicare fiscal intermediary. To separate costs, we would require that the transplant centers compute the ratio of the number of organs used for Medicare beneficiaries to the total number of organs used and adjust the costs for organs transplanted in patients other than Medicare beneficiaries (proposed § 413.202).

Payment for Erythropoietin (EPO)/ Epoietin (EPO)

Erythropoietin (EPO) is an anti-anemia drug given to dialysis patients with a specified level of anemia. Payments to ESRD facilities are made in increments of 1,000 unit doses, rounded to the nearest 100 units. Section 13566 of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93) decreased the maximum payment for EPO from $11 to $10 per 1,000 units, which is specified in section 1881(b)(11)(B)(ii) of the Act. This amount is subject to adjustment by HCFA, if necessary. Existing § 413.170(c) provides that HCFA publishes annually a **Federal Register** notice indicating whether an update in the EPO payment amount is appropriate and requesting public comment. We would revise redesignated § 413.174(f)

to add the statutory reference and to clarify that when we determine that an adjustment to the payment amount is necessary, we publish a **Federal Register** notice proposing a revision to the EPO payment amount, but that we will no longer publish a notice routinely on an annual basis.

III. Response to Comments

Because of the large number of items of correspondence we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, we will consider all comments that we receive by the date and time specified in the "Dates" section of this preamble, and we will respond to the comments in the preamble to the final rule.

IV. Collection of Information Requirements

Sections 413.184, 413.186, 413.190, and 413.192 of the regulations contain information collection or recordkeeping requirements, or both, that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). The information collection requirements concern the documentation required of a facility furnishing dialysis services to patients with end stage renal disease that requests an exception to the prospective payment rate. The respondents who will provide the information include providers that furnish dialysis services to patients with end stage renal disease. No new reporting burden will exist as a result of this regulation, since we propose to place in regulations current documentation requirements already published in Chapter 27 of the PRM. Therefore, the public reporting burden for this collection of information would be the same as that for Chapter 27, which was approved by OMB on September 21, 1991 for use through September 30, 1994, under control number 0938–0296. Organizations and individuals desiring to submit comments on the information collection and recordkeeping requirements should direct them to the OMB official whose name appears in the "ADDRESSES" section of this preamble. A notice will be published in the **Federal Register** after approval of the regulations' information collection requirements is obtained.

V. Regulatory Impact Statement

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a proposed rule would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, all hospitals and ESRD facilities are considered to be small entities. Individuals and States are not included in the definition of a small entity.

Also, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 50 beds.

Payment Exception Requests

The purpose of this portion of the proposed rule is to codify in regulations existing policy concerning an ESRD facility's request for an exception to its prospectively determined payment rate. This policy is contained in chapter 27 of the Provider Reimbursement Manual (PRM). This proposed rule would affect all ESRD facilities, including hospital-based and freestanding, that file for an ESRD exception request.

Our records indicate that as of December 31, 1990, there were 1,968 facilities eligible to file exception requests. Of these, 275 or 14 percent of the facilities filed exception requests during the December 1, 1989 to May 29, 1990 exception period. This resulted in 194 granted requests (mostly partially granted) and 81 denials. During our most recent exception request cycle, for the period March 1, 1991 through August 27, 1991, 135 facilities filed exception requests. This resulted in 87 requests being granted at least in part and 48 denials.

Under current procedures, an ESRD facility requesting an exception to its prospective payment rate complies with the instructions contained in chapter 27 of the PRM. A facility whose request is granted only partially or is denied an exception may appeal its request to the Provider Reimbursement Review Board (PRRB). The PRRB is bound by the statute and regulations and, in interpreting them, may come to a different conclusion than if it followed program instructions. If we codify in regulations details now found in the PRM instructions, the PRRB would be presented with more specific bases for adjudicating an appeal of a partially denied or denied exception request.

Organ Acquisition Costs

In 1992, there were 66 hospitals certified to perform heart transplants and 33 hospitals certified to perform liver transplants. These amount to less than two percent of all Medicare participating hospitals. In 1991, there were 182 liver transplants and 335 heart transplants performed on Medicare beneficiaries. Although the number of Medicare transplants represents less than one-fourth of the total number of heart and liver transplants, a preliminary review of cost report data indicates the average Medicare acquisition cost per liver and per heart is higher than the average non-Medicare acquisition cost. Most organ procurement costs are incurred before a recipient is identified as a Medicare beneficiary; thus, we do not believe the Medicare program's share of acquisition costs should exceed the non-Medicare share. We believe that the current method of cost reimbursement contains the potential for transplant centers to include some non-Medicare costs in the Medicare costs.

This proposed rule would extend the formula used to compute kidney acquisition costs to other organs, including hearts and livers. Acquisition costs would be based on the ratio of the number of usable organs transplanted into Medicare beneficiaries to the total number of usable organs. It would not affect our obligation to pay allowable organ acquisition costs, but would prevent Medicare from bearing costs associated with non-Medicare procedures. Based on the number of Medicare organ transplants, we anticipate annual Medicare program savings associated with this provision of less than $5 million. Facilities that have been correctly reporting non-Medicare acquisition costs would not be affected by this proposal. Facilities that have not would find their Medicare payments reduced to better reflect Medicare's share of allowable acquisition costs.

For the reasons stated above, we are not preparing analyses for either the RFA or section 1102(b) of the Act since we have determined, and the Secretary certifies, that this proposed rule would not result in a significant economic impact on a substantial number of small entities and would not have a significant economic impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was not reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part 414

Administrative paractice and procedure, Health facilities, Health professions, Kidney diseases, Medicare, Reporting and recordkeeping requirements, Rural area, X-rays.

42 CFR Chapter IV would be amended as set forth below:

A. 42 CFR part 412 is amended as follows:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

1. The authority citation for part 412 is revised to read as follows:

Authority: Secs. 1102, 1815(e), 1820, 1871, 1881, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395g(e), 1395i-4, 1395hh, 1395rr, and 1395ww).

2. Section 412.113 is amended by revising paragraph (d) to read as follows:

§ 412.113 Other payments.

* * * * *

(d) *Heart, kidney, and liver acquisition costs incurred by hospitals with approved transplantation centers.* Payment for heart, kidney, and liver acquisition costs incurred by hospitals with approved transplantation centers is made on a reasonable cost basis, as provided in § 413.202.

B. 42 CFR part 413 is amended as follows:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES

1. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1814(b), 1815, 1833(a), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act as amended (42 U.S.C. 1302, 1395f(b), 1395g, 1395l(a), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww).

2.–3. Section 413.170 is revised to read as follows:

§ 413.170 Scope.

Basis and purpose. This subpart implements section 1881(b)(2) and (b)(7) of the Act by—

(a) Setting forth the principles and authorities under which HCFA is authorized to establish a prospective payment system for outpatient maintenance dialysis furnished in or under the supervision of an ESRD facility approved under subpart U of part 405 of this chapter (referred to as "facility" in this section). For purposes of this section and § 413.198, outpatient maintenance dialysis means outpatient dialysis, home dialysis and self-dialysis and home dialysis training, as defined in § 405.2102(f)(2)(ii), (f)(2)(iii), and (f)(3) of this chapter, and includes all items and services specified in §§ 410.50 and 410.52 of this chapter.

(b) Providing procedures and criteria under which a facility may receive an exception to the prospective payment rates established under this section; and

(c) Establishing procedures and criteria for a facility to appeal its payment amount under the prospective payment system.

4. A new § 413.172 is added to read as follows:

§ 413.172 Principles of prospective payment.

(a) Payments for outpatient maintenance dialysis are based on rates set prospectively by HCFA.

(b) All approved ESRD facilities must accept the prospective payment rates established by HCFA as payment in full for covered outpatient maintenance dialysis.

(c) HCFA publishes the methodology used to establish payment rates and changes in those rates in the Federal Register, as provided in § 413.196(b).

§ 413.174 [Redesignated as § 413.198]

5. Existing section 413.174 is redesignated as § 413.198.

6. A new § 413.174 is added to read as follows:

§ 413.174 Prospective rates for hospital-based and independent ESRD facilities.

(a) In accordance with section 1881(b)(7) of the Act, HCFA establishes prospective rates using a methodology that—

(1) Differentiates between hospital-based facilities and independent ESRD facilities;

(2) Effectively encourages efficient delivery of dialysis services; and

(3) Provides incentives for increasing the use of home dialysis.

(b) For purposes of rate-setting and payment under this section, HCFA considers any facility that does not meet all of the criteria of a hospital-based facility to be an independent facility. A determination under this paragraph is an initial determination under § 498.3 of this chapter.

(c) For purposes of rate-setting and payment under this section, HCFA will determine that a facility is hospital-based if the—

(1) Facility and hospital are subject to the bylaws and operating decisions of a common governing board. This governing board, which has final administrative responsibility, approves all personnel actions, appoints medical staff, and carries out similar management functions;

(2) Facility's director or administrator is under the supervision of the hospital's chief executive officer and reports through him or her to the governing board;

(3) Facility personnel policies and practices conform to those of the hospital;

(4) Administrative functions of the facility (for example, records, billing, laundry, housekeeping, and purchasing) are integrated with those of the hospital; and

(5) Facility and hospital are financially integrated, as evidenced by the cost report, which reflects allocation of overhead to the facility through the required step-down methodology.

(d) In determining whether a facility is hospital-based, HCFA does not consider—

(1) An agreement between a facility and a hospital concerning patient referral;

(2) A shared service arrangement between a facility and a hospital; or

(3) The physical location of a facility on the premises of a hospital.

(e) If all the physicians furnishing services to patients in an ESRD facility elect the initial method of payment (as described in § 414.313(c) of this subchapter), the prospective rate (as described in paragraph (a) of this section) paid to that facility is increased by an add-on amount as described in § 414.313.

(f) Erythropoietin (EPO)/Epoietin (EPO).

(1) When EPO is furnished to an ESRD patient by a Medicare approved ESRD facility or a supplier of home dialysis equipment and supplies, payment is based on the amount specified in paragraph (f)(3) of this section.

(2) The payment is made only on an assignment basis, that is, directly to the facility or supplier, which must accept, as payment in full, the amount that HCFA determines.

(3) HCFA determines the payment amount in accordance with the following rules:

(i) The amount is prospectively determined, as specified in section 1881(b)(11)(B)(ii) of the Act, reviewed and adjusted by HCFA, if necessary, and paid to hospital-based and independent dialysis facilities and to suppliers of home dialysis equipment and supplies, regardless of the location of the facility, supplier, or patient.

(ii) If HCFA determines that an adjustment to the payment amount is necessary, HCFA publishes a **Federal Register** notice proposing a revision to the EPO payment amount and requesting public comment.

(iii) Any increase in this amount for a year does not exceed the percentage increase (if any) in the implicit price deflator for gross national product (as published by the Department of Commerce) for the second quarter of the preceding year over the implicit price deflator for the second quarter of the second preceding year.

(iv) The Medicare payment amount is subject to the Part B deductible and coinsurance.

(g) In addition to the prospective payment described in this section, HCFA makes an additional payment for certain drugs furnished to ESRD patients by a Medicare-approved ESRD facility. HCFA makes this payment directly to the ESRD facility. The facility must accept the allowance determined by HCFA as payment in full. Payment for these drugs is made as described below:

(1) *Hospital-based facilities.* HCFA makes payment in accordance with the cost reimbursement rules set forth in this part.

(2) *Independent facilities.* HCFA makes payment in accordance with the methodology set forth in § 405.517 of this chapter for paying for drugs that are not paid on a cost or prospective payment basis.

7. A new § 413.176 is added to read as follows:

§ 413.176 Amount of payments.

(a) If the beneficiary has incurred the full deductible applicable under Part B of Medicare before the treatment, the intermediary pays the facility 80 percent of its prospective payment rate.

(b) If the beneficiary has not incurred the full deductible applicable under Part B of Medicare before the treatment, the intermediary subtracts the amount applicable to the deductible from the facility's prospective rate and pays the facility 80 percent of the remainder, if any.

§ 413.178 [Redesignated as § 413.200]

8. Existing § 413.178 is redesignated as § 413.200.

9. A new § 413.178 is added to read as follows:

§ 413.178 Bad debts.

(a) HCFA reimburses each facility its allowable Medicare bad debts, up to the facility's costs as determined under Medicare principles, in a single lump sum payment after the facility's cost reporting period ends.

(b) A facility must attempt to collect deductible and coinsurance amounts owed by beneficiaries before requesting payment from HCFA for uncollectible amounts. Section 413.80 specifies the collection efforts facilities must make.

(c) A facility must request payment for uncollectible deductible and coinsurance amounts owed by beneficiaries by submitting an itemized list of all specific uncollectible amounts related to covered services.

§ 413.179 [Redesignated as § 413.202]

10. Existing § 413.179 is redesignated as § 413.202.

11. A new § 413.180 is added to read as follows:

§ 413.180 Procedures for requesting exceptions to payment rates.

(a) All payments for outpatient maintenance dialysis furnished at or by facilities are made on the basis of prospective payment rates.

(b) If a facility projects on the basis of prior year cost and utilization trends that it will have an allowable cost per treatment higher than its prospective rate set under this chapter and if these excess costs are attributable to one or more of the factors in § 413.182, the facility may request that HCFA approve an exception to that rate and set a higher prospective payment rate.

(c) This higher payment rate is subject to the rules governing the amount of payment in § 413.176.

(d) A facility must request an exception to its payment rate within 180 days of—

(1) The effective date of its new prospective payment rate;

(2) The effective date that HCFA opens the exceptions process; or

(3) The date on which an extraordinary cost increasing event occurs, as described in §§ 413.182(c) and 413.188.

(e) The facility must demonstrate to HCFA's satisfaction that the requirements of this section and the criteria in § 413.182 are fully met. The burden of proof is on the facility to show that one or more of the criteria are met and that the excessive costs are justifiable under the reasonable cost principles set forth in this part. The burden of proof is not on HCFA to show that the criteria are not met and that the facility's costs are not allowable.

(f) If requesting an exception to its payment rate, a facility must submit to HCFA its most recently completed cost report as required under § 413.198 and whatever statistics, data, and budgetary projections are determined by HCFA to be needed to adjudicate the exception. HCFA may audit any cost report or other information submitted. The materials submitted to HCFA must—

(1) Separately identify elements of cost contributing to costs per treatment in excess of the facility's payment rate;

(2) Show that the facility's costs, including those costs that are not directly attributable to the exception criteria, are allowable and reasonable under the reasonable cost principles set forth in this part;

(3) Show that the elements of excessive cost are specifically attributable to one or more conditions specified in § 413.182;

(4) Specify the amount of additional payment per treatment the facility believes is required for it to recover its justifiable excess costs; and

(5) Specify that the facility has compared its most recently completed cost report with prior years. The facility must explain any material cost changes and include the data and explanation with the documentation supporting the exception request.

(g) An exception request is deemed approved unless it is disapproved within 60 working days after it is filed with its intermediary.

(h) In determining the facility's payment rate under the exception process, HCFA excludes all costs that are not reasonable or allowable under the reasonable cost principles set forth in this part.

(i) Except for exceptions approved under § 413.182(c), a prospective exception payment rate approved by HCFA applies for the period from the date the complete exception request was filed with its intermediary until the earlier of the—

(1) Date the circumstances justifying the exception rate no longer exist; or

(2) End of the period during which the announced rate was to apply.

(j) A prospective exception payment rate approved by HCFA under §§ 413.182(c) and 413.188 applies from the date of the extraordinary event until the end of the period during which the prospective announced rate was to apply, unless HCFA determines that another date is more appropriate. If HCFA does not extend the exception

period and the facility believes that it continues to require an exception to its rate, the facility must reapply in accordance with the procedures in this section.

(k) HCFA denies exception requests submitted without the documentation specified in § 413.182 and the applicable cross-references.

(l) Facilities that have been denied exception requests during the 180 days may file a subsequent exception request if all required documentation is filed with the intermediary by the 180th day.

12. A new § 413.182 is added to read as follows:

§ 413.182 Criteria for approval of exception requests.

HCFA may approve exceptions to an ESRD facility's prospective payment rate if the facility demonstrates by convincing objective evidence that its total per treatment costs are reasonable and allowable under the relevant cost reimbursement principles or this part 413 and that its per treatment costs in excess of its payment rate are directly attributable to any of the following criteria:

(a) Atypical service intensity (patient mix), as specified in § 413.184.

(b) Isolated essential facility, as specified in § 413.186.

(c) Extraordinary circumstances, as specified in § 413.188.

(d) Self-dialysis training costs, as specified in § 413.190.

(e) Frequency of dialysis, as specified in § 413.192.

13. A new § 413.184 is added to read as follows:

§ 413.184 Payment exception: Atypical service intensity (patient mix).

(a) To qualify for an exception to the prospective payment rate based on atypical service intensity (patient mix)—

(1) A facility must demonstrate that a substantial proportion of the facility's outpatient maintenance dialysis treatments involve atypically intense dialysis services, special dialysis procedures, or supplies that are medically necessary to meet special medical needs of the facility's patients. Examples that may qualify under this criterion are more intense dialysis services that are medically necessary for patients such as—

(i) Patients who have been referred from other facilities on a temporary basis for more intense care during a period of medical instability and who return to the original facility after stabilization;

(ii) Pediatric patients who require a significantly higher staff-to-patient ratio than typical adult patients; or

(iii) Patients with medical conditions that are not commonly treated by ESRD facilities and that complicate the dialysis procedure.

(2) The facility must demonstrate clearly that these services, procedures or supplies and its per treatment costs are prudent and reasonable when compared to those of facilities with a similar patient mix.

(3) A facility must demonstrate that—

(i) Its nursing personnel costs have been allocated properly between each mode of care; and (ii) The additional nursing hours per treatment are not the result of an excess number of employees.

(b) Documentation:

(1) A facility must submit a listing of all outpatient dialysis patients (including all home patients) treated during the most recently completed fiscal or calendar year showing—

(i) Patients who received transplants, including the date of transplant;

(ii) Patients awaiting a transplant who are medically able, have given consent, and are on an active transplant list, and projected transplants;

(iii) Home patients;

(iv) Infacility patients, staff-assisted or self-dialysis;

(v) Individual patient diagnosis;

(vi) Diabetic patients;

(vii) Patients isolated because of a contagious disease;

(viii) Age of patients;

(ix) Mortality rate broken out by age and diagnosis;

(x) Number of patient transfers, reasons for transfers and any related information; and

(xi) Total number of hospital admissions for the facility's patients, reason for, and length of stay, of each session.

(2) The facility must also—

(i) Submit the following documentation on costs of nursing personnel (registered nurses, licensed practical nurses, technicians and aides) incurred during the most recently completed fiscal or calendar year cost report showing—

(A) Amount each employee was paid;

(B) Number of personnel;

(C) Amount of time spent in the dialysis unit; and

(D) Staff to patient ratio based on total hours, with an analysis of productive and nonproductive hours.

(ii) Submit the following documentation on supply costs incurred during the most recently completed fiscal or calendar year cost report showing—

(A) By modality, a complete list of supplies used routinely in a dialysis treatment;

(B) The make and model number of dialyzer, and component cost of each dialyzer; and

(C) That supplies are prudently purchased (for example, that bulk discounts are used when available).

14. A new § 413.186 is added to read as follows:

§ 413.186 Payment exception: Isolated essential facility.

(a) To qualify for an exception to the prospective payment rate based on being an isolated essential facility—

(1) The facility must be the only supplier of dialysis in its geographical area;

(2) The facility's patients must be unable to obtain dialysis services elsewhere without substantial additional hardship; and

(3) The facility's excess costs must be justifiable.

(b) Criteria for approval of exception requests: In determining whether a facility qualifies for an exception based on its being an isolated essential facility, HCFA considers—

(1) Local permanent residential population density;

(2) Typical local commuting distances for medical services;

(3) Volume of treatments; and

(4) Dialysis facility usage by area residents other than the applying facility's patients.

(c) Documentation:

(1) *Isolated.* To be considered isolated, the facility must document that it is located outside an established Metropolitan Statistical Area and provides dialysis to a permanent patient population, as opposed to a transient patient population.

(2) *Essential.* To be considered essential, the facility must document—

(i) That a substantial number of its patients cannot obtain dialysis services elsewhere without additional hardship; and

(ii) The additional hardship the patients will incur, generally, in travel time and cost.

(3) *Cost per treatment.* The facility must—

(i) Document that its cost per treatment is reasonable; and

(ii) Explain how the facility's cost per treatment in excess of its composite rate relates to the isolated essential facility criteria specified in paragraph (b) of this section.

(4) *Additional information.* The facility must also furnish the following information in a format that concisely explains the facility's cost and patient data to support its request:

(i) A list of current and requested payment rates for each modality.

(ii) An explanation of any unusual geographic conditions in the area surrounding the facility.

(iii) A copy of the latest filed cost report and a budget estimate for the next 12 months prepared on cost report forms.

(iv) An explanation of unusual costs reported on the facility's actual or budgeted cost reports and any significant changes in budgeted costs and data compared to actual costs and data reported on the latest filed cost report.

(v) The name, location of, and distance to, the nearest renal dialysis facility.

(vi) A list of patients by modality showing commuting distance and time to the current and the next nearest renal dialysis facility.

(vii) The historical and projected patient to staff ratios and number of machines used for maintenance dialysis treatments.

(viii) A computation showing the facility's treatment capacity, arrived at by taking the total stations multiplied by the number of hours of operation for the year divided by the average length of a dialysis treatment.

(ix) The geographic boundaries and population size of the facility's service area.

15. A new § 413.188 is added to read as follows:

§ 413.188 Payment exception: Extraordinary circumstances.

(a) To qualify for an exception to the prospective payment rate based on extraordinary circumstances, the facility must substantiate that it incurs excess costs beyond its control due to a fire, earthquake, flood, or other natural disaster.

(b) HCFA does not grant an exception based on increased costs if a facility chose not to—

(1) Maintain adequate insurance protection against such losses (through the purchase of insurance, the maintenance of a self-insurance program, or other equivalent alternative); or

(2) File a claim for losses covered by insurance or utilize its self-insurance program.

16. A new § 413.190 is added to read as follows:

§ 413.190 Payment exception: Self-dialysis training costs.

(a) To qualify for an exception to the prospective payment rate based on self-dialysis training costs, the facility must establish that it incurs per treatment costs for furnishing self-dialysis and home dialysis training that exceed the facility's payment rate for such training sessions.

(b) To justify its exception request, a facility must—

(1) Separately identify those elements contributing to its costs in excess of the composite training rate; and

(2) Demonstrate that its per treatment costs are reasonable and allowable.

(c) HCFA considers the facility's total costs, cost finding and apportionment, including its allocation of costs, to determine if costs are properly reported by treatment modality.

(d) Exception requests for a higher training rate are limited to those cost components relating to training such as technical staff, medical supplies, and the special costs of education (manuals and education material) and do not generally include overhead and other indirect costs.

(e) Documentation: The facility must provide the following information to support its exception request:

(1) A copy of the facility's training program.

(2) Computation of the facility's cost per treatment for maintenance sessions and training sessions including an explanation of the cost difference between the two modalities.

(3) Class size and patients' training schedules.

(4) Number of training sessions required, by treatment modality, to train patients.

(5) Number of patients trained for the current year and the prior 2 years on a monthly basis.

(6) Projection for the next 12 months of future training candidates.

(7) The number and qualifications of staff at training sessions.

(f) Accelerated training exception:

(1) An ESRD facility may bill Medicare for a dialysis training session only when a patient receives a dialysis treatment (which normally is three times a week).

(2) If an ESRD facility elects to train all its patients using a particular treatment modality more often than during each dialysis treatment and, as a result, the number of its billable training dialysis sessions are reduced, the facility may request a composite rate limited to the lesser of the—

(i) Facility's projected training cost per treatment; or

(ii) Cost per treatment the facility would have received in training a patient if it had trained patients only during a dialysis treatment.

(3) An ESRD facility may bill a maximum per patient of 25 training sessions for hemodialysis training and 15 training sessions for continuous cycling peritoneal dialysis (CCPD) and continuous ambulatory peritoneal dialysis (CAPD) training.

(4) In computing the payment amount under an accelerated training exception, to ensure adequate patient training, HCFA uses a minimum number of training sessions per patient, (15 for hemodialysis and 5 for CAPD and CCPD) when the facility actually provides fewer than the minimum number of training sessions.

(5) To justify an accelerated training exception request, an ESRD facility must document that all training sessions provided for a particular modality are provided during the shorter but more condensed period.

(6) The facility must submit with the exception request a list of patients, by modality, trained during the most recent cost report period, and the list must include each beneficiary's—

(i) Name;

(ii) Age; and

(iii) Training status (completed, not completed, being retrained, or in the process of being trained).

(7) The total treatments from the patient list must be the same as the total treatments reported on the cost report filed with the request.

17. A new § 413.192 is added to read as follows:

§ 413.192 Payment exception: Frequency of dialysis.

(a) To qualify for an exception to the prospective payment rate based on frequency of dialysis, the facility must establish that it has a substantial portion of outpatient maintenance dialysis treatments furnished to patients who dialyze less frequently than three times per week.

(b) For purposes of this section, *substantial* means the number of treatments furnished by the facility is at least 15 percent lower than the number if all patients dialyzed three times a week.

(c) Per treatment payment rates granted under this exception may not exceed the amount that results in weekly payment per patient equal to three times the facility's prospective composite rate, exclusive of any exception amounts.

(d) Documentation: To document that an ESRD facility furnishes a substantial number of dialysis treatments at a frequency less than 3 times per week per patient, the facility must submit the following information:

(1) A list of patients receiving outpatient dialysis treatments for the cost report that is being filed with the request. The list must indicate—

(i) Whether the patients are permanent, transient or temporary;

(ii) The medically prescribed frequency of dialysis; and

(iii) The number of dialysis treatments that each patient received on a weekly and yearly basis and an explanation of any discrepancy between that calculation and the number of treatments reported on the facility's cost report.

(2) A list of patients used to project treatments. The list must indicate—

(i) Whether the patients are permanent, transient or temporary;

(ii) The medically prescribed frequency of dialysis;

(iii) The number of dialysis treatments that each patient is projected to receive on a weekly and yearly basis, an explanation of any discrepancy between that calculation and the number of treatments reported on the facility's projected cost report, and an explanation for any change between prior actual and projected data.

(3) A schedule showing the number of treatments to be furnished twice a week and the number of treatments that would have been furnished if each patient were dialyzed three times a week, including a computation of the facility's projected costs per treatment using the—

(i) Projected number of treatments furnished twice a week; and

(ii) Number of treatments if patients dialyze three times a week.

(4) A schedule showing the computation of the percentage decrease in the number of treatments.

18. A new § 413.194 is added to read as follows:

§ 413.194 Appeals.

(a) *Appeals under section 1878 of the Act.* (1) A facility that disputes the amount of its allowable Medicare bad debts reimbursed by HCFA under § 413.178 may request review by the intermediary or the Provider Reimbursement Review Board (PRRB) in accordance with subpart R of part 405 of this chapter.

(2) A facility must request and obtain a final agency decision prior to seeking judicial review of a dispute regarding the amount of allowable Medicare bad debts.

(b) *Other appeals.* (1) A facility that has requested higher payment per treatment in accordance with § 413.180 may request review from the intermediary or the PRRB if HCFA has denied the request in whole or in part. In such a case, the procedure in subpart R of part 405 of this chapter is followed to the extent that it is applicable.

(2) The PRRB, subject to review by the Administrator under § 405.1875 of this chapter, has the authority to review the action taken by HCFA on the facility's requests.

(3) A facility must request and obtain a final agency decision prior to seeking judicial review of the denial, in whole or in part, of the exception request.

(c) *Procedure.* (1) The facility must request review within 180 days of the date of the decision on which review is sought.

(2) The facility may not submit to the reviewing entity, whether it be the intermediary or the PRRB, any additional information or cost data that had not been submitted to HCFA at the time HCFA evaluated the exception request.

(d) *Determining amount in controversy.* For purposes of determining PRRB jurisdiction under subpart R of part 405 of this chapter for the appeals described in paragraph (b) of this section—

(1) The amount in controversy per treatment is determined by subtracting the amount of program payment from the amount the facility requested under § 413.180; and

(2) The total amount in controversy is calculated by multiplying the amount in controversy per treatment by the projected number of treatments for the exception request period (as specified in § 413.180(g) and (h)).

19. A new § 413.196 is added to read as follows:

§ 413.196 Notification of changes in rate-setting methodologies and payment rates.

(a) HCFA or the facility's intermediary notifies each facility of changes in its payment rate. This notice includes changes in individual facility payment rates resulting from corrections or revisions of particular geographic labor cost adjustment factors.

(b) Changes in payment rates resulting from incorporation of updated cost data or general revisions of geographic labor cost adjustment factors are announced by notice published in the **Federal Register** without opportunity for prior public comment. Revisions of the rate-setting methodology are published in the **Federal Register** in accordance with the Department's established rulemaking procedures.

20. Newly redesignated § 413.200 is amended by revising the heading and paragraph (b) to read as follows:

§ 413.200 Payment of independent organ procurement organizations and histocompatibility laboratories.

* * * * *

(b) *Definitions.* For purposes of this section:

Freestanding—An OPO or a histocompatibility laboratory is freestanding unless it—

(1) Is subject to the control of the hospital in regard to the hiring, firing, training and paying of employees; and

(2) Is considered as a department of the hospital for insurance purposes (including malpractice insurance, general liability insurance, worker's compensation insurance, and employee retirement insurance).

Histocompatibility laboratory means a laboratory meeting the standards and providing the services for kidneys or other organs set forth in § 405.2171(d) of this chapter.

OPO means an organization that meets the definition in § 485.302 of this chapter.

* * * * *

§ 413.202 [Amended]

21. In newly redesignated section 413.202, the following changes are made:

(a) The heading is revised to read as follows: 413.202 Organ procurement organizations' (OPOs') or transplant centers' costs for organ sent to foreign countries or transplanted in patients other than Medicare beneficiaries.

(b) The term "organs" is substituted for "kidneys" in the text wherever the term appears.

(c) The phrase "military transplant hospital" is substituted for "military renal transplant hospital".

C. 42 CFR part 414 is amended as follows:

PART 414—PAYMENT FOR PART B MEDICAL AND OTHER HEALTH SERVICES

1. The authority citation for part 414 continues to read as follows:

Authority: Secs. 1102, 1833(a), 1834 (a) and (h), 1871, and 1881 of the Social Security Act (42 U.S.C. 1302, 1395l(a), 1395m (a) and (h), 1395hh, and 1395rr).

2. Section 414.313 is amended by revising paragraph (a) to read as follows:

§ 414.313 Initial method of payment.

(a) *Basic rule.* Under this method, the intermediary pays the facility for routine professional services furnished by physicians. Payment is in the form of an add-on to the facility's composite rate payment, which is described in part 413 subpart H of this subchapter.

* * * * *

3. Section 414.314 is amended by revising paragraph (a)(5) to read as follows:

§ 414.314 Monthly capitation payment method.

(a) *Basic rules.* * * *

(5) Payment for physician administrative services (§ 414.310) is

made to the dialysis facility as part of the facility's composite rate (part 413 subpart H of this subchapter) and not to the physician under the MCP.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: May 15, 1994.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Dated: August 10, 1994.

Donna E. Shalala,

Secretary.

[FR Doc. 94–20626 Filed 8–25–94; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 24

[PP Docket No. 93–253; FCC 94–219]

Implementation of Section 309(j) of the Communications Act—Competitive Bidding

AGENCY: Federal Communications Commission.

ACTION: Further notice of proposed rulemaking.

SUMMARY: In this *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, the Commission seeks comment on certain proposals to increase opportunities for smaller entities, including entities owned by minorities and women to participate in narrowband PCS auctions and in the provision of narrowband PCS services. These proposed rules will promote economic opportunity and competition, and disseminate licenses among a wide variety of applicants, including small business and businesses owned by members of minority groups and women.

DATES: Comments are due September 16, 1994; Reply comments are due on October 3, 1994.

FOR FURTHER INFORMATION CONTACT: Jackie Chorney Office of Plans and Policy, (202) 418–2030.

SUPPLEMENTARY INFORMATION: Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before September 16, 1994 and reply comments on or before October 3, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commission to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, NW., Washington, DC 20554. The complete text of this document may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, Room 236, Washington, DC 20554, telephone (202) 857–3800.

In the matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding Narrowband PCS, PP Docket No. 93–253 and Amendment of the Commission's Rules to Establish New Narrowband Personal Communication Services, GEN Docket No. 90–314, ET Docket No. 92–100.

Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking

Adopted: August 16, 1994.

Released: August 17, 1994.

Comment Date: September 16, 1994.

Reply Comment Date: October 3, 1994.

By the Commission:

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I. Proposed Designated Entity Provisions for MTA and BTA Auctions

A. Introduction

1. In the Budget Act, Congress recognized the novelty of auctions as a licensing method and encouraged us to experiment with a variety of techniques to ensure that small businesses and those owned by women and minorities have an opportunity to participate in spectrum-based services. While we believe that measures taken with respect to the regional narrowband PCS auctions will provide substantial opportunities for designated entities to participate in narrowband PCS, we seek comment on whether it may be necessary to adopt alternative provisions such as entrepreneurs' blocks or higher bidding credits to encourage investment in minority- and women-owned businesses in future auctions. As we have learned, narrowband PCS licenses may be auctioned for large sums of money in the competitive bidding process. It therefore may be necessary to do more to ensure that designated entities have the opportunity to participate in narrowband PCS than may be necessary in other, less costly spectrum-based services. In our view, we must consider whether these steps and any others we may adopt are required to fulfill Congress's mandate that designated entities have the opportunity to participate in the provision of PCS. We believe that the measures we propose today would increase the likelihood that designated entities will win licenses in the auctions and become strong competitors in the provision of narrowband PCS service. We also will review the results of the regional auction in making our decision on the rules proposed in this Further Notice.

2. As we noted in the *Fifth Report and Order*, by instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the difficulties these groups encounter in accessing capital.[1] Indeed, less than two years ago, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased

[1] *Fifth Report and Order* at ¶ 97, in PP Docket No. 93–253, FCC 94–178, adopted June 29, 1994, released July 15, 1994, 59 FR 37566 (Jul 29, 1994), (*Fifth Report and Order*).

difficulties in obtaining credit."[2] Because of these problems, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."[3]

3. Congress also recognized that these funding problems are even more severe for minority and women-owned businesses, who face discrimination in the private lending market. For example, Congress explicitly found that businesses owned by minorities and women have particular difficulties in obtaining capital and that problems encountered by minorities in this regard are "extraordinary."[4] A number of studies also amply support the existence of widespread discrimination against minorities in lending practices. As we noted in the *Fifth Report and Order*, in October, 1992, the year prior to passage of the auction law, the Federal Reserve Bank of Boston released an important and highly-publicized study demonstrating that a black or Hispanic applicant in the Boston area is roughly 60 percent more likely to be denied a mortgage loan than a similarly situated white applicant.[5] The researchers measured every variable mentioned as important in numerous conversations with lenders, underwriters, and examiners and found that minority applicants are more likely to be denied mortgages even where they have the same obligation ratios, credit history, loan to value and property characteristics as white applicants. The lending discrimination that occurs, the study found, does not involve the application of specific rules, but instead occurs where discretionary decisions are made. Based on the Boston study, we found that it is reasonable to expect that race will affect business loans that are based on more subjective criteria to an even greater extent than the mortgage loan process, which uses more standard rules.

4. Similarly, evidence presented in testimony before the House Minority Enterprise Subcommittee on May 20, 1994 indicates that African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources, such as affluent family or friends. Assuming two hypothetical college-educated, similarly situated male entrepreneurs, one black, one white, the testimony indicated that the white candidate would have access to $1.85 in bank loans for each dollar of owner equity invested, while the black candidate would have access to only $1.16. According to the testimony, the problems associated with lower incomes and intergenerational wealth, as well as the discriminatory treatment minorities receive from financial institutions, make it much more likely that minorities will be shut out of capital intensive industries, such as telecommunications. This testimony also noted that African American representation in communications is so low that it was not possible to generate meaningful summary statistics on underrepresentation.[6]

5. We also stated in the *Fifth Report and Order* that inability to access capital is also a major impediment to the successful participation of women in PCS auctions. In enacting the Women's Business Ownership Act in 1988, Congress made findings that women, as a group, are subject to discrimination that adversely affects their ability to raise or secure capital.[7] AWRT documents that these discriminatory barriers still exist today. Indeed, AWRT reports that while venture capital is an important source of funding for telecommunications companies, women-owned companies received only approximately one percent of the $3 billion invested by institutional venture capitalists in 1993. Citing a 1992 National Women's Business Council report, AWRT further argues that even successful women-owned companies did not overcome these financing obstacles after they had reached a level of funding and profitability adequate for most other businesses.[8]

6. A study prepared in 1993 by the National Foundation for Women Business Owners (NFWBO) further illustrates the barriers faced by women-owned businesses. For example, it finds that women-owned firms are 22 percent more likely to report problems dealing with their banks than are businesses at large. In addition, the NFWBO study finds that the largest single type of short-term financing used by women business owners is credit cards and that over half of women-owned firms use credit cards for such purposes, as compared to 18 percent of all small to medium-sized businesses, which generally use bank loans and vendor credit for short-term credit needs. With regard to long-term financing, the study states that a greater proportion of women-owned firms are turning, or are forced to turn, to private sources, and to a wider variety of sources, to fulfill their needs. Based on these findings, the NFWBO study concludes that removal of financial barriers would encourage stronger growth among women-owned businesses, resulting in much greater growth throughout the economy.[9]

7. If we are to meet the congressional goals of promoting economic opportunity and competition by disseminating licenses among a wide variety of providers, we must find ways to counteract effectively these barriers to entry. As chronicled in the *Fifth Report and Order*, both Congress and the Commission have tried various methods to enhance access to the broadcast and cable industries by minorities and women.[10] These efforts however, have met with limited success. The record shows that women and minorities have not gained substantial ownership representation in either the broadcast or non-broadcast telecommunications industries. For example, a 1993 report conducted by the National Telecommunications and Information Administration's (NTIA) Minority Telecommunications Development Program shows that, as of August 1993, only 2.7 percent of commercial broadcast stations were owned by minorities. Another study commissioned by the Commerce Department's Minority Business Development Agency in 1991 found that only one half of one percent of the telecommunications firms in the country were minority owned. The study also identified only 15 minority cable operators and 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging or messaging services in the United States.[11] And, according to the last

[2] Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a)(3), Pub. Law 102-366, Sept. 4, 1992.

[3] *Id.*, Section 441(b)(2),(3).

[4] *Id.*, Section 12(4); 331(a)(4).

[5] Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

[6] Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development (House Minority Enterprise Subcommittee), May 20, 1994.

[7] Pub. L. 100-533 (1988). In 1991, Congress enacted the Women's Business Development Act of 1991 to further assist the development of small businesses owned by women. *See* Pub. L. 102-191 (1991).

[8] *See* Letter of AWRT to the Honorable Kweisi Mfume, Chairman, House Minority Enterprise Subcommittee, June 1, 1994.

[9] *See* The National Foundation for Women Business Owners, Financing the Business, A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners, October 1993.

[10] *See Fifth Report and Order* at ¶¶ 103-106.

[11] *See* Testimony of Larry Irving, Assistant Secretary for Communications and Information,

available U.S. Census, only 24 percent of the communications firms in the country were owned by women, and these women-owned firms generated only approximately 8.7 percent of the revenues earned by communications companies.[12] When companies without paid employees are removed from the equation, firms with women owners represent only 14.5 percent of the communications companies in the country.[13] One result of these low numbers is that there are very few minority or women-owned businesses that bring experience or infrastructure to narrowband PCS. They thus face an additional barrier relative to many existing service providers.

8. Small businesses also have not become major participants in the telecommunications industry. For instance, one commenter asserts that ten large companies—six Regional Bell Operating Companies (RBOCs), AirTouch (formerly owned by Pacific Telesis), McCaw, GTE and Sprint—control nearly 86 percent of the cellular industry. This commenter further contends that nine of these ten companies control 95 percent of the cellular licenses and population in the 50 BTAs that have one million or more people.[14]

9. In the new auction law, Congress directed the Commission to remedy this serious imbalance in the participation by certain groups, especially minorities and women. The auction law itself contemplates that requiring payment for initial licenses through competitive bidding, unlike existing licensing methods such as comparative hearings or lotteries, may inhibit participation by those with limited access to capital and could further diminish opportunities for designated entities. The first nationwide auction demonstrated that a 25 percent bidding credit may not be sufficient to ensure that designated entities have the opportunity to participate where narrowband PCS values are high. The regional auctions will demonstrate whether a 40 percent bidding credit for women- and minority-owned firms combined with installment payments for eligible small businesses is sufficient to provide meaningful opportunities for designated entities at the regional level. We further propose to examine the use of measures we specified in the *Fifth Report and Order* to carry out Congress's directive to provide meaningful opportunities for small entities and businesses owned by women and minorities to provide PCS services. If, based on the results of the regional auction, we conclude that the 40 percent bidding credit is insufficient, we may decide that these measures, which are expressly designed to address the funding problems faced by these groups, may be necessary to achieve Congress's goals with respect to narrowband PCS.

B. Summary of Special Provisions for Designated Entities

10. While there was significant designated entity participation in the nationwide narrowband PCS auction, we are concerned that the high license values in that auction and the substantial involvement by large, incumbent firms with significant financial resources suggests that designated entities may have difficulties in competing in future narrowband PCS auctions. We recognize that larger incumbent firms are able to pay much higher license prices than smaller firms because of the significant infrastructure and cost of capital advantages these firms enjoy. Because of these factors, we believe that additional measures may be necessary to achieve Congress's mandate that we ensure the opportunity for designated entities to participate in the competitive bidding process and in the provision of spectrum-based services. In this regard, we propose additional provisions for businesses owned by women and/or minorities and small businesses similar to those employed in the auction rules for broadband PCS.

11. To fulfill Congress's mandate that we ensure that designated entities have the opportunity to participate in providing narrowband PCS; we propose to reserve up to four MTA frequency blocks—19, 21, 22 and 24—, and both BTA frequency blocks—25 and 26—for bidding exclusively by entities with annual gross revenues of less than $125 million and total assets of less than $500 million ("entrepreneurs' blocks"). We believe that excluding large companies from bidding in the proposed entrepreneurs' blocks, and limiting the total number of licenses that one entity can obtain in these blocks, would significantly enhance opportunities for smaller entities to become PCS providers and thereby ensure that narrowband PCS licenses will be disseminated "among a wide variety of applicants," as required by Section 309(j)(3)(B).

12. We recognize, however, that reserving blocks for bidding only by relatively small companies may not, by itself, be sufficient to ensure that small businesses and businesses owned by members of minority groups and women have the opportunity to obtain narrowband PCS licenses. Businesses owned by members of minority groups and women face discrimination that poses additional obstacles for these firms. Accordingly, we propose a number of related steps to assist small businesses and businesses owned by woman and/or minorities in attracting the capital necessary to obtain a narrowband PCS license.

13. First, to encourage large companies to invest in designated entities and to assist designated entities without large investors to overcome the additional hurdle presented by auctions, we propose to make bidding credits available to designated entities within the entrepreneurs' blocks. More specifically, we propose to provide small businesses with a 10 percent bidding credit. Businesses owned by minorities and women would receive a 15 percent bidding credit to compensate for the substantial problems they face in attracting capital.[15] The credits would be cumulative, so that a business owned by minorities or women that also qualified as a small business would receive a 25 percent bidding credit. Second, we propose to allow most successful bidders within the entrepreneurs' block to pay for their licenses in installments and to "enhance" those installment payments for small businesses and businesses owned by minorities and women by varying the moratorium on principal and the interest rate. Third, we propose to continue to extend our tax certificate policies to promote participation by minorities and women in the provision of narrowband PCS. Fourth, we propose to reduce the upfront payment for all eligible bidders in the entrepreneurs'

U.S. Department of Commerce, before the House Minority Enterprise Subcommittee, May 20, 1994. In his testimony at this same hearing, FCC Chairman Reed Hundt cited some of these statistics and noted that in light of this serious underrepresentation, there remains "a fundamental obligation for both Congress and the FCC to examine new and creative ways to ensure minority opportunity." Testimony of Reed E. Hundt, Chairman, Federal Communications Commission, before the House Minority Enterprise Subcommittee, May 20, 1994.

[12] *See* Women-Owned Businesses, 1987 Economic Censuses, U.S. Department of Commerce, issued August 1990, at 7,147. The census data includes sole proprietorships, partnerships, and subchapter S corporations. We have no statistics regarding women representation among owners of larger communications companies.

[13] *Id.*

[14] *Ex parte* filing of DCR Communications, May 31, 1994.

[15] Although this bidding credit would be less than the bidding credit available for selected nationwide and regional licenses (25 percent and 40 percent respectively), the 15 percent bidding credit would be available within the entrepreneurs' block rather than in a block where all companies could participate.

blocks from $0.02 per MHz per pop to $0.015 per MHz per pop.

14. Finally, we propose to redesignate the two BTA licenses as regional licenses organized in the same configuration set forth in Section 24.102 of the rules. We also seek comment on other means to achieve larger geographic license sizes such as designating these BTA licenses as nationwide licenses or by maintaining the BTA designation, but allowing combinatorial bidding for the designated regions. We also seek comment on whether some of the MTA and BTA response channels should be redesignated as larger license areas with bidding limited only to those entities eligible to bid for entrepreneurs' block licenses.

15. The following chart highlights the major provisions proposed for businesses bidding in the proposed entrepreneurs' blocks.[16]

	Bidding credits (Percent)	Installment payments	Tax certificates for investors
Entrepreneurial businesses (in excess of $40 MM and less than or equal to $125 MM in revenue and less than $500 MM in total assets).	0	Interest only for 1 year; rate equal to 10-year Treasury note plus 2.5 percent; (for businesses with revenues greater than $75 MM, available only in regional and MTA markets)	No.
Small businesses (not in excess of $40 MM in revenues and less than $500 MM in total assets).	10	Interest only for 2 years; rate equal to 10-year Treasury note plus 2.5 percent;	No.
Businesses owned by minorities and/or women (in excess of $40 MM and less than or equal to $125 MM in revenues and less than $500 MM in total assets).	15	Interest only for 3 years; rate equal to 10-year Treasury note;	Yes.
Small businesses owned by minorities and/or women (not in excess of $40 MM in revenues and less than $500 MM in total assets.	25	Interest only for 5 years; rate equal to 10-year treasury note;	Yes.

C. Summary of Eligibility Requirements and Definitions

1. Entrepreneurs' Blocks and Small Business Eligibility

16. The following points summarize the principal rules we propose regarding eligibility to bid in the entrepreneurs' blocks and have adopted above to qualify as a small business. In addition, they summarize the attribution rules we will propose to use to assess whether an applicant satisfies the various financial thresholds. More precise details are discussed in the subsections that follow.

Proposed Financial Caps

• *Entrepreneurs' Blocks:* To bid in the entrepreneurs' blocks, the applicant, including attributable investors and affiliates, must cumulatively have less than $125 million in gross revenues and less than $500 million in total assets. No individual attributable investor or affiliate may have $100 million or more in personal net worth.

• *Small Business:* To qualify for special measures accorded a small business, the applicant, including attributable investors and affiliates, must cumulatively have not in excess of $40 million in gross revenues. No individual attributable investor or affiliate may have in excess of $40 million in personal net worth. (Note: this is the small business definition we have adopted above). We seek comments on whether in an entrepreneur's block we should define small businesses differently.

Proposed Attribution Rules

• *Control Group.* The gross revenues, total assets and personal net worth of certain investors are not considered so long as the applicant has a "control group" consisting of one or more individuals or entities that control the applicant, hold at least 25 percent of the equity and, for corporations, at least 50.1 percent of the voting stock.

• The gross revenues, total assets and personal net worth of each member of the control group are counted toward the financial caps.

• *Other Investors.* Where the applicant has a control group, the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds 25 percent or more of the applicant's passive equity (which, for corporations, will include as much as 15 percent of the voting stock).

• *Passive Equity.* Passive equity is limited partnership or non-voting stock interests or voting stock interests of 15 percent or less of the issued and outstanding voting stock.

• *Proposed Option for Minority or Woman-Owned Applicants.* If the control group (consisting entirely of women and/or minorities) owns at least 50.1 percent of the equity and, or corporation, at least 50.1 percent of the voting stock, then the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds more than 49.9 percent of the applicant's passive equity (which, for corporations, includes no more than as 15 percent of the voting stock).

• *Affiliates.* The gross revenues, assets and personal net worth of outside interests held by the applicant (and the attributable investors in the applicant) are counted toward the financial caps if the applicant (or the attributable investors in the applicant) control or have power to control the outside interests or if the applicant (or the attributable investors in the applicant) is under the control of the outside interests. The financial interests of spouses are also attributed to each other.

2. Definition of Women and/or Minority-Owned Business

17. The points below summarize the two structural options proposed to be available to firms that wish to qualify for the special provisions adopted for businesses owned by minorities and women. These options will be discussed in more detail in the text that follows.

50.1 Percent Equity Option

• If woman and/or minority principals control the applicant and own at least:

• 50.1 percent of the equity, and;

• 50.1 percent of the voting stock, in the case of corporations.

• Then any other investor may hold:

• not more than 49.9 percent of the passive equity (which, for corporations,

[16] This table is not comprehensive and therefore it does not present all the provisions established for designated entities, especially those available outside the entrepreneurs' blocks.

includes as much as 15 percent of the voting stock).

25 Percent Equity Option

• If women and/or minority principals control the applicant and own at least:

• 25 percent of the equity, and;

• 50.1 percent of the voting stock, in the case of corporations.

• Then any other investor may hold:

• 25 percent or less of the passive equity (which, for corporations, includes as much as 15 percent of the voting stock).

18. We also request comment on alternatives intended to deter shams and fronts and to prevent abuse of the incentives for designated entities. The Commission would enforce vigorously any requirements adopted. These proposals include a holding and limited transfer period for licensees in the entrepreneurs' blocks and repayment provisions associated with bidding credits and installment payments. These steps and our eligibility and affiliation rules are intended to ensure that the benefits of any measures we take flow to the entities Congress intended. Ultimately, we believe that we will best fulfill our statutory mandate by creating powerful incentives for *bona fide* designated entities to attract the capital necessary to compete both in auctions for narrowband PCS and in the provision of service. We therefore specifically request that comments address in detail the impact any of these alternatives would likely produce on the opportunity for designated entities to acquire narrowband PCS licenses.

D. The Entrepreneurs' Blocks

19. As discussed above, because the auction process itself requires additional expenditures of capital to acquire licenses, this new licensing procedure in many respects holds the potential to erect an additional barrier to entry that had not existed even under the Act's previous licensing methods, comparative hearings and lotteries. As reflected in the House Committee Report, Congress was well aware of that possibility and wanted to ensure that competitive bidding should not exclude smaller entities from obtaining licenses.[17] The inability of small businesses and businesses owned by women and minorities to obtain adequate private financing creates a serious imbalance between these companies and large businesses in their prospects for competing successfully in narrowband PCS auctions.

[17] *See* H.R. Rep. No. 103–111 at 255.

20. We anticipate that the results of the narrowband regional auctions as well as the comments we seek in this Notice will be relevant to our final conclusion of whether an entrepreneurs' block is appropriate in narrowband PCS. We seek comments on what results in the regional auction would or would not justify the use of an entrepeneurs' block in subsequent narrowband auctions. The $125 million gross revenue/$500 million asset caps have the effect of excluding the large companies that would easily be able to outbid designated entries and frustrate Congress' goal of disseminating licenses among a diversity of licensees. At the same time, this restriction does not exclude many firms that, while not large in comparison with other telecommunications companies, nevertheless are likely to have the financial ability to provide sustained competition for the PCS licensees. For example, the $125 million gross revenue figure corresponds roughly to the Commission's definition of a Tier 2, or medium-sized, local exchange carrier,[18] and would include virtually all of the independently owned rural telephone companies, while excluding the largest incumbent paging licensees. Limiting the personal net worth of any individual investor or affiliate of the applicant to $100 million would prevent a very wealthy individual from leveraging his or her personal assets to allow the applicant to circumvent the size limitations of the entrepeneurs' blocks.

21. In determining which of the blocks in each market should constitute the entrepreneurs' blocks, we seek to make sufficient opportunity available to businesses that would qualify for the entrepreneurs' blocks and to those that would not. We seek comment on whether it would be appropriate to include all of those remaining blocks designated for bidding credits and to add one additional MTA block and one additional BTA block if we decide to adopt the proposal. We seek comment on the choice of blocks and the number of blocks that should be included in the entrepreneurs' blocks. We want to choose blocks to provide adequate amounts of spectrum and geographic territory necessary to ensure that the eligible bidders will be able to compete effectively. We believe that designating a variety of frequency blocks as entrepreneurs' blocks would satisfy the needs of those parties who believe they must have larger amounts of spectrum to compete effectively as well as the needs of other designated entities who require smaller blocks. Finally, it would not foreclose opportunities for other parties.[19]

22. *Holding and Limited Transfer Period.* Because we interpret the congressional goal of giving designated entities the opportunity to provide spectrum-based services to extend beyond merely obtaining a license, we seek comment on whether we should prohibit licensees in the entrepreneurs' blocks from voluntarily assigning or transferring control of their licenses for a period of three years from the date of the license grant.[20] We further ask commenters to address whether, for the next two to seven years of the license term, we should permit the licensee to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria.[21] Comments should address whether any restrictions of this type would accurately balance the goal of promoting access to capital by designated entities with the need to assure the integrity of our process. During this limited transfer period, licensees would continue to be bound

[18] Local exchange carriers are categorized as Tier 1 and Tier 2 companies by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules use to distinguished Class A and Class B companies, respectively. Class A companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than $100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. A company's classification is changed when its annual operating revenue exceeds or is under the $100 million mark in each of five consecutive years. The Commission imposes more relaxes regulatory requirements on Tier 2 LECs than on Tier 1 LECs. *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, 2 FCC Rcd 5770, 5772 (1987), 52 FR 35918 (Sept. 24, 1987), Commission Requirements for Cost Support Material to be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, 9 FCC Rcd 1060 n. 3 (Comm. Carr. Bur. 1994), Commission Requirements for Cost Support Material to be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133 (Comm. Carr. Bur. released Jan. 25, 1985).

[19] In addition, incumbent paging licensees would have the opportunity to bed on 2,176 MTA and BTA response channel licenses reserved for existing paging licensees.

[20] We propose considering exceptions to this three-year holding period rule on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks. In addition, we note that a transfer is considered "involuntary" if it is made pursuant to a court decree requiring the sale or transfer of the licensee's stock or assets. *Paramount Pictures, Inc.*, 43 FCC 453 (1949); *Cf. William Penn Broadcasting*, 16 FCC 2d 1050 (1969).

[21] We note that a licensee assigning its authorization pursuant to this limited transfer period might be subject to the repayment provisions associated with installment payments and bidding credits. *See infra* ¶¶ 28, 35.

by the financial eligibility requirements, as set forth below.[22] In addition, a transferee or assignee who receives an entrepreneurs' block license during this period would remain subject to the transfer restrictions for the balance of the holding period.[23] Should any of these proposals be adopted, the Commission would conduct random pre- and post-auction audits to ensure that applicants receiving preferences are in compliance with the FCC's rules.

23. Our goals are to create significant opportunities for entrepreneurs, small businesses, and businesses owned by minorities and women to compete in auctions for licenses and attract sufficient capital to build-out those licenses and provide service. We recognize the critical need to attract capital, which requires flexibility. We are very concerned, however, that such flexibility not undermine our more fundamental objective, which is to ensure that designated entities retain *de facto* and *de jure* control of their companies. The holding and limited transfer period upon which we seek comment, may help promote this objective. We seek comment on the effect that any rules of this sort are likely to have on the achievement of our goals of meaningful long-term participation by designated entities and how such a rule would impact the ability to raise capital.

E. Bidding Credits

24. In the *Third Report and Order* we adopted a 25 percent bidding credit for businesses owned by minorities and women. We concluded that the use of bidding credits would be an effective tool to ensure that women and minority-owned businesses have opportunities to participate in the provision of narrowband services.[24] And, in this Order, we raised this bidding credit to 40 percent for the regional narrowband auctions. While we do not think that a bidding credit of this magnitude is required when used in conjunction with an insulated entrepreneurs' block, we continue to believe that a bidding credit is necessary to ensure that women and minority-owned businesses have the opportunity to participate in narrowband PCS. In addition, we believe that a small bidding credit is warranted to help small businesses overcome financing obstacles. Accordingly, we propose to continue to provide a bidding credits in the proposed entrepreneurs' blocks that would give small businesses a 10 percent credit, women and minority-owned businesses a 15 percent credit, and small businesses owned by women and minorities an aggregate credit of 25 percent.

25. In *ex parte* presentations to the Commission, many commenters have indicated that, without spectrum set-asides for narrowband PCS, bidding credits would not be sufficient to assist designated entities in outbidding very large entities who are likely to bid for licenses in this service. PCSD states, for example, that all of the existing large paging companies can justify much larger payments for licenses than could an individual entrepreneur, regardless of a bidder's credit. Therefore, it believes no entrepreneur will win a bid for any PCS market that is desirable to any of the large companies.[25] As described above, in order to afford designated entities a realistic opportunity to obtain licenses in the narrowband PCS service, we propose to exclude very large businesses from bidding for licenses in the entrepreneurs' blocks. These measures would enhance the value of the bidding credits for small businesses and businesses owned by minorities and women. In this context, we believe that bidding credits can have a significant effect on the ability of small businesses and businesses owned by women and minorities to participate successfully in auctions for licenses in entrepreneurs' blocks.

26. As explained above, the capital access problems faced by small firms and women and minority-owned firms make special provisions like bidding credits appropriate for these designated entities in narrowband PCS.[26] In effect, the bidding credit would function as a discount on the bid price a firm would actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. Moreover, as noted previously, women and minorities face discrimination in lending and other barriers to entry not encountered by other firms, including other designated entities. Therefore, as one of the measures designed to counter these increased capital formation difficulties, we propose to provide them with a slightly higher bidding credit than small businesses. Thus, women and minorities would receive a 15 percent payment discount that is applied against the amounts they bid on licenses. Absent such measures targeted specifically to women and minorities, it might be impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of narrowband PCS. Similarly, it is reasonable to assume that small firms owned by women and minorities suffer the problems endemic to both groups. Therefore, we propose a cumulative bidding credit of 25 percent for these groups. We believe that these measures will help women and minorities to attract the capital necessary for obtaining a license and constructing and operating a narrowband PCS system, consistent with the intent of Congress. We seek comments on these proposals.

27. As discussed below, we have also proposed to modify the definition of a minority and women-owned firm.[27] To receive a 10 percent bidding credit, we propose that a small business must satisfy the same gross revenue test adopted for installment payments. As explained more fully in the small business definition section, we propose that a consortium consisting entirely of small businesses also be eligible for a 10 percent bidding credit even if the combined gross revenues of the consortium exceed the small business gross revenues threshold. In addition, we propose that a small business that is owned by women and minorities must satisfy the definition of a business owned by minorities and women as well as the small business definition to receive a 25 percent bidding credit. Finally, we propose that a consortium of small firms owned by women and/or minorities is eligible for a 25 percent bidding credit, provided that each member of the consortium meets the definition of a small business and a minority and/or women-owned firm.

28. *Repayment Policies Applicable to Bidding Credits*. To ensure that bidding credits benefit the parties to whom they are directed, we inquire whether we should adopt strict repayment policies: if, within the original 10-year term, a licensee applies to assign or transfer control of a license to for example, an

[22] *See infra* ¶¶ 38–43. In addition, for purposes of the installment payment and bidding credit provisions set forth below, licensees will continue to be bound by the financial eligibility requirements throughout the term of the license.

[23] For example, if an entrepreneurs' block authorization is assigned to an eligible business in year four of the license term, it would be required to hold that license until the original holding period expires, subject to the same exceptions that applied to the original licensee.

[24] *See Third Report and Order* at ¶ 72, in PP Docket No. 93–252, 9 FCC Rcd 2941, 59 FR 26741 (May 24, 1994), (*Third Report and Order*).

[25] *Ex parte* filing of PCSD Development Corporation (PCSD), August 9, 1994.

[26] Although we did not previously grant bidding credits to small businesses in the *Third Report and Order*, we now believe that, given the exponentially greater expense likely to be incurred in acquiring broadband PCS licenses, bidding credits might be a proper means to ensure that these firms have the opportunity to participate in this service.

[27] *See infra* ¶¶ 44–54.

entity that is not eligible for as a high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify would have to be paid to the U.S. Treasury as a condition of approval of the transfer. Thus, an assignment of a license from a small minority-owned firm to a women-owned firm with revenues greater than $40 million would require repayment of 10 percent of the original bid price (25 percent less 15 percent) to the Treasury. A sale to an entity that would not qualify for bidding credits would entail full repayment of the original bidding credit as a condition of transfer. Small businesses also would be bound by the financial eligibility rules during the entire license term as set forth below. Thus, if after licensing an investor purchases an "attributable" interest in the business and, as a result, the gross revenues of the firm exceed the $40 million small business cap, this repayment provision would apply.[28] If such a proposal were to be adopted, we would envision that these repayment provisions apply throughout the original term of the license to help promote the long-term holding of licenses by those parties receiving bidding credits. Nevertheless, as in the case of the holding period and transfer restrictions discussed at ¶¶ 88–89 above we seek comment on any effects such rules may have on the ability of designated entities to attract capital. We therefore ask commenters to address in detail whether this type of restriction would further the goal of increasing the number of designated entities participating in the provision of narrowband PCS services.

F. Installment Payments

29. A significant barrier for most businesses small enough to qualify to bid in the proposed entrepreneurs' blocks would be access to adequate private financing to ensure their ability to compete against larger firms in the PCS marketplace.[29] In the *Third Report and Order*, we concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum. We also determined that small businesses eligible for installment payments would only be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license. Finally, we indicated that installment payments should be made available to small businesses at an interest rate equal to the rate for U.S. Treasury obligations.[30]

30. In light of the expected substantial capital required to acquire narrowband PCS licenses, we proposed that installment payments be available to most businesses that obtain narrowband PCS licenses in the proposed entrepreneurs' blocks. By allowing payment in installments, the government would in effect be extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction. Such low cost government financing would promote long-term participation by these businesses, which, because of their smaller size, lack access to sufficient capital to compete effectively with larger PCS licensees. Under the rules we propose today, installment payments would be available to smaller entities that do not technically qualify as small businesses for purposes of other measures we have proposed, such as bidding credits. We believe, however, that, given the significant costs of narrowband PCS licenses and the likelihood of very large participants in the other blocks, this option would be fully consistent with the congressional intent in enacting Section 309(j)(4)(A) to avoid a competitive bidding program that has the effect of favoring incumbent providers of other communications services, with established revenue streams, over smaller entities.[31]

31. Under the plan we propose here, all licenses that satisfy the gross revenues, total assets and personal net worth criteria to bid in the entrepreneurs' blocks would be allowed to pay in installments for regional and MTA licenses granted in those blocks. With respect to the BTA licenses in those blocks, however, only businesses owned by women and minorities and those licensees with less than $75 million in gross revenues would be able to use installment payments.[32] This distinction is based on the expected lower costs to acquire licenses and construct systems in the BTAs. However, if we adopt our proposal to redesignate BTA licenses as nationwide or regional licenses, we propose extending installment payments on those blocks to all parties eligible for the entrepreneurs' blocks. Thus, with the exception of companies owned by women or minorities, which face additional problems accessing capital, we do not think that a firm with gross revenues exceeding $75 million would require government financing to be competitive for the BTA licenses.[33]

32. The installment payment option would enable qualified businesses to pay their winning bid over time. These businesses would still make the applicable upfront payment in full before the auction, but would be required to make a post-auction down payment equaling only ten percent of their winning bids, half of which will be due five business days after the auction closes. Payment of the other half of the down payment would be deferred until five business days after the license is granted. In general, the remaining 90 percent of the auction price would be paid in installments with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Under this general rule, only payments of interest would be due for the first year with principal and interest payments amortized over the remaining nine years of the license. Timely payment of all installments would be a condition of the license grant and failure to make such timely payment would be grounds for revocation of the license.[34] We seek comment on this installment payment proposal.

33. *Enhanced Installment Payments.* As explained previously, small businesses and businesses owned by minorities and women face capital access difficulties not encountered by other firms and, thus, require special measures to ensure their opportunity to participate in narrowband PCS.

[28] *See infra* ¶¶ 39–43, for a discussion of which investor interests would be "attributable" for purposes of calculating the gross revenues caps.

[29] *See e.g.*, comments of SBA Chief Counsel of Advocacy at 6, 20–21, NTIA at 27; SBAC Report at 2 (September 15, 1993).

[30] *See Third Report and Order* at ¶¶ 86–90.

[31] *See* H.R. Rep. No. 103–111 at 255 (Commission has the authority to design alternative payment schedules in order that the auction process does not inadvertently favor only those with "deep pockets" over new or small companies).

[32] We will apply the same $500 million total assets and $100 million personal net worth standards for purposes of determining eligibility for installment payments in the BTA entrepreneurs' blocks. The attribution rules set forth with regard to eligibility to bid will also apply in all of the BTA entrepreneurs' blocks.

[33] We note that a consortium of small businesses would be eligible for installment payments in any market so long as each member of the consortium satisfies the definition of a small business, as set forth in Section V.A., *infra*.

[34] As described in the *Second Report and Order*, in PP Docket No. 93–253, 9 FCC Rcd 2348, 59 FR 22980 (May 4, 1994), (*Second Report and Order*), the Commission may, on a case-by-case basis, permit a three to six month grace period within which a licensee may seek a restructuring of the payment plan.

Accordingly, we propose an "enhanced" installment payment plan for these entities. Pursuant to this enhanced installment payment plan, small businesses who win licenses in the proposed entrepreneurs' blocks would be required to pay interest only for the first two years of the license term at the same interest rate as set forth in the general rule. Businesses owned by women and/or minorities would be able to make interest-only payments for three years. Interest would accrue at the Treasury note rate without the additional 2.5 percent.[35] And finally, businesses that are both small and owned by women and/or minorities would be required to pay only interest for five years. Interest would accrue at the Treasury note rate.

34. These proposed enhanced installment payments are narrowly tailored to the needs of the various designated entities, as reflected in the record in this proceeding. We believe that varying the moratorium on principal in the early years of the loan and varying the interest rate based on these needs would allow small businesses and companies owned by women and/or minorities to bid higher in auctions, thereby increasing their chances for obtaining licenses. In addition, it would allow them to concentrate their resources on infrastructure build-out and, therefore, it would increase the likelihood that they become viable narrowband PCS competitors. We request comment on these proposed enhancements to the installment payment plan.

35. *Unjust Enrichment Applicable to Installment Payments.* To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we propose to retain the unjust enrichment provisions adopted in the *Third Report and Order* applicable to installment payments. Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity not meeting the applicable eligibility standards set out above during the term of the license, we would require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer.[36] Moreover, if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan, if any, for which the acquiring entity qualifies would become effective immediately upon transfer. Thus, a higher interest rate and earlier payment of principal may begin to be applied. For example, a transfer of a license in the fourth year after license grant from a small minority-owned firm to a small non-minority owned firm would require that the firm begin principal payments and the balance would begin accruing interest at a rate 2.5 percent above the rate that had been in effect. Finally, if an investor subsequently purchases an "attributable" interest in the businesses and, as a result, the gross revenues or total assets of the business exceed the applicable financial caps, this unjust enrichment provision would also apply.[37] We seek comment on these proposals.

G. Upfront Payments

36. As previously indicated in the *Third Report and Order*, the upfront payment requirement was designed to ensure that bidders are qualified and serious and to provide the Commission with a source of funds in the event that it becomes necessary to assess default or bid withdrawal penalties.[38] The upfront payment ensures that bids during the course of the auction are *bona fide* and convey information about the value of the underlying licenses. Our standard upfront payment for narrowband PCS is $0.02 per MHz per pop. As an additional means of enhancing the opportunity of designated entities to participate in competitive bidding we propose to reduce the required upfront payment for those applicants. As we concluded in the *Fifth Report and Order*, we are concerned that the $0.02 per MHz per pop upfront payment requirement might impose a barrier for smaller entities wishing to participate in the auctions. Moreover, we note that most bidders in the proposed entrepreneurs' blocks would be entitled to pay for their licenses in installments, which would require a down payment of only five percent of the winning bid. We are concerned that requiring an upfront payment that may be larger than the down payment that the winning bidder is required to tender could discourage auction participation.

37. For these reasons, we propose to reduce the upfront payment requirement to $0.015 per MHz per pop for bidders in the entrepreneurs' blocks. This 25 percent discount should facilitate auction participation by capital-constrained companies and would permit them to conserve resources for infrastructure development after winning a license. Moreover, since the upfront payment is still substantial, we believe that insincere bidding would be discouraged and the Commission would have access to funds if it must collect default or bid withdrawal penalty payments.

H. Definitions and Eligibility

1. Eligibility to Bid in the Proposed Entrepreneurs' Blocks

38. As noted previously, eligibility to bid in the proposed entrepreneurs' blocks would be limited to companies that, together with their affiliates and investors, had gross revenues of less than $125 million in each of the last two years and have total assets of less than $500 million at the time their short form applications are filed. In addition, we propose to prohibit an applicant from bidding in these blocks if any one attributable individual investor or principal in the applicant has $100 million or greater in personal net worth at the short form application filing date.

2. Attribution Rules for the Proposed Entrepreneurs' Blocks

39. For purposes of determining whether an entity qualifies to bid in the entrepreneurs' blocks, we propose to follow the control group and attribution rules set forth with regard to eligibility to bid as a small business. In particular, winning bidders would be required to identify on their long-form applications a control group that controls the applicant, owns at least 25 percent of the equity, and in the case of a corporation, holds at least 50.1 percent of the voting stock. For partnership applicants, we propose that every general partner be considered part of the group. The gross revenues and total assets of each member of the control group and each member's affiliates would be counted toward the $125 million/$500 million thresholds, regardless of the size of the member's total interest in the applicant. The $100 million personal net worth limitation would also apply to each member of the control group. We would not consider the gross revenues or personal net worth of any other investor unless the investor holds 25 percent or more of the outstanding passive equity in the applicant, which, as defined above, includes as much as fifteen percent of the voting stock in a corporate applicant.

40. We also propose more relaxed attribution standard with regard to

[35] To be eligible for these "enhanced" installment payments, a firm would have to satisfy either of the two alternative definitions of a woman or minority-owned business, as set forth in ¶¶44–54, *infra*, as well as the applicable financial caps.

[36] *See Third Report and Order* at ¶89.

[37] *See infra* ¶¶39–43, for a discussion of which investor interests would be "attributable" for purposes of calculating the gross revenues and total assets thresholds.

[38] *Third Report and Order*, §§ 41–45.

investors in small businesses owned by minorities and women. Specifically, we would not consider the gross revenues or personal net worth of a single passive investor in a minority or female-owned small business unless the investor holds in excess of a 49.9 percent passive interest (which includes as much as fifteen percent of a corporate applicant's voting stock), provided the women or minority control group maintains at least 50.1 percent of the equity and, in the case of a corporate applicant, at least 50.1 percent of the voting stock. We believe that such revenue attribution would ensure that only *bona fide* small businesses are able to take advantage of the special provisions we have proposed, but would allow those businesses to attract sufficient equity capital to be truly viable contenders in the PCS industry.

41. In addition, we propose to allow a consortium of small businesses to qualify for any of the measures adopted in this order applicable to individual small businesses including the ability to bid in the entrepreneurs' block. As used here, the term "consortium" means a conglomerate organization formed as a joint venture among mutually-independent business firms, each of which individually satisfies the definition of a small business.

42. We explain how these attribution rules would apply with regard to any holding and limited transfer period for entrepreneurs' block licensees should such rules ultimately be adopted. During this holding period, an entrepreneurs' block licensee could not sell more than 25 percent of its passive equity to a single investor if the resulting attribution of that investor's gross revenues or total assets would bring the company over the $125 million gross revenues/$500 million personal net worth cap. Similarly, while individual members of the control group could change (if it would not result in a transfer of control of the company), the control group would have to maintain control and at least 25 percent of the equity and 50.1 percent of the voting stock.[39] A company would be permitted to grow beyond these gross revenues/total assets caps, however, through equity investment by non-attributable (i.e. passive) investors, debt financing, revenue from operations, business development or expanded service.[40]

43. We seek comment on these proposed eligibility requirements for the entrepreneurs' blocks. In particular, parties should discuss the equity and control requirements for the control group and investors in both the corporate and partnership context. In addition, commenters should discuss the alternative option for women and minority-owned companies and the ability of small businesses to form consortia. With regard to all of these issues, parties are asked to comment on the proposals' impact on the ability of entities to obtain financing as well as on the Commission's goals of deterring shams and fronts.

3. Definition of Women and Minority-Owned Business

44. As discussed above, we have proposed steps in this order to address the special funding problems faced by minority and women-owned firms and thereby to ensure that these groups have the opportunity to participate and become strong competitors in the narrowband PCS service.[41] We previously adopted a tax certificate program for women and minorities to allow more sources of potential funding, and in this Order have relaxed the attribution standard used to determine eligibility as a qualified small business.

45. For purposes of implementing these steps, we propose to depart from the definition of a minority and women-owned firm that was adopted in the *Third Report and Order*. We have adopted relaxed attribution standards for businesses owned by women and minorities for purposes of qualifying for small business provisions. We are proposing relaxed standards for businesses owned by women and minorities to qualify for the entrepreneurs' blocks. In the *Third Report and Order*, we found generally that to establish ownership by minorities and women, a strict eligibility standard should be adopted that required minorities or women to have at least 50.1 percent equity stake and a 50.1 percent controlling interest in the designated entity. *Third Report and Order* at ¶ 68; 47 CFR § 1.2110(b)(2). For future narrowband PCS auctions, we propose to retain the requirement that minorities and/or women control the applicant and hold at least 50.1 percent of a corporate applicant's voting stock. However, to establish their eligibility for certain benefits, summarized below, we propose an additional requirement that, even where minorities and women hold at least 50.1 percent of the applicant's equity, other investors in the applicant may own only passive interests, which, for corporate applicants, is defined to include as much as fifteen percent of the voting stock. In addition, provided that certain restrictions are met, we propose to allow women and minority-owned firms the option to reduce to 25 percent the 50.1 percent minimum equity amount that must be held.

46. We emphasized in the *Third Report and Order* that we did not intend to restrict the use of various equity financing mechanisms and incentives to attract financing, provided that the minority and women principals continued to own 50.1 percent of the equity, calculated on a full-diluted basis, and that their equity interest entitled them to a substantial stake in the profits and liquidation value of the venture relative to the non-controlling principals. We noted, however, in the *Second Report and Order* that different standards that meet the same objectives may be appropriate in other contexts. *Second Report and Order* at ¶ 278. In view of the evidence of discriminatory lending experiences faced by minority and women entrepreneurs and the exceptionally great financial resources believed to be required by narrowband PCS applicants, we conclude that it may be appropriate to allow more flexibility with regard to the 50.1 percent equity requirements for this service in order to open doors to more sources of equity financing for women and minority-owned firms.

47. We propose therefore to allow women and minority-owned firms the following options. First, they may satisfy the general definition set forth in the *Second Report and Order*, which requires the minority and/or female principals to control the applicant, own at least 50.1 percent of its equity and, in the case of corporate applicants, hold at least 50.1 percent of the voting stock. Under this option, other investors may own as much as a 49.9 percent passive equity interest. As noted above regarding eligibility to bid in the entrepreneurs' blocks, passive equity in the corporate context means only non-

[39] A minority of woman-owned company would have to continue to adhere to the attribution rules applicable to it, set out above.

[40] These rules would continue to apply in this manner throughout the license term with regard to firm's continuing eligibility for installment payments, "enhanced" installment payments and bidding credits.

[41] We proposed to use the same criteria set forth in the Second Report and Order, and consider the members of the following groups "minorities" for purposes of our rules: "[T]hose of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n.8 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849, 489 n.1 (1982). Moreover, as adopted in the Second Report and Order, minority and women-owned businesses would be eligible for special measures only if the minority and women principals are also United States citizens.

voting stock may be held, or stock that includes no more than fifteen percent of the voting interests.[42] For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity. We ask commenters specifically to address whether the proposed fifteen percent voting interest limitation strikes the correct balance, or whether a higher percentage would facilitate capital formation without unduly contributing to a proliferation of shams. In addition, the *Second Report and Order*, all investor interests would be calculated on a fully-diluted basis, meaning that agreements such as stock options, warrants and convertible debentures generally would be considered to have a present effect and would be treated as if the rights thereunder already have been fully exercised.[43] We recognize that the requirement that other investors own only passive interests would be a departure from the definition of a minority or women-owned business adopted in the *Second Report and Order*, but because of the very significant financial contribution that may be made by such other investors in designated entities, we believe that the passive equity requirement may be appropriate as an additional safeguard. In addition, we seek comments on whether these rules as currently framed may affect the ability of legitimate designated entities to obtain the capital needed to participate in the auction.

48. As a second proposed option, women and minority-owned firms would be able to sell up to 75 percent of the company's equity, provided that no single investor may hold 25 percent or more of the firm's passive equity, which is defined in the same manner as above. For example, a corporation with 100 shares of voting stock and 100 shares of non-voting stock, with the 200 shares representing the total outstanding shares of the company, could qualify as a minority or women-owned business under the following circumstances. The minority or women principals would have to own at least 51 shares of voting stock, which satisfies the requirement that they have voting control and, in this case, also meets the requirement that they hold at least 25 percent of the equity. Two other investors could each own 34 shares of non-voting stock and fifteen shares of voting stock, which represents 24.5 percent of the company's equity for each of the shareholders. A third investor could own the remaining 32 shares of non-voting stock and fifteen shares of the voting stock, or 23.5 percent of the equity. The remaining 4 shares of voting stock may be sold to other investors.

49. Whichever option is chosen, we would require establishment of a "control group" for women and minority-owned firms in much the same way we did for purposes of eligibility to bid in the entrepreneurs' blocks. Specifically, winning bidders, transferees or assignees would have to identify on their long-form applications a control group (consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and women) that has *de jure* and *de facto* control of the applicant and holds either at least 50.1 or 25 percent of the applicant's equity, depending upon which option is elected.

50. We believe that a modification of our 50.1 percent equity requirement would best achieve the Congressional objective of providing effective and long-term economic opportunities for women and minority-owned firms in narrowband PCS. At the same time, we propose to maintain strict enforcement of the requirement that actual control reside with the qualified designated entities. Thus, to establish their eligibility for tax certificates, enhanced installment payments, bidding credits and relaxed cellular attribution rules, women and minority-owned applicants electing to use the 25 percent equity option could not in any instance allow an individual investor who is not in the control group to own more than a 25 percent passive equity interest. This restriction would apply even in circumstances in which allowing an investor to exceed these limitations would not result in the applicant's exceeding the gross revenues and other financial standards that apply to other bidders in the entrepreneurs' blocks and other situations involving financial caps. These structural safeguards, as well as the general requirement that other investors hold only passive interests in women and minority-owned applicants, would help to ensure that control truly remains with the women and minority designated entities.

51. For example, a women or minority-owned firm electing to use the 25 percent option may have a non-eligible investor with more than 25 percent passive stake and still qualify to bid in the entrepreneurs' blocks or for benefits that apply to small businesses, as long as the attributable revenues of the investor do not cause the applicant to exceed the gross revenues/total asset caps. In these contexts, no additional restrictions would be necessary, because women and minority-owned applicants, like other applicants, would be eligible to bid in these blocks and to qualify as small businesses so long as they comply with the same restrictions on financial eligibility that apply to other applicants. Since the attribution rule itself operates to ensure compliance with size limitations, it would not be necessary to impose additional restrictions on the size of interests held by investors with attributable interests. This firm would not qualify, however, for special measures applicable only to women and minority-owned businesses, such as "enhanced" installment payments or the 15 or 25 percent bidding credits, because it has a single non-eligible investor with more than 25 percent passive interest. In circumstances in which women and minorities are required to retain only 25 percent of the firm's equity, this additional structural restriction would be appropriate because the objective in this context is to ensure not merely financial eligibility, but that women and minorities retain control of the license.

52. We set forth previously rules defining more explicitly the term "control" for purposes of determining whether a "control group" maintains *de facto* as well as *de jure* control of an applicant.[44] We propose to apply those rules equally to the minority and women principals of minority and women-owned applicants. Consistent with our general policies with regard to women-owned applicants for purposes of our multiple ownership and cross-ownership rules in this broadcast context, we do not propose to adopt, at this time, any special rules or presumptions to determine whether women-owned applicants exercise independent control of their firms. *See* In the Matter of Clarification of Commission Policies Regarding Spousal

[42] For example, under this option, a corporate applicant with two classes of issued and outstanding stock, 100 shares of voting stock and 100 shares of non-voting stock, could sell to a single non-eligible entity 49.9 percent of the applicant's equity, consisting of 5 shares of the corporation's voting stock and 94 shares of its non-voting stock. Under this scenario, eligible minorities or women, in order to retain at least 50.1 percent of the value of all outstanding shares of the corporation's stock, must own all of the corporation's remaining shares of stock; that is, 95 shares of voting stock and six shares of non-voting stock.

[43] As also noted in the Second Report and Order, we will consider departing from the requirement that the equity of investors in minority and women-owned businesses must be calculated on a fully-diluted basis only upon a demonstration, in individual cases, that options or conversion rights held by non-controlling principals will not deprive the minority and women principals of a substantial financial stake in the venture or impair their rights to control the designated entity. *See* Second Report and Order at ¶ 277.

[44] *See supra* ¶ 49.

Attribution, 7 FCC Rcd. 1920, 57 FR 08845 (Mar 13, 1992).

53. We also note here that we are proposing to depart from the provision in the *Third Report and Order* that bars publicly traded companies from qualifying as minority and women-owned businesses for purposes of participating in auctions. Most of the steps proposed to assist these designated entities in this Further Notice (*e.g.*, bidding credits and installment payments) are confined to winning bidders in the entrepreneurs' blocks, where there would be a financial limit on the size of participants. Because of the large capital entry costs of narrowband PCS, we now believe that even publicly traded companies owned by women and minorities that qualify to bid in entrepreneurs' blocks require additional measures, such as bidding credits and installment payments, to be able to participate successfully.

54. As noted above, we propose that applicants owned by women and minorities must meet the limitations on gross revenues, total assets and personal net worth to qualify for entry into the entrepreneurs' blocks. The size limitations would not apply, however, to all measures designed to assist applicants owned by minorities and/or women. The tax certificate policy applies to all narrowhead PCS licenses and would not be limited to licenses in the entrepreneurs' blocks. Therefore, businesses owned by minorities and women need not meet the gross revenue and other financial restrictions to qualify for tax certificates. But minority and women-owned firms would have to satisfy the Commission's structural ownership requirements to receive the benefits of tax certificates; that is, they would be subject to the limitation that interests held by investors who are not women and minorities must be passive.

4. Definition of an Affiliate

55. In the *Second Report and Order*, we referenced the SBA's affiliation rules for purposes of defining generally whether an entity qualifies as a small business and gave examples of how the affiliation rules would be applied. In the *Fifth Report and Order*, we expanded on the SBA's affiliation rules in establishing detailed affiliation standards for narrowband PCS to be used when designated entities must include "affiliates" to determine their eligibility for special designated entity provisions. In the *Second Memorandum Opinion and Order*[45] that we adopted in this docket, we incorporate into our generic auction rules the affiliation standards that we established for narrowband PCS in the *Fifth Report and Order*. We propose to apply these affiliation standards to narrowband PCS for purposes of determining any of the above described, size-based eligibility criteria for designated entities seeking special treatment under the provisions adopted herein. These standards would give applicants clear guidance regarding the relationships that we will attribute for purposes of applying any of our sized-based eligibility criteria.

I. Limit on Licenses Awarded in Entrepreneurs' Blocks

56. The special provisions which we propose for designated entities are based, in part, on our mandate to fulfill the congressional goal that we disseminate licenses among a wide variety of applicants. 47 U.S.C. § 309(j)(3)(B). Therefore, in proposing the financial assistance measures set forth in this Further Notice, we are concerned about the possibility, even if remote, that a few bidders will win a very large number of the licenses in the entrepreneurs' blocks. As a consequence, the benefits that Congress intended for designated entities would be enjoyed, in disproportionate measure, by only a few individuals or entities. Congress, in our view, did not intend that result. We therefore propose steps to ensure that the financial assistance provided through our rules is dispersed to a reasonable number of applicants who win licenses in these blocks.

57. To achieve a fair distribution of the benefits intended by Congress, we propose a limit on the total number of licenses within the entrepreneurs' blocks that a single entity could win at auction. In setting this limit, we would avoid imposing a restriction that would prevent applicants from obtaining a sufficient number of licenses to create large and efficient nationwide or regional services. Specifically, we propose a limitation that no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks. These licenses could be in any combination of frequency blocks. Such a limit would ensure that at least 10 winning bidders enjoy the benefits of the entrepreneurs' blocks. At the same time, it would allow bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage.

58. Further, this limitation would apply only to the total number of licenses that may be won at auctions in these proposed entrepreneurs' blocks; it would not be an ownership cap that applies to licenses that might be obtained after the auctions. For purposes of implementing this restriction, we would consider licenses to be won by the same entity if an applicant (or other entity) that controls, or has the power to control licenses won at the auction, controls or has the power to control another license won at the auction.

J. Redesignation of Certain Narrowband PCS Spectrum Blocks

59. Finally, we are concerned that there are companies that would be eligible for an entrepreneurs' block license that may desire larger license areas than MTAs and BTAs. It appears that over half of the bidders in the nationwide auction would have qualified for an entrepreneurs' block license. As a result, we propose to redesignate the two BTA licenses as regional licenses organized in the same configuration set forth in section 24.102 of the rules. Doing so would give designated entities an opportunity to bid on a larger and more valuable license under the rules for entrepreneurs' blocks. We also seek comment on other means to achieve larger geographic license sizes such as designating these BTA licenses as nationwide licenses or by maintaining the BTA designation, but allowing combinatorial bidding for the designated regions. Commenters should also address the appropriate premium we should adopt for comparison of combinatorial and BTA license bids if we allow combinatorial bidding. We also seek comment on whether some of the MTA and BTA response channels should be redesignated as larger license areas with bidding limited only to those entities eligible to bid for entrepreneurs' block licenses.

II. Procedural Matters and Ordering Clause

A. Further Notice—Initial Analysis

60. *Reason for the Action.* The purpose of the *Further Notice* is to implement competitive bidding rules and regulations rules consistent with the Commission's competitive bidding authority that will carry out the statutory mandates that certain designated entities, including small entities, are afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

[45] *Second Memorandum Opinion and Order* at ¶46, in PP Docket No. 93–253, FCC No. 94–215, released Aug. 15, 1994, (*Second Memorandum Opinion and Order*).

61. *Objectives of this Action.* The Omnibus Budget Reconciliation Act of 1993 and the subsequent Commission actions to implement it are intended to establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, are afforded an opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services.

62. *Legal Basis.* Authority for the *Further Notice* can be found in the Omnibus Budget Reconciliation Act of 1993 and in Sections 2(a), 4(i) 303(r), 309(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), 303(r), 309(i) and 309(j).

63. *Reporting, Recordkeeping and Other Compliance Requirements.* The proposals under consideration in this *Further Notice* include the possibility of new reporting and recordkeeping requirements for a number of small business entities.

64. *Federal Rules Which Overlap, Duplicate or Conflict With These Rules.* None.

65. *Description, Potential Impact, and Number of Small Entities Involved.* The rule changes proposed in this *Further Notice* could effect smaller entities if they have mutually exclusive applications for initial licenses or permits for narrowband PCS licenses. The *Further Notice* proposes to establish certain narrowband PCS spectrum blocks for bidding exclusively by smaller entities and to provide installment payments and bidding credits to certain eligible entities within those blocks.

66. *Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.* The *Further Notice* proposes certain provisions for smaller entities designed to ensure that such entities have the opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services.

B. Ex Parte Rules

67. This is a non-restricted notice and comment rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR §§ 1.1202, 1.1203, and 1.120(a).

C. Comment Dates

68. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415 and 1.419, interested parties may file comments on or before September 16, 1994 and reply comments on or before October 3, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, NW., Washington, DC 20554. The complete text of this document may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, room 236, Washington, DC 20554, telephone (202) 857–3800.

List of Subjects in 47 CFR Part 24

Administrative practice and procedure, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

LaVera F. Marshall,

Acting Secretary.

[FR Doc. 94–21015 Filed 8–25–94; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 91–58; RM–7419, RM–7797, RM–7798]

Radio Broadcasting Services; Caldwell, College Station, Gause, TX

AGENCY: Federal Communications Commission.

ACTION: Order to Show Cause.

SUMMARY: This document directs an Order to Show Cause against Roy E. Henderson, permittee of Station KHEN, Caldwell, Texas, to show cause why his license should not be modified to specify operation on Channel 297A in lieu of Channel 236A. Such modification would permit consideration of a Channel 236C2 allotment in College Station, Texas. The reference coordinates for a Channel 297A allotment are 30–33–31 and 96–34–50. See 56 FR 11982 (March 21, 1991).

DATES: Comments must be filed on or before October 7, 1994.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Order to Show Cause in MM Docket No. 91–58, adopted August 12, 1994, and released August 23, 1994. The full text of this Commission action 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 action may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

Douglas W. Webbink,

Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 94–21017 Filed 8–25–94; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF DEFENSE

Department of the Army

48 CFR Part 52

Engineer Federal Acquisition Regulation Supplement (EFARS); Variation in Estimated Quantity

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Proposed deviation with request for comments.

SUMMARY: The Corps of Engineers is requesting a deviation from the FAR Variation in Estimated Quantity (VEQ) clause at 52.212–11 to revise the method for computing price adjustments under the clause (for quantity overruns and underruns) to be more equitable both for the Government and for the contractor.

DATES: Comments on the proposed deviation, to be included in the EFARS clause, should be submitted in writing to the address shown below on or before November 1, 1994, to be considered in the formulation of a deviation.

ADDRESSES: U.S. Army Corps of Engineers, Principal Assistant Responsible for Contracting, ATTN: CEPR–P, 20 Massachusetts Avenue NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Ms. Patricia B. Paianton, (202) 272–0961 or 0566. Telefax number: (202) 504–4752.

SUPPLEMENTARY INFORMATION:

A. Background

Typical, in the Corps of Engineers, the VEQ clause is used in contracts for dredging or construction excavation. When the VEQ clause is used, the Government estimates the quantity of units of work to be performed, and the solicitation and contract provide a unit price for the work. The clause provides that, if the actual quantity is between 85 percent and 115 percent of the original estimated quantity, the original contract unit price will be paid by the Government to the contractor, but, if the actual quantity is below 85 percent or above 115 percent, the unit price may be revised for the underrun or overrun quantity only, but not for the quantities within the 85–115 percent range of the estimated quantity. The clause states that *"The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity.* * * * (Emphasis added.) Because the FAR VEQ clause limits unit price adjustment so those "due solely to" the variations in costs, it freezes the results of a "bad bargain" for the Government or the contractor in computing a unit price for increased work above 115 percent of the estimated quantity. The revised EFARS clause proposed by the Corps provides for repricing based on the contractor's profit or loss position as well as changes in costs. This will compensate the contractor fairly, but eliminate windfalls for either the contractor or the Government.

The Corps of Engineers is interested in receiving comments on the following issues:

1. Should contracting officers have discretion to use figures different from 85 percent and 115 percent?

2. Should the use of this clause (and its repricing mechanism) be limited to "major" work items under the contract? How would a major work item be defined?

(3) Should implementing guidance make it clear that issuance of a request for repricing by the contracting officer is a discretionary decision to be issued only when it is expected that the reduction in contract price will exceed the administrative cost involved or is otherwise in the Government's interest?

B. Regulatory Flexibility Act

A Regulatory Analysis is not required by the Regulatory Flexibility Act (5 U.S.C. 601–611). The proposed change would not impose a new burden on any small businesses. It is estimated that the revised method would increase the price paid to a contractor about half the time and decrease the price paid to the contractor about half the time and that the instances when the clauses would allow reporting the work above 115 percent or below 85 percent would be few.

C. Paperwork Reduction Act

The provisions of the Paperwork Reduction Act (44 U.S.C., Ch. 35) do not apply. This deviation would not impose a new requirement on ten or more offerors or contractors to submit, maintain, retain or disclose information.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

The USACE would be granted a deviation from FAR 52.212–11 to use a new clause to read as follows:

Variation in Estimated Quantity (Deviation)

As prescribed at _____, insert the following clause in solicitations and contracts for fixed-price construction contracts when subdivided items are to be separately priced for payment purpose.

Variation in Estimated Quantity (Deviation) (XXX 1994)—EFARS

(a) If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity is at least 85 percent but not more than 115 percent of the estimated quantity, payment for the actual quantity shall be made at the contract unit price.

(b) If the actual quantity of a unit-priced quantity varies more than 15 percent above or below the original estimated quantity:

(1) Either party may request an equitable adjustment in the contract price as set forth in (2) and (3) below. The party requesting the equitable adjustment must establish the basis for the equitable adjustment; if no basis is established, payment for actual quantity shall be made at the original contract unit price.

(2) If the actual quantity exceeds 115 percent, payment for 115 percent shall be made at the original contract unit price, and an equitable adjustment may be made in the unit price for the quantity above 115 percent. The equitable adjustment in the unit price for the balance of the actual quantity above 115 percent shall be based on the reasonable costs for that part of the work. Such reasonable costs may include reasonable various costs and a reasonable profit; additional fixed costs may be included, if incurred and reasonable.

(3) If the actual quantity is less than 85 percent of the original estimated quantity, payment for the actual quantity shall be made at the original contract unit price, and an equitable adjustment may be made to compensate the contractor for incurred reasonable fixed costs that would otherwise be unrecovered.

(c) If a quantity variation causes an increase in the time necessary for completion, the Contractor may request in writing an extension of time. The written request must be received by the Contracting Officer within 10 days from the beginning of the delay, or with such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon receipt of the written request, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgment of the Contracting Officer, is justified.

(end of clause)

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 94–21047 Filed 8–25–94; 8:45 am]

BILLING CODE 3710–92–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 575

[Docket No. 91–68; Notice 04]

RIN 2127–AC64

Consumer Information Regulations; Federal Motor Vehicle Safety Standards; Rollover Prevention

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of proposed rulemaking; notice to extend comment period.

SUMMARY: In response to petitions submitted by Advocates for Highway and Auto Safety and the American Automobile Manufacturers Association, this notice extends the comment period for a proposal to require manufacturers of passenger cars, light multipurpose passenger vehicles, and light trucks to provide consumers with information on the resistance of those vehicles to rollover. NHTSA believes that commenters need more time to formulate their responses because of the complexity of the issues in the NPRM. Moreover, to the extent that persons commenting on a series of public meetings on consumer safety information issues discuss rollover resistance information, preparation of those comments and the comments on the proposal will be facilitated by specifying the same comment closing date for both. Accordingly, the agency has decided to extend the comment period from August 29, 1994 to October 21, 1994, the current comment closing date on the public meeting issues.

DATES: Comments on the notice of proposed rulemaking, Docket 91–68, Notice 4 must be received by October 21, 1994.

ADDRESSES: Comments should refer to Docket No. 91–68, Notice 3 and be

submitted to: Docket Section, Room 5109, National Highway Traffic Safety Administration, 400 Seventh Street S.W., Washington, D.C. 20590. Docket hours are 9:30 to 4 pm. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Ms. Gayle Dalrymple, Office of Rulemaking, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590 (202–366–5559).

SUPPLEMENTARY INFORMATION: On June 28, 1994, NHTSA published a notice of proposed rulemaking (NPRM) in the **Federal Register** that would require vehicle manufacturers to provide consumers with information on the vehicle's resistance to rollover, in the form of a label that would be affixed to the vehicle and information in the owner's manual (59 FR 33254). The notice contained an analysis of methods for objectively measuring vehicle stability. It also referenced an extensive discussion of rollover statistics in an "Addendum to Technical Assessment Paper" that was placed in the docket. In addition to proposing methods to be used to generate the information on the label, the NPRM requested comments on the size, location, permanence, and content of the information label. The notice requested comments on the proposed regulation and specified a comment due date of August 29, 1994.

On July 26, 1994, NHTSA published a notice (59 FR 38025) announcing a series of four public meetings on the general subject of vehicle safety information for consumers. The agency is seeking comment at those meetings on what kinds of safety information would be useful to consumers and how that information should be presented. The last of the public meetings will be held on October 6, 1994. The comment due date for public comments on the issues raised at those meetings is October 21, 1994.

Advocates for Highway and Auto Safety (Advocates) submitted a petition dated August 4, 1994, asking that the comments period for the NPRM be extended to October 21. Advocates requested the extension primarily because it believes that the public meetings are "substantively connected" to the rollover rulemaking. Advocates believes that the commenters on the June 28 NPRM should have the benefit of the statements presented at each of the public meetings. It suggested that the agency will receive better submissions from commenters who desire to file comments in both dockets. In addition, Advocates requested the extension because it needs additional time to resolve the "highly technical" issues raised by the use of engineering metrics for generating consumer information.

The American Automobile Manufacturers Association (AAMA) submitted a petition dated August 9, 1994, also asking the agency to extend the comment period for the NPRM. The AAMA requested the extension because it believes that the NPRM and other available agency information are insufficient to permit a meaningful analysis of the proposal. The AAMA requested additional information and an extension of the comment period to the date 60 days after the information is provided.

After reviewing the petitions, NHTSA agrees with the petitioners that extending the comment closing date is desirable, given the complexity of the issues underlying the NPRM. NHTSA also accepts Advocates' reasoning that the public meeting may generate issues and information that would aid the public in preparing comments on this rulemaking.

Based on the above considerations, the agency believes that there is good cause to extend the comment period an additional 53 days and that this decision is consistent with the public interest. Accordingly, the agency has decided to extend the comment period until October 21, 1994.

However, the agency wants to stress that persons commenting about issues raised at the public meetings should not focus on the limited issue of how to present rollover information. Instead, they should address the larger issues of what additional safety information NHTSA can provide to the public and how NHTSA can better present consumer information from all the agency's safety activities. Comments focusing on rollover information should be addressed to the docket for this rulemaking.

NHTSA believes that it is unnecessary to grant a further extension in response to AAMA's petition. The extension to October 21 should provide sufficient additional time to complete analysis of even the complex issues presented in the NPRM. The additional information that the AAMA sought in its petition is, and has always been, publicly available, either by careful reading of the documents in Docket 91–68, Notices 1 and 3, or through direct correspondence with the NHTSA personnel who conducted the statistical analyses. Further, much of this information is comparatively minor and does not significantly affect commenters' ability to conduct analysis or prepare meaningful comments on the agency's proposal.

Issued on: August 22, 1994.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 94–21011 Filed 8–22–94; 4:32 pm]

BILLING CODE 4910–59–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Extension of Comment Period for the Status Review of the Alexander Archipelago Wolf

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Status Review; Extension of comment period.

SUMMARY: The U.S. Fish and Wildlife Service (Service) provides notice that the comment period on the status review for this petitioned action is extended. The Alexander Archipelago wolf (*Canis lupus ligoni*) is found in forested areas of southeast Alaska. All interested parties are invited to submit comments regarding this species' status.

DATES: The comment period, which originally closed July 19, 1994, now closes October 1, 1994.

ADDRESSES: Data, information, comments or questions concerning the status of the petitioned species described below should be submitted to the Field Supervisor, U.S. Fish and Wildlife Service, Ecological Services, 3000 Vintage Blvd., Suite 201, Juneau, Alaska 99801. The petition, findings, and supporting data are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: John Lindell, Endangered Species Biologist (see **ADDRESSES** above) (907/586–7240).

SUPPLEMENTARY INFORMATION:

Background

The Alexander Archipelago wolf occurs in insular and mainland southeast Alaska, from Dixon Entrance (U.S./Canada border) to Yakutat Bay, including all large islands of the Alexander Archipelago except Admiralty, Baranof, and Chichagof Islands. The subspecies may be threatened by elimination of habitat, reduction in prey availability due to the harvest of older forests, and disturbance due to increased opportunities for

public access on expanded logging road networks.

The comment period for the status review originally closed on July 19, 1994 (59 FR 26476). Since that date many parties have expressed interest in submitting substantive comments. In order to accommodate these parties, the Service is extending the comment period until October 1, 1994. Written comments may be submitted to the Service office in the ADDRESSES section.

Author

The primary author of this notice is Teresa Woods, U.S. Fish and Wildlife Service, Division of Endangered Species, 1011 E. Tudor Rd., Anchorage, Alaska 99503.

Authority

The authority of this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: August 17, 1994.

David B. Allen,

Acting Regional Director, Region 7, Fish and Wildlife Service.

[FR Doc. 94–21001 Filed 8–25–94; 8:45 am]

BILLING CODE 4310–55–M

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50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding for a Petition to List as Endangered or Threatened the Contiguous United States Population of the Canada Lynx and to Emergency List a Southern Rocky Mountain Population

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces a 90-day finding for a petition to add the contiguous United States population of the Canada lynx (*Lynx lynx canadensis*) to the List of Threatened and Endangered Species (List) and to add a southern Rocky Mountain population to the List via an emergency listing. The Service finds the petition presents substantial information indicating the requested action for the contiguous population may be warranted, but there is not substantial information to indicate that an emergency listing of a southern Rocky Mountain population may be warranted. As a result of a previous court settlement, a formal status review is underway.

DATES: The finding announced in this document was made on August 19, 1994. Comments and materials need to be submitted to the Service by October 1, 1994, to be considered in the 12-month finding.

ADDRESSES: Data, information, comments, or questions concerning this petition should be submitted to the Field Supervisor, U.S. Fish and Wildlife Service, 100 North Park Avenue, Suite 320, Helena, Montana 59601. The petition, 90-day finding, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Kemper McMaster, Field Supervisor, at the above address, telephone (406) 449–5225.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act (Act) of 1973 as amended (16 U.S.C. 1531 *et seq.*), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that the petitioned action may be warranted. This finding is to be based on all information available to the Service at the time the finding is made. To the maximum extent practicable, this finding is to be made within 90 days of the date the petition was received, and a notice regarding the finding is to be published promptly in the **Federal Register**. If the finding is that substantial information was presented, the Service also is required to promptly commence a review of the status of the species involved if one has not already been initiated under the Service's internal candidate assessment process.

This document meets the requirement that a notice be published for the 90-day finding made earlier for the petition discussed below. Information contained in this document is a summary of the information in the 90-day finding, which is the Service's decision document. A status review has been ongoing since the species was classified as a category 2 candidate species in the December 30, 1982, Vertebrate Notice of Review (47 FR 58454)

A petition dated April 23, 1994, was received by the Service from the Biodiversity Legal Foundation, Evan Frost, Mark Skatrud, Craig Coonrad, and Michael J. Polly on April 27, 1994. The petition requested that the conterminous United States population of the "North American" lynx (*Felis lynx canadensis*) be listed as a threatened or endangered species. Additionally, the petitioners requested that the southern Rocky Mountain population of the "North American" lynx in Wyoming and Colorado be emergency listed.

This species is now recognized as *Lynx lynx canadensis (Jones et al. 1992) and is often referred to as the Canada lynx. The Service accepts both of these names.*

The petitioners assert that the Canada lynx population in the contiguous United States should be added to the List of Threatened and Endangered Species because of the following factors: 1. Intensive logging that eliminates foraging and denning habitat for Canada lynx and snowshoe hare until the vegetation has regrown sufficiently, creates openings in the forest that Canada lynx avoid, and causes habitat fragmentation that creates barriers to dispersal and colonization; 2. Logging roads allow human accessibility that may increase incidental trapping of Canada lynx and disrupt Canada lynx travel and hunting; 3. Forest fire suppression adversely affects Canada lynx through the reduction of hare habitat; 4. Few comprehensive management plans for Canada lynx have been developed or implemented by government agencies; 5. State agencies have not adequately modified their furbearer regulations; 6. The Canada lynx's inherent characteristics, including naturally low population densities, specialized prey requirements, and large home ranges, make it vulnerable to extinction; and 7. The southern Rockies population is further threatened by ski area developments that may reduce habitat and prey base and increase human disturbance and accidental trapping. The petitioners requested that the southern Rocky Mountain population of the lynx be protected by emergency listing because it is severally imperiled, the population level is low, and it is reproductively isolated.

Listing Factors

The following are the five listing criteria as set forth in section 4(a)(1) of the Act and regulations (50 CFR Part 424) promulgated to implement the listing provisions of the Act and their applicability to the current status of the Canada lynx.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The suppression of forest fires and intensive logging prescriptions have had a detrimental effect on Canada lynx habitat, and logging roads have increased human accessibility to the species.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Past overharvest has had a detrimental effect on Canada lynx populations.

C. Disease or Predation

Canada lynx may be displaced or eliminated when competitors, such as the bobcat (*Lynx rufus*) or coyote (*Canis latrans*), expand into the range of the Canada lynx.

D. The Inadequacy of Existing Regulatory Mechanisms

States managed the Canada lynx as a furbearer in the past, but as a result of declining Canada lynx populations, Canada lynx are classified as threatened or endangered in Colorado, Michigan, New Hampshire, Vermont, Washington, and Wisconsin. It is also fully protected from harvest in Maine, Minnesota, New York, North Dakota, Utah, and Wyoming. Only Idaho and Montana currently allow the harvest of Canada lynx. The above States either prohibit or control the "take" of Canada Lynx, but their laws are relative ineffective in controlling the loss or modification of the species' habitat.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Human development has had a determinental effect on the Canada lynx habitat and population.

Finding

The Service may issue an emergency rule when there is an emergency posing a significant risk to the well-being of a species. Although the Canada lynx population in the southern Rockies may be small, the Service is not aware of any actions that immediately threaten the population. The petition did not present substantial information to indicate that emergency listing is warranted.

After finding that a 1991 petition to list the North Cascades population of the Canada lynx as endangered was not warranted, the Service concluded that a rangewide status review of the Canada lynx should be conducted (58 FR 36924). As a result of a court settlement in November 1993, the Service is now in the process of formally reviewing the status of the contiguous United States population of the Canada lynx to determine whether it should be added to the List of Threatened and Endangered Species. On February 2, 1994, the Service published a notice (50 FR 4887) announcing a continuation of the status review initiated in 1982. The findings from this review, which must be published by the court appointed date of November 15, 1994, will constitute the 12-month finding for this petition. Considering the language agreed to by the Service in the court settlement, information provided by the petitioners, and the fact that the Canada lynx is a category 2 candidate species, the Service finds that there is substantial information to indicate that listing the contiguous population of the Canada lynx may be warranted.

The Services' 90-day administrative finding contains more detailed information regarding the above decisions. A copy may be obtained from the Service's Helena office (see **ADDRESSES** section).

References Cited

Jones, J.R., Jr., R.S. Hoffman, D.W. Rice, C. Jones, R.J. Baker, and M.D. Engstrom, 1992. Revised checklist of North American mammals north of Mexico, 1991. Occas. Papers Mus. No. 146, Texas Tech Univ., Lubbock.

Author

This document was prepared by Lori H. Nordstrom (see ADDRESSES section).

Authority

The authority for this action is the Endangered Species Act (16 U.S.C. 1531 *et seq.*).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

Dated: August 19, 1994.

Bruce Blanchard,

Acting Director, Fish and Wildlife Service.

[FR Doc. 94–21077 Filed 8–25–94; 8:45 am]

BILLING CODE 4310–55–M

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50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding for a Petition to List the Queen Charlotte Goshawk and Request for Additional Information

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: The Fish and Wildlife Service (Service) announces a 90-day finding for a petition to list the Queen Charlotte goshawk (*Accipiter gentilis laingi*) under the Endangered Species Act of 1973, as amended. The Service finds that the petition presents substantial information indicating the requested action may be warranted. Through issuance of this notice, the Service is requesting additional information regarding this subspecies.

DATES: The finding announced in this document was made August 19, 1994. Comments and materials related to this petition finding may be submitted until further notice, but they must be received by November 25, 1994 to be considered in the 12-month finding.

ADDRESSES: Data, information, comments or questions concerning the status of the petitioned subspecies described below should be submitted to the Field Supervisor, U.S. Fish and Wildlife Service, Ecological Services, 3000 Vintage Blvd., Suite 201, Juneau, Alaska 99801–7100. The petition finding, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: John Lindell, Endangered Species Biologist (see **ADDRESSES** above) (907/586–7240).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the **Federal Register**. If the finding is positive, the Service must promptly commence a review of the status of the species involved and disclose its findings within 12 months (12-month finding).

On November 21, 1991, the Service published in the **Federal Register** (56 FR 58804) a notice of review for an updated list of animal taxa that are being considered for possible addition to the List of Endangered and Threatened Wildlife. Among the species included as a Category 2 candidate species was the northern goshawk (*Accipiter gentilis*). By inclusion as a subspecies, the Queen Charlotte goshawk (*Accipiter gentilis laingi*) was also designated a Category 2 candidate species at that time. Through the publication of that notice, the Service announced the possible vulnerability of the Queen Charlotte goshawk, initiated a review of subspecies' status, and requested additional pertinent information.

On May 9, 1994, a petition dated May 2, 1994, was received by the Service

from Mr. Peter Galvin of the Greater Gila Biodiversity Project, Silver City, New Mexico, and nine copetitioners, including the Southwest Center for Biological Diversity, the Biodiversity Legal Foundation, Greater Ecosystem Alliance, Save the West, Save America's Forests, Native Forest Network, Native Forest Council, Eric Holle, and Don Muller.

The petitioners request that the Queen Charlotte goshawk be listed as endangered under the Endangered Species Act (16 U.S.C. 1533(a)(1)) because of the following factors:

1. Present or threatened destruction, modification, or curtailment of habitat and range because of clearcut logging of mature and old growth forest;

2. Increased predation because of increased open area habitat caused by clearcut logging;

3. Inadequacy of existing regulatory mechanisms to protect preferred habitat from clearcut logging.

The Service has reviewed the petition, literature cited in the petition, and other references available in the Service's files, and contacted persons knowledgeable about this subspecies. On the basis of the best scientific and commercial information available, the Service finds the petition presents substantial information that listing the Queen Charlotte goshawk may be warranted.

As part of an ongoing status review, the Service will further evaluate the current status of the Queen Charlotte goshawk and determine if listing is warranted for either the entire subspecies or certain distinct population segments of the subspecies.

The Service would appreciate any additional data, comments, and suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other parties concerning the status of the Queen Charlotte goshawk.

The following issues are of particular interest to the Service:

1. The genetic, morphologic, and ecological differences, including variations of intergradation of the Queen Charlotte goshawk within it's currently described range, and from adjacent goshawk subspecies.

2. The range of geographic distribution of goshawks exhibiting the described characteristics of the Queen Charlotte goshawk subspecies.

3. Additional historic and current population data which may assist in determining population trends.

4. The extent and effects of long-term habitat conversion and fragmentation of mature forest habitat on Queen Charlotte goshawks and their prey.

References Cited

A complete list of all references cited in the 90-day finding is available upon request (see **ADDRESSES** section).

Authors

The primary author of this document is John Lindell, of the Juneau, Alaska Ecological Services Office. (See **ADDRESSES** section).

List of Subjects in 50 CFR part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); unless otherwise noted.

Dated: August 19, 1994.

Bruce Blanchard,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 94–21078 Filed 8–25–94; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Notice of Extension of Comment Period on Data Pertaining to the Subspecies Taxonomy of the California Gnatcatcher

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of extension of public comment period.

SUMMARY: The U.S. Fish and Wildlife Service (Service) gives notice that the comment period on the data pertaining to the subspecies taxonomy of the California gnatcatcher is extended. The notice of availability opening the public comment period was published on June 2, 1994 (59 FR 28508) and opened the comment period until August 1, 1994. On July 28, 1994, the Service extended the comment period to August 31, 1994 (59 FR 38426). This notice extends the comment period until October 31, 1994.

DATES: Comments and materials must be received by October 31, 1994.

ADDRESSES: Copies of the subject data are available from the U.S. Fish and Wildlife Service, Carlsbad Field Office, 2730 Loker Avenue West, Carlsbad, California 92008. Comments and materials concerning these data should be submitted to the above address.

FOR FURTHER INFORMATION CONTACT:

Gail Kobetich, Field Supervisor, at the address listed above (telephone 619/431–9440, facsimile 619/431–9624).

SUPPLEMENTARY INFORMATION:

Background

On March 30, 1993, the U.S. Fish and Wildlife Service (Service) published a final rule in the **Federal Register** determining the coastal California gnatcatcher to be a threatened species (58 FR 16741). In its decision to the list the gnatcatcher, the Service relied, in part, on taxonomic studies conducted by Dr. Jonathan Atwood of the Manomet Bird Observatory, Manomet, Massachusetts. As is the standard practice in the scientific community, the Service did not request, nor was it offered, the data collected and used by Dr. Atwood in reaching his conclusions. Instead, the Service depended upon the conclusions published by Dr. Atwood in a peer-reviewed scientific article on the subspecific taxonomy of the California gnatcatcher (Atwood 1991).

In response to a suit filed by the endangered Species Committee of the Building Industry Association of Southern California and the other plaintiffs, the United States District Court of the District of Columbia vacated the listing of the coastal California gnatcatcher because the Service did not make available Atwood's data for public review and comment. In response to the court decision, Dr. Atwood released his data to the Service, which the agency made available to the public for review and comment on June 2, 1994. On June 16, 1994, the court reinstated threatened status for the coastal California gnatcatcher until the Secretary of the Interior determines in a finding whether the listing should be revised or revoked in light of his review of the subject data and public comments received during the comment period. as a result of the court order of July 27, 1994, the Secretary must publish this finding in the **Federal Register** by December 31, 1994.

On July 1, 1994, the plaintiffs requested a 100-day extension in the comment period. Because the Secretary had no objection to a 30-day extension, both parties agreed to an extension in the comment period to August 31, 1994, which the Service published in the **Federal Register** on July 28, 1994 (59 FR 38426). On July 27, 1994, the court ordered the comment period extended to October 31, 1994.

References Cited

Atwood, J.L. 1991. Subspecies limits and geographic patterns of morphological variation in California gnatcatchers (*Polioptila californica*). Bulletin of the southern California Academy Sciences 90:118–133.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*)

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Thomas J. Dwyer,

Acting Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. 94–21068 Filed 8–25–94; 8:45 am]

BILLING CODE 4310–55–M

Notices

Federal Register
Vol. 59, No. 165
Friday, August 26, 1994

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

Information About Filing Fees For Reparation Complaints Under The Perishable Agricultural Commodities Act

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: This document gives notice to the public of the requirement that filing fees and handling fees be paid when informal and formal reparation complaints are filed under the Perishable Agricultural Commodities Act (PACA), as required by the enactment of Public Law 103–276.

FOR FURTHER INFORMATION CONTACT: J.R. Frazier, Assistant Chief, PACA Branch, USDA, AMS, F&V Division, P.O. Box 96456, Room 2095–So. Bldg., Washington, D.C., 20090–6456, 202–720–4180.

SUPPLEMENTARY INFORMATION: Public Law 103–276, signed by President Clinton on July 5, 1994, requires a filing fee of $60 for each informal complaint, and a handling fee of $300 for each formal complaint filed under Section 6(a) of the PACA (7 U.S.C. 499f(a)) during fiscal years 1995 and 1996. Therefore, a $60 fee must accompany each informal complaint filed on or after October 1, 1994, through September 30, 1996, before it will be considered a valid complaint, processed, and investigated by the agency. Informal complaints received without the fee will not toll the nine-month statute of limitations set by Section 6(a) (7 U.S.C. 499f(a)).

Pursuant to 7 CFR 47.3 of the Rules of Practice under the Perishable Agricultural Commodities Act, 1930, upon receipt of the informal complaint and the filing fee, the Director of the Fruit and Vegetable Division of the Agricultural Marketing Service (AMS) will cause such an investigation to be made as, in his or her opinion, is justified by the facts. If such investigation reveals that no violation of the act has occurred, no further action shall be taken and the person filing the informal complaint shall be so informed. In the alternative, pursuant to 7 CFR § 47.3(b)(2), the Director may attempt to effect an amicable or informal adjustment of the matter. If this attempt fails, the complainant may elect to proceed with a formal complaint pursuant to 7 CFR 47.6.

In addition to the filing fee, the complainant must submit a handling fee of $300 at the time of filing a formal complaint. A copy of the formal complaint will not be served on the respondent until the $300 handling fee is paid. Counterclaims filed under the PACA are considered new formal complaints and must be accompanied by the $300 handling fee before they will be considered filed and served on the opposing party. In determining the amount of damages incurred by an injured party, the Secretary will include the amount of the handling fee as additional damages.

All payment instruments for fees shall be made payable to the Agricultural Marketing Service (AMS) and shall be deposited by the Agency into the account of the Perishable Agricultural Commodities Act Fund. Filing of both informal and formal complaints will continue to be accomplished by providing the informal or formal complaint, accompanied by the appropriate fee, to the Director of the Fruit and Vegetable Division of the AMS as prescribed in 7 CFR § 47.3 and § 47.6 of the Rules of Practice under the Perishable Agricultural Commodities Act. Delivery of the complaint and fee to a regional office of the PACA Branch of the Fruit and Vegetable Division is deemed to be delivery to the Director of the Fruit and Vegetable Division. If a payment instrument is dishonored, the complainant will be allowed seven days to replace it with a cashier's check or a certified check or the complaint proceedings will be terminated.

Dated: August 22, 1994.

Kenneth C. Clayton,

Acting Administrator.

[FR Doc. 94–21089 Filed 8–25–94; 8:45 am]

BILLING CODE 3410–02–P

ARMS CONTROL AND DISARMAMENT AGENCY

Request for Companies Interested in Bidding for Contracts to Supply Inspection Equipment for Evaluation and Use in Training of Inspectors of the Technical Secretariat of the Organization for the Prohibition of Chemical Weapons

AGENCY: United States Arms Control and Disarmament Agency (ACDA).

ACTION: Companies interested in bidding for contracts to supply inspection equipment for evaluation and use in training of inspectors to the Organization for the Prohibition of Chemical Weapons Provisional Technical Secretariat in The Hague, The Netherlands.

SUMMARY: The U.S. Government has been notified that the Provisional Technical Secretariat (PTS), predecessor to the Technical Secretariat of the Organization for the Prohibition of Chemical Weapons (OPCW), a new international organization created by the Chemical Weapons Convention, is beginning the process of procuring inspection equipment for the evaluation and use in training of inspectors. The PTS has requested that by October 1, 1994, each Member State identify companies interested in bidding for contracts to provide such equipment. Upon receipt of names of interested companies, the PTS will compile an initial tender list for each type of equipment.

Because this information could be considered commercially sensitive, all responses will be classified as confidential by the PTS and will be treated accordingly. Only the names and addresses of interested companies will be made available to Member States.

Interested companies must answer a questionnaire providing company and production information and return it to the PTS in The Hague, The Netherlands, by October 1, 1994. Packages containing the questionnaire and specific information about equipment needed by the PTS can be obtained by contacting ACDA at the address below.

FOR FURTHER INFORMATION CONTACT: Interested companies should contact Mary Fannin (202) 647–8018 or Jennifer Inman (202) 647–6465, FAX: (202) 647–7663, at the U.S. Arms Control and

Disarmament Agency, 320 21st Street NW., Washington, DC 20451.

Cathleen E. Lawrence,

Director of Administration.

[FR Doc. 94-21101 Filed 8-25-94; 8:45 am]

BILLING CODE 6820-32-M

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 940827-4227]

Feature and Address Reference Source Assessment Survey

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of Consideration.

SUMMARY: Notice is hereby given that the Bureau of the Census plans to conduct a Feature and Address Reference Source Assessment Survey in the years 1995 through 1997 under the authority of Title 13, United States Code, Sections 141 and 193. The Census Bureau would use the information collected to identify and acquire reference sources needed to update address and geographic files that are critical for all three phases of the 2000 decennial census—data collection, data processing, and data tabulation. The information to be collected is not available from any single source, either governmental or nongovernmental.

DATES: Any suggestions or recommendations concerning the proposed survey should be submitted in writing by September 26, 1994 to receive consideration.

ADDRESSES: Director, Bureau of the Census, Washington, DC 20233.

FOR FURTHER INFORMATION CONTACT: John McKay, Geography Division, Bureau of the Census, Washington, DC 20233, or 301/763-4667.

SUPPLEMENTARY INFORMATION: The Census Bureau will be the sole user of the information collected, and will use it to determine the reference sources that are the most complete and up to date, vis-a-vis streets and addresses, for each geographic area, typically a county or place. The identification and acquisition of complete and current reference sources are necessary for updating the Topologically Integrated Geographic Encoding and Referencing (TIGER) data base and creating the Master Address File (MAF) so that the Census Bureau can use the TIGER data base to assign each structure number-street name address in the MAF to the correct geographic location. The TIGER data base is a nationwide geographic data base that is used for producing maps, organizing addresses, and tabulating statistical data. The MAF will be a permanent and continuously maintained nationwide inventory of housing unit addresses to meet the needs of the Census Bureau's statistical programs. The TIGER data base and the MAF are two critical components of the infrastructure to support the 2000 decennial census, and the success of that census depends, to a great extent, on their completeness and currency.

This survey proposal has been submitted to the Office of Management and Budget for approval in accordance with the Paperwork Reduction Act, Public Law 96-511, as amended.

Dated: August 18, 1994.

Paula J. Schneider,

Principal Associate Director for Programs, Bureau of the Census.

[FR Doc. 94-21113 Filed 8-25-94; 8:45 am]

BILLING CODE 3510-07-P

International Trade Administration

[A-570-827]

Preliminary Affirmative Determination of Critical Circumstances; Certain Cased Pencils From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

ACTION: Notice.

EFFECTIVE DATE: August 26, 1994.

FOR FURTHER INFORMATION CONTACT: Kristin Heim or Thomas McGinty, Office of Countervailing Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-3798 or (202) 482-5055, respectively.

PRELIMINARY CRITICAL CIRCUMSTANCES DETERMINATION: The Department of Commerce (the Department) published its preliminary determination of sales at less than fair value in this investigation on June 16, 1994 (54 FR 30911). On July 22, 1994, petitioner in this investigation alleged that there is a reasonable basis to believe or suspect that critical circumstances exist with respect to imports of certain cased pencils from the People's Republic of China (PRC). On August 1, 1994, petitioner amended the original allegation, submitting additional information regarding the existence of critical circumstances in this investigation.

In accordance with 19 CFR 353.15(b)(2)(ii), since this allegation was filed later than 20 days before the scheduled date of the preliminary determination, we must issue our preliminary critical circumstances determination not later than 30 days after the allegation was submitted.

Section 733(e)(1) of the Tariff Act of 1930, as amended (the Act), provides that the Department will determine that there is a reasonable basis to believe or suspect that critical circumstances exist if:

(A)(i) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation, or

(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than is fair value, and

(B) there have been massive imports of the class or kind of merchandise which is the subject of the investigation over a relatively short period.

History of Dumping

In this investigation, the first criterion of analysis is addressed in petitioner's July 22, 1994, submission. This submission provides documentation indicating that in April 1994 the government of Mexico published an antidumping duty order of 451 percent on certain cased pencils produced and exported from the PRC. Therefore, petitioner has established that there is a history of dumping elsewhere of such pencils by PRC producers/exporters.

Importer Knowledge

With respect to the alternative first criterion, we have consistently determined that preliminary antidumping duty margins in excess of 25 percent on U.S. purchase price sales are sufficient to impute importer knowledge of sales at less than fair value. *See, Final Determination of Sales at Less Than Fair Value: Silicon Metal from China* (56 FR 18570, April 23, 1991) and *Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread from Malaysia* (57 FR 38465, August 25, 1992). In this investigation, all responding and non-responding companies received preliminary antidumping duty margins in excess of 25 percent. Therefore, we determine that importers either knew or should have known that the exporter was selling certain cased pencils at less than fair value.

Massive Imports

Because we have preliminarily found that the first statutory criterion is met for finding critical circumstances in that there is a history of dumping of the

subject merchandise and, alternatively, there is actual or imputed importer knowledge of sales at less than fair value, we must consider the second statutory criterion: whether imports of the merchandise have been massive over a relatively short period.

According to 19 CFR 353.16(f) and 353.16(g), we consider the following to determine whether imports have been massive over a relatively short period of time: (1) Volume and value of the imports; (2) seasonal trends (if applicable); and (3) the share of domestic consumption accounted for by the imports.

When examining volume and value data, the Department typically compares the export volume for equal periods immediately preceding and following the filing of the petition. Under 19 CFR 353.16(f)(2), unless the imports in the comparison period have increased by at least 15 percent over the imports during the base period, we will not consider the imports to have been "massive."

To determine whether there have been massive imports over a relatively short period of time, the Department examines shipment information submitted by the respondent or import statistics, when respondent-specific shipment information is not available.

On August 4, 1994, the Department sent letters to respondents requesting information regarding shipments of certain cased pencils for the period January 1992 to May 1994. On August 16, 1994, we received the requested information filed in proper form for each of the four responding companies. Because company-specific shipment data was provided by the four responding companies in this investigation, we have used this data for our analysis.

To determine whether or not there have been massive imports of certain cased pencils over a relatively short period, we compared each respondent's export volume for the seven months subsequent to the filing of the petition (November 1993 through May 1994) to that during the seven months prior to the filing of the petition (April through October 1993). This period of review was selected based on the Department's practice of using the longest period for which information is available from the month that the petition was filed through the effective date of the preliminary determination of sales at less than fair value, which in this investigation was June 16, 1994. *See, Preliminary Affirmative Determination of Critical Circumstances; Silicon Carbide From the People's Republic of China* (59 FR 16795, April 8, 1994). We were unable to consider the share of domestic consumption accounted for by the imports, pursuant to § 353.16(f)(1)(iii), because the available data did not permit such a post-filing analysis. In addition, we found no evidence of seasonality, pursuant to 19 CFR 353.16(f)(1)(ii), with respect to PRC exports of certain cased pencils to the U.S.

Based on respondents' shipment information, we find that imports of certain cased pencils from the PRC have been massive over a relatively short period for the following companies: Shanghai Foreign Trade Corporation (SFTC), Shanghai Lansheng, Co., Ltd. (SLC), and China First Pencil Co., Ltd. (CFP). In addition, we find that imports from Guangdong Stationery & Sporting Goods I/E Corporation (GSSG), the other respondent in this investigation, have not been massive.

Therefore, because there is a history of dumping, and, alternatively, importers knew or should have known that the exporters were selling the merchandise at less than its fair value, and because imports of certain cased pencils have been massive over a relatively short period of time, we preliminarily determine that there is a reasonable basis to believe or suspect that critical circumstances exist with respect to imports of certain cased pencils from SFTC, SLC, and CFP. Because imports from GSSG have not been massive, we preliminarily determine that there is not a reasonable basis to believe or suspect that critical circumstances exist with respect to imports of certain cased pencils from GSSG. In addition, with respect to all non-responding procedures/exporters of certain cased pencils from the PRC, we preliminarily determine, as best information available, that critical circumstances exist.

Final Critical Circumstances Determination

We will make a final determination concerning critical circumstances when we make our final determination of sales at less than fair value in this investigation.

ITC Notification

In accordance with section 733(f) of the Act, we have notified the International Trade Commission (ITC) of our determination.

Public Comment

We will accept written comments on this preliminary determination of critical circumstances at the public hearing in this case currently scheduled for October 5, 1994, at 1:00 p.m. in room 3708.

This determination is published pursuant to section 733(f) of the Act.

Dated: August 22, 1994.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 94-21122 Filed 8-25-94; 8:45 am]

BILLING CODE 3510-DS-M

[A-588-833, and A-351-825]

Notice of Postponement of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Japan and Brazil

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: August 26, 1994.

FOR FURTHER INFORMATION CONTACT: Kate Johnson or Irene Darzenta, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482-4929 or (202) 482-6320, respectively.

Postponement

On July 28, 1994, the Department of Commerce (the Department) issued affirmative preliminary determinations in the antidumping duty investigations of stainless steel bar (SSB) from Japan (59 FR 39739, August 4, 1994) and Brazil (59 FR 39732, August 4, 1994).

On July 26, 1994, Daido Steel Co., Ltd. (Daido); Aichi Steel Works, Ltd. (Aichi); Sanyo Special Steel Co., Ltd. (Sanyo) (the three respondents in the Japanese investigation); Abe Bright Shaft Mfg. Co., Ltd.; Pacific Metals Co., Ltd.; Tohoku Steel Co., Ltd.; Yamashin Steel Co., Ltd.; and Kansai Metal Industry Co., Ltd. (other Japanese exporters), requested that the Department postpone the final determination in the Japanese investigation until 135 days after the publication date of the preliminary determination in the **Federal Register**, in accordance with section 735(a)(2)(A) of the Tariff Act of 1930, as amended (the Act) (19 U.S.C. 1673d(a)(2)(A)). Daido, Aichi, and Sanyo are Japanese exporters which accounted for a significant portion of exports of the subject merchandise to the United States. On July 26, 1994, Acos Villares, S.A. (the Brazilian respondent), an exporter which accounted for a significant portion of exports of the subject merchandise to the United States, requested that the Department postpone the final determination in the Brazilian investigation until 135 days after the publication date of the preliminary determination in the

Federal Register. In both of these investigations the respondents requested a postponement in order to permit the Department to align all of the related SSB investigations on one timetable, and thereby alleviate the administrative burden on all the parties.

On July 29 and August 1, 1994, petitioners submitted comments opposing respondents' request for a postponement of the final determinations. In those submissions, petitioners claimed they would be adversely affected by a postponement because importers would have the option of posting a bond in lieu of paying cash deposits of estimated antidumping duties. Petitioners also asserted that there is no increase in the level of administrative convenience for any of the parties if the final determinations are postponed.

The Department's regulations provide that upon the receipt of a proper request, the Department will postpone the final determination unless there are compelling reasons to deny the request (19 CFR 353.20(b)(1) (1994)). After considering the respondents' and petitioners' comments, we find that petitioners will not be adversely affected by a postponement of the final determinations. The preliminary results have already been issued and suspension of liquidation is already in effect. In addition, several of the SSB investigations have already been postponed. Given the complexity of these investigations as a whole, and the resulting increased burden on the Department to review and analyze the documents submitted in these investigations, aligning all the SSB investigations will ease the administrative burden on the Department. Therefore, in the context of these investigations, we have determined that the fact that respondents will be able to post a bond in lieu of paying an actual cash deposit for a slightly longer period does not rise to a compelling reason for denying the respondents' requests.

Therefore, we are postponing the final determinations on Japan and Brazil to the full extent authorized under section 735(a)(2)(A) of the Tariff Act. The final determinations will be issued not later than December 19, 1994, which is the due date for the previously extended investigations of SSB from India, Spain, and Italy.

In accordance with 19 CFR 353.38, case briefs or other written comments must be submitted in at least ten copies to the Assistant Secretary for Import Administration no later than November 8, 1994, and rebuttal briefs no later than November 15, 1994. In addition, a public version and five copies should be submitted by the appropriate date if the submission contains business proprietary information. In accordance with 19 CFR 353.38(b), we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. If requested, hearings are tentatively scheduled on November 17, 1994, at 2:00 p.m. for the Japanese investigation and on November 17 1994, at 3:00 p.m. for the Brazilian investigation. Both hearings will be held at the U.S. Department of Commerce, Room 1414, 14th Street and Constitution Avenue N.W., Washington D.C., 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

This notice is published pursuant to section 735(d) of the Act (19 U.S.C. 1673d(d)) and 19 CFR 353.20(b)(2).

Dated: August 16, 1994.

Barbara R. Stafford,

Deputy Assistant Secretary for Investigations.

[FR Doc. 94–21121 Filed 8–25–94; 8:45 am]

BILLING CODE 3510–DS–P

Performance Review Board Membership

This notice announces the appointment by the Department of Commerce Deputy Under Secretary for the International Trade, Timothy J. Hauser, of the Performance Review Board (PRB). This is a revised list of membership which includes previous members as listed in the August 12, 1993, Federal Register Announcement 58 FR 42939 with additional members added for a two-year term. The Purpose of the International Trade Administration's PRB is to review and make recommendations to the appointing authority on performance and other issues concerning members of the Senior Executive Service (SES). The members are:

Ann Hughes, Deputy Assistant Secretary for Western Hemisphere, International Economic Policy

Jude Kearney, Deputy Assistant Secretary for Service Industries and Finance, Trade Development

Eleanor Roberts Lewis—Chief Counsel for International Trade Administration—(non-ITA member)

Anne L. Alonzo, Deputy Assistant Secretary for Environmental Technologies Exports, Trade Development

Charles Ludolph, Director, Office of European Community Affairs, International Economic Policy

Susan Kuhbach, Director, Office of Countervailing Investigations, Import Administration

Mary Fran Kirchner, Deputy Assistant Secretary for Export Promotion Services, U.S. and Foreign Commercial Service

Dated: August 19, 1994.

James T. King, Jr.,

Human Resources Manager, ITA.

[FR Doc. 94–21123 Filed 8–25–94; 8:45 am]

BILLING CODE 3510–25–M

Wayne State University, et al.; Notice of Consolidated Decision on Applications for Duty-Free Entry of Electron Microscopes

This is a decision consolidated pursuant to Section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR 301). Related records can be viewed between 8:30 A.M. and 5:00 P.M. in Room 4211, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C.

Docket Number: 94–050. *Applicant:* Wayne State University, Detroit, MI 48201. *Instrument:* Electron Microscope, Model JEM-1010. *Manufacturer:* JEOL Ltd., Japan. *Intended Use:* See notice at 59 FR 23697, May 6, 1994. *Application Accepted by Commissioner of Customs:* April 12, 1994.

Docket Number: 94–054. *Applicant:* University of South Florida, St. Petersburg, FL 33701. *Instrument:* Electron Microscope, Model H-7100. *Manufacturer:* Hitachi Scientific Instruments, Japan. *Intended Use:* See notice at 59 FR 24690, May 12, 1994. *Order Date:* July 26, 1993.

Docket Number: 94–055. *Applicant:* Virginia Commonwealth University, Richmond, VA 23298-0024. *Instrument:* Electron Microscope, Model EM 900. *Manufacturer:* Carl Zeiss, Germany. *Intended Use:* See notice at 59 FR 24691, May 12, 1994. *Order Date:* January 31, 1994.

Comments: None received. *Decision:* Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as these instruments are intended to be used, was being manufactured in the United States at the time the instruments were ordered. *Reasons:* Each foreign instrument is a conventional transmission electron microscope (CTEM) and is intended for research or scientific educational uses requiring a CTEM. We know of no CTEM, or any other instrument suited to these purposes, which was being manufactured in the United States

either at the time of order of each instrument or at the time of receipt of application by the U.S. Customs Service.

Pamela Woods

Acting Director, Statutory Import Programs Staff

[FR Doc. 94–21120 Filed 8–25–94; 8:45 am]

BILLING CODE 3510–DS–F

National Oceanic and Atmospheric Administration

[I.D. 082294B]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council is convening an ad hoc meeting of fishery agency staffs to discuss an industry-funded inspector option for the proposed West Coast sablefish individual quota (IQ) program and a few key implementation issues such as interactions of the IQ program with the open access fishery.

The meeting will begin at 10:00 a.m. on September 14, 1994, and, if necessary, continue through the afternoon of September 16. It will be held at NMFS Northwest Region Office, in the Directors Conference Room, Building 1, 7600 Sand Point Way, NE., Seattle, WA.

FOR FURTHER INFORMATION CONTACT: Lawrence D. Six, Executive Director, Pacific Fishery Management Council, 2130 SW Fifth Avenue, Suite 224, Portland OR 97201; telephone: (503) 326–6352.

SUPPLEMENTARY INFORMATION: This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Michelle Perry Sailer at (503) 326–6352 at least 5 days prior to the meeting date.

Dated: August 22, 1994.

David S. Crestin,

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

[FR Doc. 94–21076 Filed 8–25–94; 8:45 am]

BILLING CODE 3510–22–F

National Telecommunications and Information Administration

Advisory Council on the National Information Infrastructure Notice of Open Meetings

AGENCY: National Telecommunications and Information Administration (NTIA).

ACTION: Notice is hereby given of a meeting of the United States Advisory Council on the National Information Infrastructure, created pursuant to Executive Order 12864, as amended. Notice is also given of a meeting of the Council's Mega-Project III, Privacy, Security and Intellectual Property.

SUMMARY: The President established the Advisory Council on the National Information Infrastructure (NII) to advise the Secretary of Commerce on matters related to the development of the NII. In addition, the Council shall advise the Secretary on a national strategy for promoting the development of the NII. The NII will result from the integration of hardware, software, and skills that will make it easy and affordable to connect people, through the use of communication and information technology, with each other and with a vast array of services and information resources. Within the Department of Commerce, the National Telecommunications and Information Administration has been designated to provide secretariat services to the Council.

AUTHORITY: Executive Order 12864, signed by President Clinton on September 15, 1993, and amended on December 30, 1993 and June 13, 1994.

DATES: The NII Advisory Council meeting will be held on Tuesday, September 13, 1994 from 8:30 a.m. until 4:00 p.m. The Mega-Project III meeting will be held on Monday, September 12, 1994 from 9:00 a.m. until 3:00 p.m.

ADDRESSES: The NII Advisory Council meeting will take place at the Celeste Bartos Forum, New York Public Library, Fifth Avenue and 42nd Street, New York, New York 10018. The Mega-Project III meeting will take place at the Shapiro Center for Engineering and Physical Science Research, Columbia University, 540 West 120 Street between Broadway and Amsterdam, New York, New York 10027.

FOR FURTHER INFORMATION CONTACT: Ms. Celia Nogales (or Ms. Meggan Griggs, alternate), Designated Federal Officer for the Advisory Council on the National Information Infrastructure, National Telecommunications and Information Administration (NTIA); U.S. Department of Commerce, Room 4892; 14th Street and Constitution Avenue, N.W.; Washington, D.C. 20230. Telephone: 202–482–1835; Fax: 202–482–0979; E-mail: nii@ntia.doc.gov.

SUPPLEMENTARY INFORMATION: Current members of the Advisory Council on the National Information Infrastructure (Mega-Project III members are indicated by an asterisk) include:

Mr. Morton Bahr
President
Communications Workers of America, AFL–CIO
Dr. Toni Carbo Bearman
Dean and Professor
School of Library and Information Sciences
University of Pittsburgh
Ms. Marilyn Bergman*
President
American Society of Composers, Authors and Publishers (ASCAP)
Ms. Bonnie L. Bracey
Teacher
Arlington County Public Schools
Mr. John F. Cooke*
President
The Disney Channel
Ms. Esther Dyson*
President
EDventure Holdings, Inc.
Mr. William C. Ferguson
Chairman and Chief Executive Officer
NYNEX Corporation
Dr. Craig I. Fields
Former Chairman and Chief Executive Officer
Microelectronics and Computer Technology Corporation
Mr. R. Jack Fishman
President, Lakeway Publishers, Inc. and Editor/Publisher of the *Citizen-Tribune*
Ms. Lynn Forester
President and Chief Executive Officer
FirstMark Holdings, Inc.
Honorable Carol Fukunaga
Senator
State of Hawaii
Mr. Jack Golodner*
President
Department for Professional Employees, AFL–CIO
Mr. Eduardo L. Gomez
President and General Manager
KABQ Radio
Mr. Haynes G. Griffin
President and Chief Executive Officer
Vanguard Cellular Systems, Inc.
Ms. LaDonna Harris
President and Founder
Americans for Indian Opportunity
Dr. George H. Heilmeier
President and Chief Executive Officer
Bellcore
Ms. Susan Herman
General Manager
Department of Telecommunications
City of Los Angeles

Mr. James R. Houghton
Chairman and Chief Executive Officer
Corning Incorporated
Mr. Stanley S. Hubbard*
Chairman, President, and Chief Executive Officer
Hubbard Broadcasting
Mr. Robert L. Johnson
President
Black Entertainment Television
Dr. Robert E. Kahn*
President
Corporation for National Research Initiatives
Ms. Deborah Kaplan
Vice President
World Institute on Disability
Mr. Mitchell Kapor
Chairman
Electronic Frontier Foundation, Inc.
Mr. Delano E. Lewis
President and Chief Executive Officer
National Public Radio
Mr. Alex J. Mandl
Executive Vice President, AT&T and Chief Executive Officer, Communications Services Group
Mr. Edward R. McCracken
Chairman and Chief Executive Officer
Silicon Graphics, Inc.
Dr. Nathan P. Myhrvold*
Senior Vice President, Advanced Technology
Microsoft Corporation
Mr. N.M. (Mac) Norton, Jr.*
Attorney-at-Law
Wright, Lindsey, and Jennings
Mr. Vance K. Opperman
President
West Publishing Company
Ms. Jane Smith Patterson
Advisor to the Governor of North Carolina for Policy, Budget, and Technology
State of North Carolina
Ms. Frances W. Preston*
President and Chief Executive Officer
Broadcast Music, Incorporated (BMI)
Mr. Bert C. Roberts, Jr.
Chairman and Chief Executive Officer
MCI Communications Corporation
Mr. John Sculley
Chief Executive Officer
Sculley Communications, Inc.
Ms. Joan H. Smith
Chairman
Oregon Public Utility Commission
Mr. Al Teller*
Executive Vice President, MCA Incorporated, and Chairman, MCA Music Entertainment Group
Mr. Laurence Tisch
President and Chief Executive Officer
CBS, Incorporated
Mr. Jack Valenti*
Chief Executive Officer and President
Motion Picture Association of America

Agenda

The Advisory Council agenda includes:

1. *Review of Progress on Mega-Projects*

2. *Framework for the NII Advisory Council*

Discussion by Co-Chairs

3. *Remarks by the Secretary of Commerce*

4. *Discussion of Critical Issues*

Social Applications of the NII

Government's Role in Developing the NII

Intellectual Property

5. *Public Discussion, Questions and Answers*

6. *Next Meeting Date and Agenda Items*

The Mega-Project III agenda includes:

1. *Introductory Remarks*

2. *Discussion of "Intellectual Property and the National Information Infrastructure," A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights, Information Infrastructure Task Force*

3. *Discussion of Possible Project Plans*

4. *Next Steps*

5. *Public Discussion, Questions and Answers (if time permits)*

Public Participation

The meetings will be open to the public, with limited seating available on a first-come, first-served basis. Any member of the public requiring special services, such as sign language interpretation, should contact Meggan Griggs at 202–482–1835.

Any member of the public may submit written comments concerning the Council's affairs at any time before or after the meetings. Comments should be submitted through electronic mail to nii@ntia.doc.gov or to the Designated Federal Officer at the address listed above.

Within thirty (30) days following the meetings, copies of the minutes of the Advisory Council and Mega-Project III meetings may be obtained through Bulletin Board Services at 202–501–1920, 202–482–1199, over the Internet at iitf.doc.gov, or from the U.S. Department of Commerce, National Telecommunications and Information Administration, Room 4892, 14th Street and Constitution Avenue, N.W.; Washington, D.C. 20230, Telephone 202–482–1835.

Larry Irving,

Assistant Secretary for Communications and Information.

[FR Doc. 94–21147 Filed 8–25–94; 8:45 am]

BILLING CODE 3510–60–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Addition and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Addition to and Deletions from Procurement List.

SUMMARY: The Committee has received a proposal to add to the Procurement List a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete services previously furnished by such agencies.

COMMENTS MUST BE RECEIVED ON OR BEFORE: September 26, 1994.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2–3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

Addition

If the Committee approves the proposed addition, all entities of the Federal Government (except as otherwise indicated) will be required to procure the service listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the service to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the service.

3. The action will result in authorizing small entities to furnish the service to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the service proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following service has been proposed for addition to Procurement List for production by the nonprofit agency listed:

Administrative Services

Waterways Experiment Station, Vicksburg, Mississippi

NPA: Warren County Association for Retarded Citizens, Inc., Vicksburg, Mississippi

Deletions

The following services have been proposed for deletion from the Procurement List:

Janitorial/Custodial

Lloyd Group Buildings, Portland, Oregon

Microfilm Reproduction

Mare Island Naval Shipyard, Vallejo, California

Repacking

Mare Island Naval Shipyard, Vallejo, California

Tape Cleaning

Wright-Patterson Air Force Base, Ohio

E.R. Alley, Jr.,

Deputy Executive Director.

[FR Doc. 94–21056 Filed 8–25–94; 8:45 am]

BILLING CODE 6820–33–P

Procurement List Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: September 26, 1994.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: On December 27, 1993, June 24 and July 1, 1994, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (58 FR 68398, 59 FR 32686 and 33958) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the services, fair market price, and impact of the additions on the current or most recent contractors, the Committee has determined that the services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the services.

3. The action will result in authorizing small entities to furnish the services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Accordingly, the following services are hereby added to the Procurement List:

Grounds Maintenance

District Ranger Office Building & Wahweap Housing Units, Glen Canyon National Recreation Area, Page, Arizona

Janitorial/Custodial

Military Traffic Management Command, 1312th Medium Port Command, Compton, California

Janitorial/Custodial

National Weather Service, Los Angeles International Airport, 10445 South Sepulveda Boulevard, Los Angeles, California

Janitorial/Custodial

Naval Air Station, Building 2739, Whidbey Island, Washington

Janitorial/Custodial

Criminal Justice Information Services Complex, Clarksburg, West Virginia

This action does not affect current contracts awarded prior to the effective date of this addition or options exercised under those contracts.

E. R. Alley, Jr.,

Deputy Executive Director.

[FR Doc. 94–21055 Filed 8–25–94; 8:45 am]

BILLING CODE 6820–33–P

COMPETITIVENESS POLICY COUNCIL

Notice of Forthcoming Meetings

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the Competitiveness Policy Council announces several forthcoming meetings.

DATES: September 19, 1994; 9:30 a.m. to 3 p.m.

ADDRESSES: Third Floor, 1726 M Street NW., Suite 300, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Howard Rosen, Executive Director, Competitiveness Policy Council, Suite 300, 1726 M Street NW., Washington, DC 20036, (202) 632–1307.

SUPPLEMENTARY INFORMATION: The Competitiveness Policy Council (CPC) was established by the Competitiveness Policy Council Act, as contained in the Trade and Competitiveness Act of 1988, Public Law 100–418, sections 5201–5210, as amended by the Customs and Trade Act of 1990, Public Law 101–382, section 133. The CPC is composed of 12 members and is to advise the President and Congress on matters concerning competitiveness of the U.S. economy. The Council's chairman, Dr. C. Fred Bergsten, will chair the meeting.

The meeting will be open to the public subject to the seating capacity of the room. Visitors will be requested to sign a visitor's register.

TYPE OF MEETING: Open.

AGENDA: The Council will discuss its FY 1995 workplan and consider additional business as suggested by its members.

Dated: August 23, 1994.

C. Fred Bergsten,

Chairman, Competitiveness Policy Council.

[FR Doc. 94–21075 Filed 8–25–94; 8:45 am]

BILLING CODE 4739–54–M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0034]

Clearance Request for Examination of Records by Comptroller General/Audit—Negotiation

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance (9000–0034).

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve an extension of a currently approved information collection requirement concerning Examination of Records by Comptroller General/Audit—Negotiation.

FOR FURTHER INFORMATION CONTACT: Beverly Fayson, Office of Federal Acquisition Policy, GSA (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Purpose

The Examination of Records by Comptroller General clause and the two audit clauses, Audit—Negotiation and Audit—Formal Advertising, implement the requirements of 10 U.S.C. 2313, 41 U.S.C. 254, and 10 U.S.C. 2306. The statutory requirements are that the Comptroller General and/or agency shall have access to, and the right to, examine certain books, documents and records of the contractor for a period of 3 years after final payment. The record retention periods required of the contractor in the clauses are for compliance with the aforementioned statutory requirements. The information must be retained so that audits necessary for contract surveillance, verification of contract pricing, and reimbursement of contractor costs can be performed.

B. Annual Recordkeeping Burden

The annual recordkeeping burden is estimated as follows: Recordkeepers, 19,142; hours per recordkeeper, 3.34; total recordkeeping burden hours, 63,934; recordkeeping retention period, 3 years.

Obtaining Copies of Proposals

Requester may obtain copies of OMB applications or justifications from the General Services Administration, FAR Secretariat (VRS), room 4037, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0034, Examination of Records by Comptroller General/Audit—Negotiation, in all correspondence.

Dated: August 12, 1994.

Beverly Fayson,

FAR Secretariat.

[FR Doc. 94–21000 Filed 8–25–94; 8:45 am]

BILLING CODE 6820–34–M

DEPARTMENT OF DEFENSE

Department of the Army

Meeting, Board of Visitors, United States Military Academy

AGENCY: United States Academy, DOD.

ACTION: Open meeting notice.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (PL 92–463), announcement is made of the following meeting:

Name of Committee: Board of Visitors, United States Military Academy.

Date of Meeting: 23 September 1994.

Place of Meeting: West Point, New York.

Start Time of Meeting: 8:00 a.m.

Proposed Agenda: Annual Report Preparation; Report on Admissions Review, Director of Intercollegiate Athletics Program Brief, Report on Summer Activities; Update Reports on Infrastructure Revitalization and Faculty Restructuring.

All proceedings are open. For further information contact Lieutenant Colonel John J. Luther, United States Military Academy, West Point, NY 10996–5000, Telephone: (914) 938–5870.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 94–21045 Filed 8–25–94; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF EDUCATION

Arbitration Panel Decision Under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of arbitration panel decision under the Randolph-Sheppard Act.

SUMMARY: Notice is hereby given that on November 26, 1990, an arbitration panel rendered a decision in the matter of *David Gardner, Charles Sadikoff, and Curtis M. Sheppard* v. *Tennessee Department of Human Services (Docket No. R–S/88–91).* This panel was convened by the U.S. Department of Education pursuant to the Randolph-Sheppard Act (the Act), 20 U.S.C. 107d–1(a), upon receipt of a complaint filed by petitioners, Messrs. Gardner, Sadikoff, and Shepherd, on July 22, 1988. The Randolph-Sheppard Act governs the operation of vending facilities by blind vendors on local, State, and Federal property and provides a priority for blind individuals to operate those facilities on Federal property. Under this section of the Randolph-Sheppard Act, a blind licensee dissatisfied with the State's operation or administration of the vending facility program authorized under the Act may request a full evidentiary hearing from the State licensing agency (SLA). If the licensee is dissatisfied with the State agency's decision, the licensee may file a complaint with the Secretary, who is then required to convene an arbitration panel to resolve the dispute.

FOR FURTHER INFORMATION: A copy of the full text of the arbitration panel decision may be obtained from George F. Arsnow, U.S. Department of Education, 400 Maryland Avenue, S.W., Room 3230, Switzer Building, Washington, D.C. 20202–2738. Telephone: (202) 205–9317. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at (202) 205–8298.

SUPPLEMENTARY INFORMATION: Pursuant to the Randolph-Sheppard Act (20 U.S.C. 107d–2(c)), the Secretary publishes a synopsis of arbitration panel decisions affecting the administration of vending facilities on Federal property.

Background

David Gardner, Charles Sadikoff, and Curtis M. Shepherd, complainants, are blind vendors licensed by the respondent, the Tennessee Department of Human Services, the SLA, pursuant to the Randolph-Sheppard Act, 20 U.S.C. 107 et seq. The SLA, through its Department of Rehabilitation, operates the Tennessee Vending Facility Program for blind vendors. The purpose of the program is to establish and support blind vendors operating vending facilities on Federal property. As the agency designated in Tennessee to carry out and manage the vending facility program established by the Act, the SLA duly promulgated rules and regulations to govern the State's program.

In December 1985, the SLA's rules and regulations were revised regarding classifications of facility types and the licensing of vendors. Five categories were established for vending facilities (all vending, counter and vending, counter service, on-site food preparation, and cafeteria). All of the existing vending facilities were placed into one of these categories by the SLA and the Committee of Blind Vendors.

In addition, all current licensed managers who had received training at the SLA's training center after April 1977 were certified in the type of facility they operated at the time the new rules were implemented. The new rules provided that, after certification to

operate a category of vending facility, the manager was required to attend one training session at the SLA's training center in Smyrna, Tennessee, within a two-year period following certification and every two years thereafter in order for the manager to maintain certification. Failure by a vendor to comply with this rule precluded the manager from assuming a location as the result of a bid on a facility opening.

Also, the rule change required that a manager be certified to operate a particular type of facility in order to obtain a promotion into that facility by bid or to obtain a transfer.

The complainants were notified in January 1986 that each vendor's certification was to be terminated because each had failed to attend an Upward Mobility Training Session at the SLA's center during the two-year period following their initial certification.

Each complainant alleged individual circumstances that prohibited them from attendance at a training session. Also, each complainant asked the SLA to adopt a uniform standard for blind vendors who wanted to use an alternative method to obtain continuing certification if the manager was unable to attend the SLA's training sessions, which usually required overnight travel.

On February 12, 1988, the complainants jointly filed for an evidentiary hearing, which was held on April 5, 1988, challenging the SLA's decision not to extend their certifications and requesting that the SLA allow them to show cause why they were unable to participate in the required training for recertification, as well as allow them to seek an alternative method of training.

Mr. Shepherd operates a vending facility at the Moccasin Bend Psychiatric Hospital and has done so for approximately 12 years. He alleged at the evidentiary hearing that he was unable to attend training due to constant care of two elderly aunts who reside with him. However, the SLA had informed Mr. Shepherd in March 1988 that his certification would be extended due to his personal situation. Mr. Shepherd declined the SLA's offer of certification extension in favor of an evidentiary hearing, thereby attempting to establish a uniform procedure for exempting any manager from attending training at the SLA's center if a manager has problems that prohibit attendance.

Mr. Sadikoff operates a vending facility at the Tennessee Valley Authority, and Mr. Gardner operates a vending facility at the Memphis Mental Health Institute. Both indicated they did not have confidence in anyone operating their respective vending locations during the three or four days they would be absent to attend mandatory SLA training for recertification.

On June 3, 1988, the Hearing Officer rendered a decision that was subsequently adopted as final agency action by the SLA on June 17, 1988. The decision of the Hearing Officer upheld the SLA's extension of Mr. Shepherd's certification for one year beyond the anticipated expiration due to the medical circumstances of his relatives. The Hearing Officer indicated that the SLA rules do not allow for a vendor to decline such an extension. The vendor may decline a particular type of certification; however, once certified to operate a particular type of facility, an extension of that certification is solely within the purview of the SLA. Also, the Hearing Officer ruled that the termination of both Mr. Sadikoff's and Mr. Gardner's certification was upheld. The evidence provided at the hearing clearly showed that neither vendor made any real effort during a two-year period following their current certification to attend a training session for recertification nor was a valid reason given for not complying with the SLA requirement.

The complainants expressed dissatisfaction with the final agency action and filed a request for a Federal arbitration panel to be convened. An arbitration hearing was held on February 12, 1990.

Arbitration Panel Decision

The central issue addressed by the arbitration panel was whether the State licensing agency can require retraining of licensed vendors at a specific rehabilitation center within the State in order to retain vendor certification to operate facilities.

The panel in a majority opinion dismissed Mr. Gardner's complaint as moot because the parties agreed that he subsequently attended and completed the required four-day training course in Smyrna, thus complying with the SLA's requirement.

Also, the arbitration panel concurred with the SLA's position of allowing complainant Sadikoff to continue to operate his current facility but declaring him ineligible for promotion, transfer, or demotion due to his refusal to take the required training. Complainant Sadikoff indicated his inability to find a person he could trust to manage his facility as the major factor in not completing the required training at Smyrna. The panel found this position to be unreasonable.

The panel further ruled that the SLA acted properly in requiring Mr. Shepherd to attend upward mobility training and, further, acted properly and within its scope of authority in granting the extension of time for Mr. Shepherd to attend a training session. The panel member designated by the complainants dissented. That panel member interpreted the Act, 20 U.S.C. 107d–4, and the regulations in 34 CFR 395.11 as requiring the SLA to provide training to licensed blind vendors and to make accommodations for those blind vendors who are unable to attend a regularly scheduled training session.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the U.S Department of Education.

Dated: August 23, 1994.

Judith E. Heumann,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 94–21136 Filed 8–25–94; 8:45 am]

BILLING CODE 4001–01–P

Arbitration Panel Decision Under the Randolph-Sheppard Act

AGENCY: Department of Education.

ACTION: Notice of Arbitration Panel Decision under the Randolph-Sheppard Act.

SUMMARY: Notice is hereby given that on August 31, 1991, an arbitration panel rendered a decision in the matter of *Fred V. Scarpello* v. *State of Nebraska, Department of Public Institutions, Division of Rehabilitative Services (Docket No. R–S/90–3).* This panel was convened by the U.S. Department of Education pursuant to 20 U.S.C. 107d-1(a) upon receipt of the original complaint filed by petitioner Fred Scarpello on January 2, 1990, and subsequently amended on June 3, 1991. The Randolph-Sheppard Act (the Act) creates a priority for blind individuals to operate vending facilities on Federal property. Under the Act, a blind licensee dissatisfied with the State's operation or administration of the vending facility program authorized under the Act may request a full evidentiary hearing from the State licensing agency (SLA). If the licensee is dissatisfied with the State agency's decision, the licensee may complain to the Secretary, who is then required to convene an arbitration panel to resolve the dispute.

FURTHER INFORMATION CONTACT: A copy of the full text of the arbitration panel decision may be obtained from George F. Arsnow, U.S. Department of Education, 400 Maryland Avenue SW., Room 3230 Switzer Building, Washington, DC. 20202–2738.

Telephone: (202) 205-9317. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at (202) 205-8298.

SUPPLEMENTARY INFORMATION: Pursuant to section 107d-2(c) of the Randolph-Sheppard Act, the Secretary publishes a synopsis of arbitration panel decisions.

Background

The complainant, Fred V. Scarpello, is a blind vendor licensed by the Nebraska Department of Public Institutions, the SLA under the provisions of the Act. Pursuant to a permit approved in 1978 by the U.S. Postal Service and a vendor operator's agreement between Mr. Scarpello and the SLA, Mr. Scarpello operates a vending facility on the second floor of the Main Post Office, 1124 Pacific Street, Omaha, Nebraska.

In 1989, the SLA submitted two applications for permits for the second floor of the Main Post Office. One permit covered the operation of a "snack bar facility," and attachment "C" to that application specified the items to be sold as "hot foods and salads." The other permit represented an updated permit and covered the items that Mr. Scarpello was in fact already vending under his current vending agreement.

The SLA granted the complainant's request for an evidentiary hearing. The issues that Mr. Scarpello wanted the arbitration panel to address were whether the SLA was splitting his location into two separate locations with separate permits that would allow for another vendor, and if that were the case, whether he would be entitled to have the additional location and permit automatically awarded to him. The State hearing officer ruled that the two permits already had been issued and that the complainant was not jeopardized by the new permits.

In July, 1990, Mr. Scarpello filed an action in the U.S. District Court for the State of Nebraska against the Director of the SLA and the U.S. Postal Service requesting that construction and remodeling of the new facilities be halted. This suit resulted in a settlement agreement and a dismissal of the action without prejudice on September 21, 1990. The settlement agreement permitted the Postal Service to proceed with planned construction and remodeling of the second floor lunchroom pursuant to the two permits that already had been approved. However, the parties agreed that the hot food line would not be implemented pending the outcome of the arbitration panel decision.

Arbitration Panel Decision

The arbitration panel ruled that the SLA, by entering into a vending agreement with the Postal Service to provide hot food service, did not violate the vending agreement between the SLA and Mr. Scarpello and that complainant's license was not being compromised. The new permit for the second facility described the facility as a "Snack Bar Facility," and the attachments to the Hot Food Permit made it clear that the services provided were different from the complainant's 1978 permit that was being updated. The SLA's decision to move, remodel, and enlarge the location and size of the food facilities on the second floor of the Main Post Office was in response to requests from postal employees to have an expanded dining area and to have served hot food different from the vended food that was available. The decision to offer hot foods and salads also meant that different equipment and facility design would be necessary.

The Panel rejected complainant's argument that he should be the vendor involved in any vending agreement issued pursuant to the "Hot Food Permit" because it would reduce his income and provide unfair competition.

The panel ruled that the Hot Food Permit did not provide for a facility similar to that of complainant and that there is nothing in the Randolph-Sheppard Act or regulations that prohibits competition among blind vendors. The panel considered that, if the SLA were to have proposed entering into an agreement to provide an identical facility as complainant's, a different issue would be involved. Accordingly, the panel held that the SLA could enter into a vending agreement with another blind licensee pursuant to the "Hot Food Permit."

One panel member dissented, arguing that complainant's original permit and agreement allowed him to serve hot food and to sell and serve salads prepared off the premises and sold over his counter and from the vending machines. This panel member believed that any change in the permit should have included a discussion and concurrence by the Committee of Blind Vendors pursuant to 20 U.S.C. 107(b)(1)(2). This panel member stated that the permit for "hot food" service was in violation of the vending agreement between the SLA and the complainant and that entering into another vending agreement with a vendor other than Mr. Scarpello violated the Act.

Complainant Scarpello filed a motion in U.S. District Court for the State of Nebraska on August 14, 1992, seeking judicial review of the panel's decision. The court ruled in an opinion dated June 13, 1994, that plaintiff (Scarpello) failed to show that the "arbitration panel's decision was arbitrary and capricious and insupportable on any rational basis." The District Court found that the evidence supported the panel's ruling that Mr. Scarpello's vending permit did not include "hot food and salads" and that his permit was not being split as the result of the SLA receiving a second permit for another vending location at the same site as plaintiff. Likewise, the court found that the evidence supported the panel's conclusion that the new permit did not threaten plaintiff's livelihood. The District Court ruled that plaintiff's complaint should be dismissed and that the arbitration panel decision should be affirmed.

The views and opinions expressed by the panel do not necessarily represent the views and opinions of the U.S. Department of Education.

Dated: August 22, 1994.

Howard R. Moses,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 94-21137 Filed 8-25-94; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Golden Field Office; Notice of Federal Assistance Award to Pacific International Center for High Technology Research

AGENCY: Department of Energy.

ACTION: Notice of Noncompetitive Financial Assistance Award.

SUMMARY: The U.S. Department of Energy (DOE), pursuant to the DOE Financial Assistance Rules, 10 CFR 600.7, is announcing its intention to award a cooperative agreement revision to The Pacific International Center for High Technology Research (PICHTR), Honolulu, Hawaii for activities to advance the commercialization of alcohol powered vehicles for Governmental and private sector vehicle fleets in Hawaii.

ADDRESSES: Questions regarding this announcement may be addressed to the U.S. Department of Energy, Golden Office, 1617 Cole Blvd., Golden Colorado 80401, Attention: Matt Barron, Contract Specialist at (303) 275-4787. The Contracting Officer is John W. Meeker. The Project Manager is Jerry Allsup at (303) 275-4740.

SUPPLEMENTARY INFORMATION: PICHTR, Honolulu, Hawaii has been conducting

research, funded by the DOE, for a number of years to develop cost effective methods to produce energy from biomass. The program has resulted in construction of a biomass gasification facility that can produce either a gaseous fuel for use in generating electricity or to produce an alcohol fuel for vehicular use. This effort will involve various activities focused on commercialization of alcohol powered vehicles in order to most effectively use the fuel to be produced.

DOE has performed a review in accordance with 10 CFR 600.7 and has made a determination of restricted eligibility pursuant to 10 CFR 600.7(b)(2)(i)(B). Subject to eligibility determinations, the Department of Energy intends to make a financial assistance award to PICHTR to undertake this activity.

The total project is estimated to cost $600,000 of which $300,000 will be provided by the participant and $300,000 will be provided by DOE. The anticipated period of performance is twelve (12) months.

Issued in Golden, Colorado on August 17, 1994.

John W. Meeker,

Contracting Officer, Golden Field Office.

[FR Doc. 94–21126 Filed 8–25–94; 8:45 am]

BILLING CODE 6450–01–M

Financial Assistance for Advanced Propulsion Division Program

AGENCY: Department of Energy, Albuquerque Operations Office.

ACTION: Renewal of Grant on a Noncompetitive Basis.

SUMMARY: The Albuquerque Operations Office (AL), pursuant to 10 CFR 600.7(b)(2), intends to renew, on a noncompetitive basis, it's current grant with Princeton University of Princeton, New Jersey.

DATES: Renewal Effective September 1, 1994.

FOR FURTHER INFORMATION CONTACT: Address comments to the attention of Erwin E. Fraqua, Department of Energy, Albuquerque Operations Office, P.O. Box 5400, Albuquerque, NM 87185–5400, (505) 845–6442.

SUPPLEMENTARY INFORMATION: Based upon a determination, pursuant to 10 CFR Part 600.7(b)(2), which authorizes a financial assistance award to be made noncompetitively if the activity to be funded is necessary to the satisfactory completion of an activity presently being funded by DOE or another federal agency, and for which competition for support would have a significant adverse effect on continuity or completion of the activity, AL gives notice of its intent to renew its current grant with Princeton University under the project entitled "Multi-Dimensional Measurements and Computations of Engine Flows and Combustion." The public purpose to be served by this renewal is to integrate the understanding of fuel injection processes and the fluid mechanics of combustion into current multi-dimensional models. Research in this program includes the development and testing of detailed spray models and the use of practical engines and injectors. The research is a continuation of work performed by Princeton under its current grant with DOE. The renewal period will be for four years. The government's funding of this grant is subject to the availability of funds.

Issued in Albuquerque, New Mexico, on August 12, 1994.

Richard A. Marquez,

Assistant Manager for Management and Administration.

[FR Doc. 94–21127 Filed 8–25–94; 8:45 am]

BILLING CODE 6450–01–M

Draft Supplemental Environmental Impact Statement for the Defense Waste Processing Facility at the Savannah River Site, Aiken, SC

AGENCY: Department of Energy.

ACTION: Notice of availability and public hearings.

SUMMARY: The U.S. Department of Energy (DOE) announces the availability of a draft supplemental environmental impact statement (SEIS) for the Defense Waste Processing Facility (DOE/EIS–0082–S–D) at the Savannah River Site, Aiken, South Carolina. The document supplements an EIS that DOE issued in 1982 (DOE/EIS–0082) to construct and operate the Defense Waste Processing Facility (DWPF). The draft SEIS assesses the potential environmental impacts of completing and operating the DWPF, as modified since 1982, to immobilize high-level radioactive waste at the Savannah River Site by incorporating the waste into borosilicate glass by a process called vitrification. The draft SEIS also addresses the potential impacts of no action and of alternative pretreatment processes for the waste. DOE invites public comments on the draft SEIS, and will hold public hearings on the document.

DATES: The public comment period extends through October 11, 1994. Written comments regarding the document should be postmarked by that date to ensure consideration in preparation of the final SEIS. Comments postmarked after that date will be considered to the extent practicable. Comments may also be submitted orally or in writing at the following public hearings (which will also serve as information meetings): September 13, 1994, in Aiken, South Carolina; September 15, 1994, in Beaufort and Hardeeville, South Carolina and Savannah, Georgia; and September 20, 1994, in Allendale, Barnwell and Columbia, South Carolina. The locations for these meetings are identified in **SUPPLEMENTARY INFORMATION** below.

ADDRESSES: Comments should be addressed to: Dr. K.L. Hooker, NEPA Compliance Officer, U.S. Department of Energy, Savannah River Operations Office, P.O. Box 5031, Aiken, South Carolina 29804–5031, Attention: "DWPF SEIS", Telephone: (803) 725–9615; or by telephone or facsimile through the Information Line (800) 242–8269.

FOR FURTHER INFORMATION CONTACT: Requests for further information or for copies of the draft SEIS should be directed to: Dr. K.L. Hooker, NEPA Compliance Officer, U.S. Department of Energy, Savannah River Operations Office, P.O. Box 5031, Aiken, South Carolina 29804–5031, Attention: "DWPF SEIS"; Telephone: (803) 725–9615 or through the Information Line (800) 242–8269. Requests for further information on DOE procedures for complying with the National Environmental Policy Act (NEPA) should be directed to: Ms. Carol Borgstrom, Director, Office of NEPA Oversight (EH–25), U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585, Telephone: (202) 586–4600 or leave a message at (800) 472–2756.

SUPPLEMENTARY INFORMATION:

Availability of Draft Supplemental EIS

Copies of the draft SEIS have been provided to Federal, State, and local agencies, organizations, and individuals known to be interested in the Savannah River Site. Additional copies may be obtained by contacting Dr. K.L. Hooker at the address given above. The draft SEIS and the documents referenced in it are available for public inspection at the DOE Reading Room located at the University of South Carolina's Aiken-Graniteville Campus Library, 2nd Floor, University Parkway, Aiken, South Carolina; and in DOE's Freedom of Information Reading Room, Room 1E–190 Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. Copies of the draft SEIS are also available for public

inspection at many local and regional libraries in Georgia and South Carolina.

Invitation To Comment

Interested parties are invited to provide comments on the draft SEIS. DOE will consider written and oral comments equally when preparing the final SEIS. Written comments should be sent to Dr. K.L. Hooker at the address given above. To be considered in the final SEIS, written comments should be postmarked by October 11, 1994; comments postmarked after that date will be considered to the extent practicable.

Information Meetings and Public Hearings

Combined information meetings and public hearings on the draft SEIS have been scheduled as follows:

September 13, 1994, from 1:00 p.m. to 4:00 p.m. and 6:00 p.m. to 9:00 p.m.:
Stevenson-McClelland Building, Pendleton Street and Hayne Avenue, Aiken, South Carolina 29801

September 15, 1994, from 9:00 a.m. to 11:00 a.m.:
Boys and Girls Club, 1100 Boundary Street, Beaufort, South Carolina 29902

September 15, 1994, from 2:00 p.m. to 4:00 p.m.:
Hardeeville City Hall, 36 East Main Street, Hardeeville, South Carolina 29927

September 15, 1994, from 7:00 p.m. to 9:00 p.m.:
Coastal Georgia Center for Continuing Education, 305 Martin Luther King Boulevard, Savannah, Georgia 31401

September 20, 1994, from 9:00 a.m. to 11:00 a.m.:
Allendale-Fairfax High School, Route 278, Allendale, South Carolina 29810

September 20, 1994, from 2:00 p.m. to 4:00 p.m.:
Barnwell County Museum, Marlborough Avenue, Barnwell, South Carolina 29812

September 20, 1994, from 7:00 p.m. to 9:00 p.m.:
Holiday Inn Coliseum, 630 Assembly Street, Columbia, South Carolina 29201

Each session will begin with presentations regarding the proposed action and an opportunity for discussion and questions by the public. After approximately one hour, the formal hearing will begin, and public comments will be recorded by a court reporter. The moderator of the hearing may ask clarifying questions to ensure that comments are understood, but will not across-examine the commenter. Additional procedural guidance will be provided by the moderator at the start of the hearings. To allow all interested parties an opportunity to speak, five minutes will be allotted to each individual or representative of a group. More speaking time may be available, depending upon the number of people who wish to comment at a specific hearing. Commenters are requested to provide DOE with written copies of their oral comments if possible. Individuals who wish to preregister to speak at any of the hearings may do so by calling (800) 242–8269.

A transcript of the hearings will be prepared, and DOE will make the entire record of the hearings, including the transcript, available for public inspection at the DOE reading rooms listed above.

Issued in Washington, D.C., on August 22, 1994.

Jill E. Lytle,

Deputy Assistant Secretary for Waste Management, Environmental Management.

[FR Doc. 94–21125 Filed 8–25–94; 8:45 am]

BILLING CODE 6450–01–M

Notice of Floodplain and Wetlands Involvement at the Pantex Plant, Amarillo, TX

ACTION: Notice of floodplain and wetland involvement.

SUMMARY: DOE proposes to conduct various activities within floodplains and wetlands on or surrounding the Pantex Plant in Carson County, 17 miles northeast of Amarillo, Texas. The proposed activities would include Resource Conservation and Recovery Act (RCRA) or Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) site characterization investigations such as environmental monitoring and surveillance activities as well as wastewater and storm water discharges. In accordance with 10 CFR part 1022, DOE will prepare a floodplain/wetland assessment and will perform these proposed actions in a manner so as to avoid or minimize potential harm to or within the affected floodplain and wetlands.

DATES: Comments on the proposed action must be received by September 12, 1994.

ADDRESSES: Comments concerning this Notice should be addressed to: Floodplain and Wetlands Comments, Tom Walton, Public Affairs Officer, Public Affairs Office, U.S. Department of Energy, Amarillo Area Office, P.O. Box 30020, Amarillo, Texas 79177, (806) 477–3120, (806) 477–3185 (Fax).

Information on this proposed action, including a map of proposed activity locations, is also available.

FOR FURTHER INFORMATION CONTACT: Information on general DOE floodplain and wetland environmental review requirements is available from: Carol M. Borgstrom, Director, Office of NEPA Oversight, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–4600 (800) 472–2756.

SUPPLEMENTARY INFORMATION: DOE proposes to conduct various activities within floodplains and wetlands on and surrounding the Pantex Plant. Site characterization activities would be conducted in support of the Permit for Industrial Solid Waste Management Site issued by the Texas Water Commission (now known as the Texas Natural Resources Conservation Commission) as part of DOE's effort to determine the nature and extent of any environmental contamination resulting from Pantex operations. These activities would occur within Solid Waste Management Units (SWMU) 6 (Playa Basin 1), SWMU 7 (Playa Basin 2), SWMU 8 (Playa Basin 3), SWMU 9 (Playa Basin 4), and SWMU 10 (Pantex Lake). Additional characterization may be required as a result of the site being listed on the National Priorities List. Specific activities would include but not be limited to the following:

1.1 Installation of monitoring wells. Monitoring wells would be drilled into the perched groundwater zone if found to be present in the proposed locations. If the perched groundwater is not present, wells may be completed into the High Plains Aquifer (locally known as the Ogallala Aquifer). Well drilling would involve limited driving of heavy equipment into the proposed areas for the purpose of drilling and boring. Twenty-four-hour pump tests would be conducted following completion of any monitoring wells. Water produced from any pump tests would be discharged to the playas if the analytical testing results allow for such disposition.

1.2 Surface water samples, ditch sediment samples, and vadose zone samples. Surface water sampling would consist of collecting a sample bottle for surface water. Site access would be by wading. Sediment sampling would consist of taking a sample of the sediment with a hand auger or with a vibrating core sampling device. The sediment samples would typically be two inches in diameter and one foot

deep. Access would be by walking or wading if water is present. Proposed boreholes for vadose zone samples would include borings ranging in depths from 4 feet to 30 feet. Borehole drilling would involve driving a drilling rig to the site, drilling the boreholes, and collecting the core samples as the drilling progresses. The boreholes would be closed by backfilling with the cuttings and/or five percent bentonite/cement.

1.3 Environmental monitoring and surveillance activities. DOE would conduct activities including: collection of groundwater, surface water, vegetation, soil, and sediment samples, installation and maintenance of environmental monitoring equipment, and routine monitoring and downloading of information from installed instrumentation in various locations within the wetlands and floodplains.

In addition, DOE would continue to discharge industrial and storm water from existing outfalls to Playas 1, 2, and 4; discharge storm water to Playa 3, and discharge treated domestic wastewater to Playa 1.

DOE proposes to assess any floodplains/wetlands impacts associated with Texas Tech University's agricultural operations including grazing in the wetlands and floodplains, and farming and related activities in the floodplains.

In accordance with DOE regulations for compliance with floodplain and wetlands environmental review requirements (10 CFR Part 1022), DOE will prepare a floodplain/wetland assessment for these proposed DOE actions which may be incorporated into the appropriate National Environmental Policy Act documentation. After DOE issues the assessment, a floodplain statement of findings will be published in the **Federal Register**.

Issued in Washington, D.C., on August 12, 1994.

Ned B. Larson,

Director, Office of Southwestern Area Programs, Environmental Restoration.

[FR Doc. 94-21131 Filed 8-25-94; 8:45 am]

BILLING CODE 6450-01-P

Office of Environment, Safety and Health

Enforcement of Employee Safety Standards at Nuclear Weapons Facilities

AGENCY: Department of Energy.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Department of Energy (DOE or the Department) hereby gives notice of, and invites public comments on, its plans to implement the enforcement authority provided pursuant to section 3131(b) of the National Defense Authorization Act for Fiscal Years 1992 and 1993 (Act). This statute provides for the assessment of civil penalties against DOE contractors who fail to provide training to employees who are assigned to carry out hazardous substance response or emergency response duties, or who fail to certify to DOE that employees are adequately trained. This advance notice requests public comment on DOE's plan to implement the enforcement provisions of the statute.

DATES: The public is invited to submit comments and recommendations to the address listed below by October 25, 1994.

ADDRESSES: Mail or telefax comments to: Roy Gibbs (EH-31.1), Office of Occupational Safety, Department of Energy, Washington, D.C. 20585, (301) 903-4343, Telefax No. (301) 903-2239

Comments may be examined in the DOE Freedom of Information Reading Room, 1E-190, 1000 Independence Avenue SW., Washington, D.C. 20585, between 9:00 AM and 4:00 PM, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: David M. Smith (EH-31.1), Office of Occupational Safety, Department of Energy, Washington, D.C. 20585 (301) 903-4669.

SUPPLEMENTARY INFORMATION

Introduction

Section 3131 of the Act (42USC7274d(6)), enacted on December 5, 1991, addresses the issue of worker training at nuclear weapons facilities. Subsection (a) provides for the awarding of grants to train workers and to develop training curricula. Subsection (b) provides for the assessment of civil penalties against any DOE contractor who fails to provide training to its employees who are engaged in hazardous substance response or emergency response at DOE nuclear weapons facilities. Subsection (b) requires that penalties shall be assessed against any contractor who fails to provide the training, or fails to certify to DOE that its employees are adequately trained for such response pursuant to orders issued by DOE relating to employee safety training.

Since the passage of the Occupational Safety and Health Act of 1970 (OSH Act), Pub. L. No. 91-596, contractor employee health and safety protection at DOE nuclear facilities has been exempt from Occupational Safety and Health Administration (OSHA) enforcement under section 4(b)(1) of the OSH Act. This section provides that the OSH Act does not apply to working conditions of employees if another Federal or state agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health (OSH). DOE, as well as its predecessor agencies, the Atomic Energy Commission and the Energy Research and Development Administration, has exercised such authority with regard to contractor employees at facilities operated under authority of the Atomic Energy Act of 1954.

On May 5, 1993, the Secretary of Energy announced a number of safety and health initiatives stressing the need for the Department to operate on a par with private industry in the safety and health arena. One of those initiatives involved the commencement of consultations with OSHA with the aim of establishing OSHA regulation of all DOE facilities. The Secretary recognized, however, that OSHA is not now ready to undertake regulation of DOE activities, and in light of the significant issues that must be addressed prior to the implementation of OSHA jurisdiction, the Department anticipates that a transition period of three to five years is necessary. Nonetheless, the Department is currently obligated to implement the enforcement authority of section 3131(b) of the Act, and intends to do so as an interim measure pending the transition to OSHA jurisdiction. The Department believes that implementation of this enforcement authority during the transition period will help to ensure that the training requirements for contractor employees are met. DOE invites the public to comment on its plans to implement its enforcement authority pursuant to section 3131(b) of the Act.

Background and Legislative History

Section 3131 of the Act contains two substantive provisions aimed at addressing the concern of Congress regarding the adequacy of worker safety training for employees handling hazardous substances, and responding to emergencies involving hazardous substances, at the nation's nuclear weapons facilities. Subsection (a) authorizes the Secretary to award grants to nonprofit organizations that have demonstrated (as determined by the Secretary) capabilities in providing safety and health training and in involving, in training, groups of workers whose duties include hazardous

substance response or emergency response. The Secretary is required to give preference to employee organizations and joint labor-management training programs that are grant recipients under section 126(g) of the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9660a, a program administered by the National Institute of Environmental Health Sciences (NIEHS). The Department has entered into an agreement with NIEHS to award and administer the grants provided under section 3131(a) of the Act.

Section 3131(b), the subject of this notice, provides that the Secretary shall assess civil penalties of up to $5,000 per day against any DOE contractor who, as determined by the Secretary, fails to provide training for employees engaged in hazardous substance response or emergency response, or who fails to certify to the Department that its employees are adequately trained for such response pursuant to DOE orders relating to employee safety training. Because of this statutory mandate, DOE does not intend to consider a reduction in contractor award fees in lieu of payment of civil penalties.

The Secretary is required by section 3131(c) to prescribe regulations for the implementation of these requirements. The Department intends to proceed with rulemaking after completion of its review of the comments and materials received in response to this Notice.

Section 3131(d) provides that the term "hazardous substance" includes both radioactive waste and mixed radioactive and hazardous waste. The Department intends also to cover substances identified within the definition of hazardous substance in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (42 U.S.C. 9601.101(14)). The statute does not define the term "nuclear weapons facility."

Certification of Training

Section 3131 places on the contractor the burden of conducting required training, certifying the completion of such training, and keeping records to document that the training requirement has been satisfied. In developing its implementing regulations, DOE is particularly interested in receiving comments on the following matters:

1—DOE intends to make contractors responsible for maintaining all documentation related to the hazardous substance and emergency response training of their work force. DOE will consider what, if any, data should be kept, and in what format. DOE's goal will be to provide easy review for DOE field inspectors while minimizing the burden on contractors. DOE also is considering requiring a wallet-sized photo identification card for each trained employee that would contain, among other things, the date of refresher training, giving DOE the opportunity to document training in the field.

2—Section 3131 permits DOE contractors to certify that employees have been adequately trained and do not need additional training. DOE seeks comment on the most effective and efficient way for the employer to certify that employees are adequately trained especially in those cases where the employer does not actually provide the training.

3—One objective of section 3131(b) is to ensure that all employees who are, or may be, engaged in hazardous substance response or emergency response at the Department's nuclear weapons facilities receive adequate safety training. DOE has the further objective of ensuring that any enforcement program is structured to provide appropriate incentives for DOE contractors to comply with DOE requirements applicable to this training, including self-identification, reporting, and prompt correction of deficiencies. Comments are requested on these objectives and on ways to achieve these objectives in an effective and efficient manner for both DOE and its contractors.

4—The Department is also developing criteria for assessing the adequacy of contractor training programs for employees engaged in hazardous substance or emergency response operations. These criteria will be used by DOE field inspectors to evaluate and certify the adequacy of contractor training programs. DOE seeks comment on the development of appropriate criteria.

5—The Act defines the term "hazardous substance" to include radioactive waste and mixed radioactive and hazardous waste. This definition is not limited, however, to those substances. For purposes of the implementing regulations, DOE intends to include within the definition of hazardous substance, in addition to radioactive and mixed waste, those substances identified within the definition of hazardous substance in section 101(14) of CERCLA. DOE seeks comments on this definition.

6—DOE is considering defining "nuclear weapons facility" as follows: "Any DOE reactor or non-reactor nuclear facility involved in research, production, assembly, storage, dismantling, or disposal of nuclear weapons, or material for nuclear weapons, that generates or contains hazardous substances, radioactive waste or mixed radioactive and hazardous waste." Comments are requested on this definition.

7—Comments are requested on the enforcement procedures that are appropriate to assure compliance with the intent of Congress, including the desirability of integration of the section 3131(b) enforcement procedures with the proposed DOE program set forth at 10 CFR Part 820, for enforcing violations of nuclear safety requirements which includes assessment of civil penalties under separate statutory authority, and whether the Department should provide for exemption from dual civil penalty assessments under both Part 820 and the Act. Comments are also requested on enforcement options such as varying penalty levels commensurate with the severity of the violation, past performance and multiple violations.

DOE solicits comments on all of these issues and objectives, and on ways to achieve these objectives in an effective and efficient manner for both DOE and its contractors.

Upon completion of its review of all comments received and other relevant materials, DOE will develop a Notice of Proposed Rulemaking for publication in the **Federal Register.**

Issued in Washington, DC, August 15, 1994.

Tara O'Toole,

Assistant Secretary, Environment, Safety and Health.

[FR Doc. 94–21128 Filed 8–25–94; 8:45 am]

BILLING CODE 6450–01–P

Energy Information Administration

Agency Information Collection Under Review by the Office of Management and Budget

AGENCY: Energy Information Administration, Energy.

ACTION: Notice of request submitted for review by the Office of Management and Budget.

SUMMARY: The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (Pub. L. 96–511, 44 U.S.C. 3501 *et seq.*). The listing does not include collections of information contained in new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements

collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection; (2) Collection number(s); (3) Current OMB docket number (if applicable); (4) Collection title; (5) Type of request, e.g., new, revision, extension, or reinstatement; (6) Frequency of collection; (7) Response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) Affected public; (9) An estimate of the number of respondents per report period; (10) An estimate of the number of responses per respondent annually; (11) An estimate of the average hours per response; (12) The estimated total annual respondent burden; and (13) A brief abstract describing the proposed collection and the respondents.

DATES: Comments must be filed within 30 days of publication of this notice. If you anticipate that you will be submitting comments but find it difficult to do so within the time allowed by this notice, you should advise the OMB DOE Desk Officer listed below of your intention to do so, as soon as possible. The Desk Officer may be telephoned at (202) 395–3084. (Also, please notify the EIA contact listed below.)

ADDRESSES: Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place N.W., Washington, D.C. 20503. (Comments should also be addressed to the Office of Statistical Standards at the address below.)

FOR FURTHER INFORMATION AND COPIES OF RELEVANT MATERIALS CONTACT: Norma White, Office of Statistical Standards, (EI–73), Forrestal Building, U.S. Department of Energy, Washington, D.C. 20585. Ms. White may be telephoned at (202) 254–5327.

SUPPLEMENTARY INFORMATION: The energy information collection submitted to OMB for review was:

1. Federal Energy Regulatory Commission
2. FERC–549
3. 1902–0086
4. Gas Pipeline Rates: NGPA Title III and Blanket Certificate Transactions
5. Extension
6. On occasion
7. Mandatory
8. Businesses or other for-profit
9. 294 respondents
10. 17.69 responses
11. 2.7 hours per response
12. 14,045 hours
13. The Commission uses the data to ensure compliance with Sections 311 and 312 of the Natural Gas Policy Act and Section 7 of the Natural Gas Act. The data are necessary to evaluate the legitimacy of a transaction; ensure just and reasonable or fair and equitable rates charged for certain sales and transportation transactions.

Authority: Section 2(a) of the Paperwork Reduction Act of 1980, (Pub. L. 96–511), which amended Chapter 35 of Title 44 United States Code (See 44 U.S.C. 3506(a) and (c)(1)).

Issued in Washington, D.C., August 19, 1994.

John Gross,

Acting Director, Office of Statistical Standards, Energy Information Administration.

[FR Doc. 94–21130 Filed 8–25–94; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. QF84–147–000]

Grays Ferry Cogeneration Partnership; Notice of Application for Commission Certification of Qualifying Status of a Cogeneration Facility

August 22, 1994.

On August 11, 1994, Grays Ferry Cogeneration Partnership of 225 South Eighth Street, Philadelphia, PA 19106, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to Section 292.207(b) of the Commission's Regulations. No determination has been made that the submittal constitutes a complete filing.

According to the applicant, the topping-cycle cogeneration facility, which will be located in Philadelphia, Pennsylvania, will consist of a boiler and a steam turbine generator. Steam recovered from the facility will be purchased by Trigen—Philadephia Energy Corporation for its urban distribution system. The Maximum net electric power production capacity of 38.9 MW will be purchased by Philadelphia Electric Company. The primary energy source of the facility will be natural gas. Installation of the facility is expected to commence on or before November 4, 1994.

Any person desiring to be heard or objecting to the granting of qualifying status should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with rules 211 and 214 of the Commission's rules of Practice and Procedure. All such motions or protests must be filed within 30 days after the date of publication of this notice in the **Federal Register** and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94–21002 Filed 8–25–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP94–728–000]

NorAm Gas Transmission Company; Notice of Request Under Blanket Authorization

August 22, 1994.

Take notice that on August 19, 1994, NorAm Gas Transmission Company (NGT), P.O. Box 21734, Shreveport, Louisiana 71151, filed in Docket No. CP94–728–000 a request pursuant to Sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.216) for authorization to abandon certain facilities in Arkansas, under NGT's blanket certificate issued in Docket No. CP82–384–000, *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.

NGT proposes to abandon a 2-inch tap and 4-inch meter run originally installed to provide service to ARKLA, a division of NorMa Energy Corp. (ARKLA), for deliveries to the City of El Dorado, in Union County, Arkansas. It is stated that ARKLA has installed distribution facilities that make NGT's facilities unnecessary.

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 Section 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 therefore, 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. 94–21003 Filed 8–25–94; 8:45 am]

BILLING CODE 6717–01–M

Office of Energy Research

Notice of Availability of Management Plan for the Conduct of Research, Development, Demonstration, and Commercial Application of Energy Technologies

AGENCY: Department of Energy.

ACTION: Notice of availability and request for comment.

SUMMARY: The Department of Energy is today giving notice that the Management Plan for the Conduct of Research, Development, Demonstration, and Commercial Application of Energy Technologies (the Plan) required by the Energy Policy Act of 1992 (the Act) is available for public comment. As required by the Act, the Plan will be made available for public comment for a 90 day period. Written comments provided during this period will be considered in the formulation and issuance of the final Plan.

DATES: Parties wishing to comment on the Plan should do so in writing to the address given below by November 25, 1994.

ADDRESSES: Written comments are to be submitted to: Dr. Ehsan Khan, Office of Energy Research, U.S. Department of Energy, Room Number 3H–049, 1000 Independence Avenue, S.W., Washington, DC 20585.

A copy of the Plan will be placed on display at the Department of Energy Reading Room, Room Number 1E–190, 1000 Independence Avenue, S.W., Washington, D.C. 20585. The Reading Room is open from 9:00 a.m to 4:00 p.m Monday through Friday, except for federal holidays. A copy of the Plan may also be obtained from Darlene Roberts at 202–586–7170.

FOR FURTHER INFORMATION CONTACT: Dr. Ehsan Khan (202) 586–4785, fax (202) 586–7719.

SUPPLEMENTARY INFORMATION: The Department of Energy in compliance with the provisions of Section 2304 of the Energy Policy Act of 1992 is developing a Management Plan for the Conduct of Research, Development, Demonstration, and Commercial Application of Energy Technologies. The Plan is being developed in consultation with the Secretary of Energy Advisory Board that serves as the Energy Research, Development, Demonstration, and Commercial Application Advisory Board, as called for in the Act. The Plan provides an inventory and status report of technologies to enhance energy supply and to improve the efficiency of energy end uses. The inventory and status report includes fossil, renewable, nuclear, and energy conservation technologies which have not yet achieved the status of fully reliable and cost-competitive commercial availability, but which the Secretary projects may become available with additional research, development, and demonstration. The inventory and status report provides, for each technology—(1) An assessment of its— (A) Degree of technological maturity, (B) principal research, development, and demonstration issues, including— (i) the barriers posed by capital, operating, and maintenance costs; (ii) technical performance; and (iii) potential environmental impact; (2) the projected time frame for commercial availability, specifying at a minimum whether the technology will be commercially available in the near-term, mid-term, or long-term, whether there are too many uncertainties to project availability, or whether it is unlikely that the technology will ever be commercial; and (3) a projection of the future cost-competitiveness of the technology in comparison with alternative technologies to provide the same energy service.

Dated: August 22, 1994.

Dr. Martha A. Krebs,

Director, Office of Energy Research, U.S. Department of Energy.

[FR Doc. 94–21129 Filed 8–25–94; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5056–8]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 1994.

FOR FURTHER INFORMATION CONTACT: For further information, or to obtain a copy of this ICR, contact Sandy Farmer at 202–260–2740.

SUPPLEMENTARY INFORMATION:

Office of Air and Radiation

Title: Compliance Extensions for Early Reductions–Reporting and Recordkeeping Requirements (EPA ICR No. 1582.02; OMB No. 2060–0222). This is a request for renewal of a currently approved information collection.

Abstract: Respondents are owners or operators of sources emitting hazardous air pollutants (HAP) who voluntarily seek compliance extensions for applicable standards through demonstration of early emission reductions, in accordance with the regulations implementing section 112(i)(5) of the Clean Air Act (see 40 CFR part 63, subpart D). Sources may obtain a six-year extension of compliance with standards promulgated under section 112(d), if the source demonstrates achievement of early reduction of HAP by 90 percent (95 percent for particulates), before proposal of an applicable section 112(d) standard. Industry respondents must submit a one-time demonstration of reductions achieved. State or local permitting agencies will evaluate these demonstrations for the purpose of granting compliance extensions.

Burden Statement: The public reporting burden for this collection of information is estimated to average 440 hours per response. This estimate includes the time needed to review instructions, search existing data sources, gather and maintain the data needed, and complete and review the collection of information.

Respondents: Owners or operators of HAP sources who voluntarily seek compliance extensions for applicable standards through demonstration of early emission reductions.

Estimated No. of Respondents: 30.

Estimated No. of Responses per Respondent: One.

Estimated Total Annual Burden on Respondents: 13,200 hours.

Frequency of Collection: One time.

Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, to:

Ms. Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (2136), 401 M Street, SW., Washington, DC 20460.

and

Mr. Troy Hillier, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20503.

Dated: August 23, 1994.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 94–21105 Filed 8–25–94; 8:45 am]

BILLING CODE 6560–50–F

[FRL–5029–6]

Public Water Supply Supervision Program Revision for the State of Georgia

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given that the State of Georgia is revising its approved State Public Water Supply Supervision Primacy Program. Georgia has adopted drinking water regulations for the Phase V (Volatile Organic Chemicals (VOC), Synthetic Organic Chemicals (SOC), and Inorganic Chemicals (IOC) Rule. The Environmental Protection Agency (EPA) has determined that this set of State program revisions is no less stringent than the corresponding federal regulations. Therefore, EPA has tentatively decided to approve this State program revision.

All interested parties may request a public hearing. A request for a public hearing must be submitted by September 26, 1994, to the Regional Administrator at the address shown below. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by September 26, 1994, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become final and effective thirty (30) days after publication in the **Federal Register.**

Any request for a public hearing shall include the following: (1) The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; (2) A brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement of the information that the requesting person intends to submit at such hearing; (3) The signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, at the following offices:

Georgia Department of Natural Resources, East Floyd Tower, suite 1362, 205 Butler Street, SE., Atlanta, Georgia 30334.

Environmental Protection Agency, Region IV, 345 Courtland Street, NE., Atlanta, Georgia 30365.

FOR FURTHER INFORMATION CONTACT: Philip H. Vorsatz, EPA, Region IV Drinking Water Section at the EPA address given above (telephone (404) 347–2913, (FAX) (404) 347–1798).

Authority: (Sec. 1413 of the Safe Drinking Water Act, as amended (1986), and 40 CFR 142.10 of the National Primary Drinking Water Regulations)

John H. Hankinson, Jr.,

Regional Administrator, EPA, Region IV.

[FR Doc. 94–19770 Filed 8–25–94; 8:45 am]

BILLING CODE 6560–50–P

[ER–FRL–4714–4]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared August 8, 1994 through August 12, 1994 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 260–5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in the **Federal Register** dated April 8, 1994 (59 FR 16807).

Draft EISs

ERP No. D–COE–G32053–LA Rating LO, Port Fourchon Navigation Channel Project, Channel Deepening, Implementation, Lafourche Parish, LA.

Summary: EPA had no objections to the proposed project.

ERP No. D–USA–L11022–WA Rating EC2, Fort Lewis Military Installation Comprehensive Solid Waste Management Program, Implementation, City of DuPont, Pierce and Thurston Counties, WA.

Summary: EPA expressed environmental concerns based on potential air and water quality impacts. Additional information and clarification is needed to: identify the extent of air quality impacts and their conformity to SIP requirements for the area; clarify the technical aspects regarding a variance request for operation of a landfill in a sole source aquifer; and describe the impacts of potentially characteristic fly ash on solid and hazardous waste management.

Final EISs

ERP No. F–FHW–K40203–CA, Adoption—Calexico East Border Station Construction and Road Construction, CA–7 between the New Port of Entry and CA–98 that borders the United States and Mexico, Funding and Right-of-way Permit, City of Calexico, Imperial County, CA.

Summary: EPA had environmental concerns and requests that the FHWA Record of Decision recognize two major issues regarding the GSA FEIS which FHWA intends to adopt: (1) the U.S. Congress has not appropriated funding for a wastewater treatment facility at the New River in Calexico and (2) that any future proposal to reverse or dam the Alamo River to prevent transboundary sewage flows into the U.S. would be a major Federal action requiring the preparation of an EIS or EIS supplement.

Dated: August 23, 1994.

William D. Dickerson,

Deputy Director, Office of Federal Activities.

[FR Doc. 94–21149 Filed 8–25–94; 8:45 am]

BILLING CODE: 6560–50–P

[ER–FRL–4714–6]

Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 260–5076 OR (202) 260–5075. Weekly receipt of Environmental Impact Statements filed August 15, 1994 through August 19, 1994 pursuant to 40 CFR 1506.9.

EIS No. 940336, FINAL EIS, BIA, SD, Crow Creek Dam Project, Crow Creek Dam and Reservoir (Lake Bedashosha) Improvements, Crow Creek Indian Reservation, near Fort Thompson, Buffalo County, SD, Due: September 26, 1994, Contact: Leonard Alberts (605) 226–7621.

EIS No. 940337, FINAL EIS, AFS, WY, Shoshone National Forest Allowable Timber Sale Quantity, Implementation, Fremont, Hot Springs, Park, Sublette and Teton Counties, WY, Due: September 26, 1994, Contact: Kevin Elliott (307) 527–6241.

EIS No. 940338, DRAFT EIS, AFS, ID, Creaky Hart Timber Sale, Timber Management and Road Construction, Idaho Panhandle National Forests, Wallace Ranger District, Shoshone County, ID, Due: October 12, 1994, Contact: Ted Pettis (208) 752–1221.

EIS No. 940339, DRAFT EIS, USN, CA, US Navy Lease of Fleet and Industrial Supply Center, (Naval Supply Center) Property of the Port of Oakland for Development of Intermodal Rail Facilities and Maritime Cargo-Related Tenant Uses, Alameda County, CA, Due: October 11, 1994, Contact: Raymond Chiang (415) 244–3720.

EIS No. 940340, DRAFT EIS, USN, MD, Naval Air Warfare Center Aircraft Division,

Base Realignment and Construction, Patuxent River, St. Mary's, Calvert and Charles Counties, MD, Due: October 10, 1994, Contact: Mike Bryan (202) 685–3061.

EIS No. 940341, FINAL EIS, USN, CA, Miramar Landfill General Development Plan/Fiesta Island Replacement Project/ Northern Sludge Processing Facility/West Miramar Landfill Phase II/Overburden Disposal, Implementation, Funding, COE Section 404 Permit and NPDES Permit, Naval Air Station Miramar, San Diego County, CA, Due: September 26, 1994, Contact: Roger Hillhouse (619) 537–1102.

EIS No. 940342, FINAL SUPPLEMENT, COE, HI, Maalaea Harbor Improvements for Light-Draft-Vessels, Entrance Channel Realignment and Breakwater Modification, Updated Information, Island of Maui, Maui County, HI, Due: September 26, 1994, Contact: Ray H. Jyo (808) 438–2264.

EIS No. 940343, FINAL EIS, BOP, MN, Waseca Federal Correctional Institution Establishment and Operation, Waseca County, MN, Due: September 26, 1994, Contact: Patricia K. Sledge (202) 514–6470.

EIS No. 940344, FINAL EIS, BLM, CA, Southeast Regional Wastewater Treatment Plant and Geysers Effluent Pipeline Injection Project, Improvements, Funding, COE Section 404 Permit and NPDES Permit, City of Clearlake, Lake County, CA, Due: September 26, 1994, Contact: Richard Estabrook (707) 468–4052.

EIS No. 940345, FINAL SUPPLEMENT, COE, LA, Lake Pontchartrain and Vicinity Hurricane Protection Project, Fish and Wildlife Mitigation Plan, St. John the Baptist, St. Charles, Orleans and St. Bernard Parishes, LA, Due: September 26, 1994, Contact: Larry Hartzog (504) 862–2524.

EIS No. 940346, FINAL EIS, UAF, ME, Loring Air Force Base (AFB) Disposal and Reuse, Implementation, Aroostook County, ME, Due: September 26, 1994, Contact: William Myers (210) 536–3860.

EIS No. 940347, FINAL EIS, FHW, MA, MA–146/Massachusetts Turnpike Interchange Project, Improvements from MA–146 between I–290 at Brosnihan Square in Worcester and MA–122A in Millbury, Funding, COE Section 404 Permit and EPA NPDES Permit, Cities of Worcester and Millbury, Worcester County, MA , Due: September 26, 1994, Contact: Arthur Churchill (617) 494–2518.

EIS No. 940348, DRAFT SUPPLEMENT, DOE, SC, Savannah River Site, Construction and Operation of Defense Waste Processing Facility, Updated Information, Aiken and Barnwell Counties, SC, Due: October 11, 1994, Contact: Karen L. Hooker (803) 725–9615.

EIS No. 940349, DRAFT EIS, UAF, AK, Alaska Military Operations Areas (MOAs) Temporary MOAs Conversion to Permanent MOAs; New MOAs Creation; MOAs Modification; Supersonic Aircraft Operations and Routine Flying Training, Joint/Combined Flying Training and Major Flying Exercises Activities, Elmendorf Air Force Base, AK, Due: October 11, 1994, Contact: Major G. Virgil Hanson (907) 552–1807.

EIS No. 940350, DRAFT EIS, NPS, WA, Lake Chelan National Recreation Area General Management Plan, Implementation, Chelan County, WA, Due: November 01, 1994, Contact: William Paleck (206) 856–5700.

EIS No. 940351, DRAFT EIS, NPS, CA, Joshua Tree National Monument General Management Plan and Development Concept Plans, Implementation, Riverside and San Bernardino Counties, CA, Due: October 24, 1994, Contact: David Moore (619) 367–7511.

EIS No. 940352, FINAL EIS, NPS, CA, Presido of San Francisco General Management Plan, Implementation, Golden Gate National Recreation Area, City and County of San Francisco, CA, Due: September 26, 1994, Contact: Robert Chandler (415) 556–3111.

Dated: August 23, 1994.

William D. Dickerson

Deputy Director, Office of Federal Activities.

[FR Doc. 94–21150 Filed 8–25–94; 8:45 am]

BILLING CODE: 6560–50–U

[FRL–5059–5]

Availability of Midyear FY 94 Grant Performance Reports for the City of Albuquerque, New Mexico and the States of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of grantee performance evaluation reports.

SUMMARY: EPA's grant regulations (40 CFR 35.150) require the Agency to evaluate the performance of agencies which receive grants. EPA's regulations for regional consistency (40 CFR 56.7) require that the Agency notify the public of the availability of the reports of such evaluations. EPA recently performed midyear evaluations of one local and five state air pollution control programs (City of Albuquerque, New Mexico; Arkansas Department of Pollution Control and Ecology; Louisiana Department of Environmental Quality; New Mexico Environment Department; Oklahoma Department of Environmental Quality; and Texas Natural Resource Conservation Commission). These audits were conducted to assess the agencies' performance under the grants made to them by EPA pursuant to section 105 of the Clean Air Act, as amended.

EPA Region 6 has prepared reports for the grantees identified above and those 105 reports are now available for public inspection.

ADDRESSES: The reports may be examined at the EPA Region 6 office at 1445 Ross Avenue, 12th floor, Dallas, Texas 75202 in the Air, Pesticides, and Toxics Management Division.

FOR FURTHER INFORMATION CONTACT: Please contact Terrie Mikus, Grant Oversight Section Chief (6T–AG), at the above EPA Region 6 address for information concerning these reports.

Dated: August 17, 1994.

Joe D. Winkle,

Acting Regional Administrator.

[FR Doc. 94–21107 Filed 8–25–94; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5059–3]

Commonwealth of Puerto Rico; Final Determination of Adequacy of State/ Tribal Municipal Solid Waste Permit Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of final determination of adequacy to fully approve the Commonwealth of Puerto Rico's municipal solid waste permit program.

SUMMARY: Section 4005(c)(1)(B) of the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments (HSWA) of 1984, requires States to develop and implement permit programs to ensure that municipal solid waste landfills (MSWLFs) which may receive hazardous household waste or small quantity generator waste will comply with the revised Federal MSWLF Criteria (40 CFR part 258). RCRA section 4005(c)(1)(C) requires the Environmental Protection Agency (EPA) to determine whether States have adequate "permit" programs for MSWLFs, but does not mandate issuance of a rule for such determinations. EPA has drafted and is in the process of proposing a State/ Tribal Implementation Rule (STIR) that will provide procedures by which EPA will approve, or partially approve, State/Tribal landfill permit programs. The Agency intends to approve adequate State/Tribal MSWLF permit programs as applications are submitted. Thus, these approvals are not dependent on final promulgation of the STIR. Prior to promulgation of the STIR, adequacy determinations will be made based on the statutory authorities and requirements. In addition, States/Tribes may use the draft STIR as an aid in interpreting these requirements. The Agency believes that early approvals have an important benefit. Approved State/Tribal permit programs provide interaction between the State/Tribe and the owner/operator regarding site-specific permit conditions. Only those owners/operators located in State/Tribes with approved permit programs can use the site-specific flexibility provided by part 258 to the extent the State/Tribal

permit program allows such flexibility. EPA notes that regardless of the approval status of a State/Tribe and the permit status of any facility, the Federal landfill criteria will apply to all permitted and unpermitted MSWLF facilities.

The Commonwealth of Puerto Rico applied for a determination of adequacy under section 4005 of RCRA. The components of authority and capability were contained in Puerto Rico's application and its revisions. EPA reviewed Puerto Rico's application, and certain revisions thereto, and on March 23, 1994, proposed a determination that Puerto Rico's MSWLF permit program is adequate to ensure compliance with the revised MSWLF Criteria. Puerto Rico's revised regulation as adopted by the Environmental Quality Board, pursuant to Commonwealth law, is titled the Non-Hazardous Solid Waste Management Regulation. After consideration of all comments received regarding the tentative determination of adequacy, EPA is today issuing a final determination that the Commonwealth's program is adequate.

EFFECTIVE DATE: The determination of adequacy for the Commonwealth of Puerto Rico shall be effective on August 26, 1994.

FOR FURTHER INFORMATION CONTACT: Jenine Tankoos, USEPA Region II, Mail Stop 2AWM, room 1006, 26 Federal Plaza, New York, New York, 10278, telephone (212) 264–1369.

SUPPLEMENTARY INFORMATION:

A. Background

On October 9, 1991, EPA promulgated revised Criteria for MSWLFs (40 CFR part 258). Subtitle D of RCRA, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), requires States to develop permitting programs to ensure that facilities comply with the Federal Criteria under part 258. Subtitle D also requires in section 4005 that EPA determine the adequacy of State municipal solid waste landfill permit programs to ensure that facilities comply with the revised Federal Criteria. To fulfill this requirement, the Agency has drafted and is in the process of proposing a State/Tribal Implementation Rule (STIR). The rule will specify the requirements which State/Tribal programs must satisfy to be determined adequate.

EPA intends to approve State/Tribal MSWLF permit programs prior to the promulgation of STIR. EPA interprets the requirements for States or Tribes to develop "adequate" programs for permits or other forms of prior approval to impose several minimum requirements. First, each State/Tribe must have enforceable standards for new and existing MSWLFs that are technically comparable to EPA's revised MSWLF criteria. Next, the State/Tribe must have the authority to issue a permit or other notice of prior approval to all new and existing MSWLFs in its jurisdiction. The State/Tribe also must provide for public participation in permit issuance and enforcement as required in section 7004(b)(1) of RCRA. Finally, EPA believes that the State/Tribe must show that it has sufficient compliance monitoring and enforcement authorities to take specific action against any owner or operator that fails to comply with an approved MSWLF program.

EPA Regions will determine whether a State/Tribe has submitted an "adequate" program based on the interpretation outlined above. EPA plans to provide more specific criteria for this evaluation when it proposes the State/Tribal Implementation Rule. EPA expects States/Tribes to meet all of these requirements for all elements of a MSWLF program before it gives full approval to a MSWLF program.

On October 8, 1993, the Commonwealth of Puerto Rico submitted an application for adequacy determination for Puerto Rico's municipal solid waste landfill permit program. On February 17, 1994, Puerto Rico made a revised submission. On March 23, 1994, after reviewing Puerto Rico's application and the revised submission, EPA published a tentative determination of adequacy for all portions of Puerto Rico's program. Further background on the tentative determination of adequacy appears at 59 FR 13707, March 23, 1994.

Along with the tentative determination, EPA announced the availability of the application for public comment. Puerto Rico's application for program adequacy determination and its revisions were available for public review and comment at the EPA Region II Caribbean Field Office in San Juan and at the EPA Region II Library in New York City. The public comment period commenced on March 23, 1994 and ended on May 26, 1994. The public comment period was originally scheduled to end on May 12, 1994. However, at a public hearing held on May 12, 1994, a request was made to extend the comment period and EPA responded by extending the comment period until May 26, 1994.

Although RCRA does not require EPA to hold a hearing on any determination to approve a State/Tribe's MSWLF program, the Region scheduled four public hearings on this tentative determination. Two public hearings were held at the Solid Waste Management Authority in Hato Rey, Puerto Rico on May 11, 1994. Two additional hearings were held at the Mayagüez City Hall in Mayagüez, Puerto Rico on May 12, 1994. A summary of the comments received, and EPA's responses thereto is contained in the public comment section of this notice.

On October 4, 1993, Puerto Rico, acting through its Environmental Quality Board, adopted comprehensive, revised regulations governing solid waste disposal. These regulations are patterned after the 40 CFR part 258 criteria, and are intended to bring Puerto Rico into full conformity with the Federal criteria. The Puerto Rico Environmental Quality Board has sufficient authority and responsibility for implementing and enforcing solid waste management regulations, including a permitprogram, inspection authority and enforcement activities. In addition, in its application, Puerto Rico states that adequatetechnical, support and legal personnel will be assigned to implement its permit program.

B. Public Comment

A summary of the public comments received on the tentative determination of adequacy and EPA's responses thereto follows below.

A number of the commenters suggested that the Environmental Quality Board (EQB), Puerto Rico's regulating agency, may not effectively implement and enforce the Commonwealth's new MSWLF regulations. Commenters cited evidence of problems they believe had occurred or currently exist at particular landfill sites and which they feel EQB had not properly addressed. The EQB, however, has instituted a new structure for implementing and enforcing its new MSWLF permit program, which was developed in order to meet part 258 requirements. Upon reviewing EQB's MSWLF permit program, EPA Region II believes that problems related to regulatory oversight, will be effectively addressed under the EQB's new program. Among the changes to the program is the implementation of a new management and staffing structure. In addition, the number of employees working on the program and the number of hours of inspection and compliance training provided to staff have increased dramatically. These changes will allow the EQB to inspect landfills semi-annually whereas inspections previously took place only once per year or in some cases every other year under the previous program. Inspections by

technicians at the Solid Waste Management Authority, which take place an average of 2 to 3 times per year at each landfill, will also be performed and the results of those inspections made available to EQB. Step by-step procedures for receiving and responding to public complaints, which did not exist under the previous program will also help the EQB to monitor landfills and permit a more efficient public participation process.

One commenter noted that Puerto Rico presents a different ecological situation than is found in the States, and one where it is more difficult to find a suitable location for a landfill. This commenter felt that the Federal Government should modify its regulations for location criteria of municipal solid waste landfills to take into account that there are locations with different situations. EPA feels that the Federal regulations, 40 CFR part 258, already contain sufficient flexibility, particularly in location standards to allow an approved state to consider local conditions. The use of the flexibility, however, does require that certain environmental protection performance standards still be met.

Two commenters expressed concern that the location of landfills in Puerto Rico may violate President Clinton's Executive Order on Environmental Justice. The Federal Government, including EPA, is currently engaged in preparing a national strategy that will establish procedures to implement this order.

There were additional comments related to oversight of EQB by EPA, coordination between EQB and the Solid Waste Management Authority, siting requirements, and groundwater protection. All the foregoing comments and several additional comments that were not relative to the subject of the public hearing are addressed in the responsiveness summary which is made part of the public record.

C. Decision

After reviewing the public comments, I conclude that Puerto Rico's application for adequacy determination meets all of the statutory and regulatory requirements established by RCRA. Accordingly, the Commonwealth of Puerto Rico is granted a determination of adequacy for all portions of its municipal solid waste permit program.

Section 4005(a) of RCRA provides that citizens may use the citizen suit provisions of section 7002 of RCRA to enforce the Federal MSWLF criteria in 40 CFR part 258 independent of any State/Tribal enforcement program. As EPA explained in the preamble to the final MSWLF criteria, EPA expects that any owner or operator complying with provisions in a State/Tribal program approved by EPA should be considered to be in compliance with the Federal Criteria. See 56 FR 50978, 50995 (October 9, 1991).

Today's action takes effect on [insert date of publication here]. EPA believes it has good cause under section 553(d) of the Administrative Procedure Act, 5 U.S.C 553(d), to put this action into effect less than 30 days after publication in the **Federal Register**. All of the requirements and obligations in the Commonwealth's program are already in effect as a matter of Commonwealth law. EPA's action today does not impose any new requirements that the regulated community must begin to comply with. Nor do these requirements become enforceable by EPA as Federal law. Consequently, EPA finds that it does not need to give notice prior to making its approval effective.

Compliance With Executive Order 12866

The Office of Management and Budget has exempted this notice from the requirements of section 6 of Executive Order 12866.

Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this approval will not have a significant economic impact on a substantial number of small entities. It does not impose any new burdens on small entities. This notice, therefore, does not require a regulatory flexibility analysis.

Authority: This notice is issued under the authority of sections 2002, 4005 and 4010(c) of the Solid Waste Disposal Act as amended; 42 U.S.C. 6912, 6945, 6949a(c).

Dated: August 17, 1994.

Jeanne M. Fox,

Regional Administrator.

[FR Doc. 94-21108 Filed 8-25-94; 8:45 am]

BILLING CODE 6560-50-F

[FRL 5059-2]

Old Henley Oil Processing Site: Proposed de minimis Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Under section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Environmental Protection Agency (EPA) has agreed to settle claims for past response costs at the Old Henley Oil Processing Site, in Norphlet, Union County, Arkansas, with the following parties: Virco Manufacturing Corporation; Monsanto Company; Cooper Tire and Rubber Company; Arkansas Power and Light Company; and Louisiana Power and Light Company.

EPA will consider public comments on the proposed settlement for thirty (30) days. EPA may withdraw from or modify the proposed settlement, should comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. Copies of the proposed settlement are available from: Mr. Anthony Robledo IV, Cost Recovery Section (Mail Code 6H-EC), Hazardous Waste Management Division, U.S. EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, telephone (214) 665-6729.

Written comments may be submitted to the person above by thirty (30) days from the date of publication.

Dated: August 18, 1994.

W.B. Hathaway,

Acting Regional Administrator.

[FR Doc. 94-21106 Filed 8-25-94; 8:45 am]

BILLING CODE 6560-50-M

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: August 17, 1994.

FOR FURTHER INFORMATION CONTACT: Pauline C. Campbell, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-3606.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective July 25, 1994.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Richard W. Krimm,

Associate Director, Response and Recovery Directorate.

[FR Doc. 94-21096 Filed 8-25-94; 8:45 am]

BILLING CODE 6718-02-M

Public Information Collection Requirements Submitted to OMB for Review

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following public information collection requirements for review and clearance in accordance with the Paperwork Reduction Act of 1980, 44 chapter 35.

DATES: Comments on this information collection must be submitted on or before October 25, 1994.

ADDRESSES: Direct comments regarding the burden estimate or any aspect of this information collection, including suggestions for reducing this burden, to: the FEMA Information Collections Clearance Officer at the address below; and to Donald Arbuckle, Office of Management and Budget, 3235 New Executive Office Building, Washington, DC 20503, (202) 395–7340, within 60 days of this notice.

FOR FURTHER INFORMATION CONTACT: Copies of the above information collection request and supporting documentation can be obtained by calling or writing Muriel B. Anderson, FEMA Information Collections Clearance Officer, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2624.

Type: Extension of 3067–0039.

Title: Recertification for Continued Assistance.

Abstract: The Disaster Relief Act of 1974 as amended by the Robert T. Stafford Disaster Relief and Emergency Assistance Act authorizes the President to provide temporary housing assistance to or on behalf of individuals and families who have requested continued housing assistance.

FEMA Form 90–71, Recertification for Continued Assistance, is used by FEMA to document information provided by the occupant concerning their relocation efforts and needs for continued assistance. This documentation supports decisions regarding continuation or termination of assistance.

Type of Respondents: Individuals or households.

Estimate of Total Annual Reporting and Recordkeeping Burden: 417 hours.

Number of Respondents: 2,500.

Estimated Average Burden Time per Response: 10 minutes.

Frequency of Response: On occasion.

Dated: August 22, 1994.

Wesley C. Moore,

Director, Office of Administrative Support.

[FR Doc. 94–21095 Filed 8–25–94; 8:45 am]

BILLING CODE 6718-01-M

Public Information Collection Requirements Submitted to OMB for Review

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following public information collection requirements for review and clearance in accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. chapter 35.

DATES: Comments on this information collection must be submitted on or before October 25, 1994.

ADDRESSES: Direct comments regarding the burden estimate or any aspect of this information collection, including suggestions for reducing this burden, to: the FEMA Information Collections Clearance Officer at the address below; and to Donald Arbuckle, Office of Management and Budget, 3235 New Executive Office Building, Washington, DC 20503, (202) 395–7340, within 60 days of this notice.

FOR FURTHER INFORMATION CONTACT: Copies of the above information collection request and supporting documentation can be obtained by calling or writing Muriel B. Anderson, FEMA Information Collections Clearance Officer, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2624.

Type: Extension of 3067–0229.

Title: Mortgage Portfolio Protection Program.

Abstract: The Mortgage Portfolio Protection Program (MPPP) is a mechanism by which lending institutions, mortgage servicing companies and others servicing mortgage loan portfolios can bring their mortgage loan portfolios into compliance with the flood insurance purchase requirements of the Flood Disaster Protection Act of 1973. Implementation of the various requirements of the MPPP should result in mortgagors, following receipt of notification of the need for flood insurance, showing evidence of such a policy or purchasing the necessary coveragee through their local insurance agent or appropriate Write Your Own (WYO) company. It is intended that flood insurance policies be written under the MPPP only as a last resort, and only on mortgages whose mortgagors have failed to respond to the various notifications required by the program.

Type of Respondent: Individuals or households, State or local governments, farms, businesses or other for-profit, Federal agencies or employees, non-profit institutions, and small businesses or organizations.

Estimate of Total Annual Reporting and Recordkeeping Burden: 4,013 hours.

Number of Respondents: 6,526.

Estimated Average Burden Time per Response: An estimated 150 hours for WYO companies to set up an initial operation under the MPPP; an average of .5 hours per lender to sign an agreement with a WYO company to participate in the program; an average of .5 hours per WYO company to send notices to each mortgagor (3 notices at 10 minutes per notice); and an average of .5 hours for each mortgagor to respond to the notices and ask any questions.

Frequency of Response: One-Time.

Dated: August 22, 1994.

Wesley C. Moore,

Director, Office of Administrative Support.

[FR Doc. 94–21094 Filed 8–25–94; 8:45 am]

BILLING CODE 6718-01-M

Public Information Collection Requirements Submitted to OMB for Review

ACTION: Notice.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following public information collection requirements for review and clearance in accordance with the Paperwork Reduction Act of 1980, 44 U.S.C. chapter 35.

DATES: Comments on this information collection must be submitted on or before October 25, 1994.

ADDRESSES: Direct comments regarding the burden estimate or any aspect of this information collection, including suggestions for reducing this burden, to: the FEMA Information Collections Clearance Officer at the address below; and to Donald Arbuckle, Office of Management and Budget, 3235 New Executive Office Building, Washington, DC 20503, (202) 395–7340, within 60 days of this notice.

FOR FURTHER INFORMATION CONTACT: Copies of the above information collection request and supporting documentation can be obtained by calling or writing Muriel B. Anderson,

FEMA Information Collections Clearance Officer, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2624.

Type: Reinstatement of 3067–0125.

Title: Request for Loan Information Verification.

Abstract: FEMA Form 90–68, Request for Loan Information Verification, is used by FEMA to obtain information required disaster victims and lending institutions to determine a fair and equitable sales price of a mobile home unit. The ability to borrow money commercially is an important factor in determining the final sales price of a mobile home.

Type of Respondents: Individuals and households, Businesses or other for-profit.

Estimate of Total Annual Reporting and Recordkeeping Burden: 86 hours.

Number of Respondents: 500 individuals and households; 20 lending institutions.

Estimated Average Burden Time per Response: 10 minutes.

Frequency of Response: On occasion.

Dated: August 22, 1994.

Wesley C. Moore,

Director, Office of Administrative Support.

[FR Doc. 94–21093 Filed 8–25–94; 8:45 am]

BILLING CODE 6718–01–M

FEDERAL RESERVE SYSTEM

Federal Open Market Committee; Domestic Policy Directive of July 5-6, 1994

In accordance with § 271.5 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on July 5-6, 1994.[1] The directive was issued to the Federal Reserve Bank of New York as follows:

The information reviewed at this meeting suggests that economic activity recorded another substantial gain in the second quarter, causing levels of resource utilization to rise further. Increases in nonfarm payroll employment have been relatively large on average in recent months; the civilian unemployment rate is reported to have declined to 6.0 percent in May. The rise in industrial production slackened in April and May, primarily because capacity constraints prevented normal seasonal increases in the production of motor vehicles. Growth in consumer spending has slowed in recent months after very large increases in February and March. Housing starts have rebounded from winter disruptions to a pace close to the elevated fourth-quarter level. Orders for nondefense capital goods point to a continued strong uptrend in spending on business equipment, while nonresidential construction has recovered from a weather-depressed level in the first quarter. The nominal deficit on U.S. trade in goods and services was larger in April than in March but about unchanged from the average for the first quarter. Increases in broad indexes of consumer and producer prices have remained moderate in recent months, though prices of many basic industrial materials have risen.

On May 17, 1994, the Board of Governors approved an increase in the discount rate from 3 to 3-1/2 percent. Most market interest rates were up slightly on balance since the May meeting; declines in bond yields early in the intermeeting period were offset later by market reactions to a weakening dollar in foreign exchange markets and rising commodity prices. The trade-weighted value of the dollar in terms of the other G-10 currencies was down significantly further on balance over the intermeeting period, reflecting a sizable drop since early June.

M2 and M3 declined on average over May and June; for the year through June, both M2 and M3 are at the bottom of their ranges for 1994. Total domestic nonfinancial debt has continued to expand at a moderate rate in recent months.

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. In furtherance of these objectives, the Committee reaffirmed at this meeting the ranges it had established in February for growth of M2 and M3 of 1 to 5 percent and 0 to 4 percent respectively, measured from the fourth quarter of 1993 to the fourth quarter of 1994. The Committee anticipated that developments contributing to unusual velocity increases could persist during the year and that money growth within these ranges would be consistent with its broad policy objectives. The monitoring range for growth of total domestic nonfinancial debt was maintained at 4 to 8 percent for the year. For 1995, the Committee agreed on tentative ranges for monetary growth, measured from the fourth quarter of 1994 to the fourth quarter of 1995, of 1 to 5 percent for M2 and 0 to 4 percent for M3. The Committee provisionally set the associated monitoring range for growth of domestic nonfinancial debt at 3 to 7 percent for 1995. The behavior of the monetary aggregates will continue to be evaluated in the light of progress toward price level stability, movements in their velocities, and developments in the economy and financial markets.

In the implementation of policy for the immediate future, the Committee seeks to maintain the existing degree of pressure on reserve positions. In the context of the Committee's long-run objectives for price stability and sustainable economic growth, and giving careful consideration to economic, financial, and monetary developments, slightly greater reserve restraint would or slightly lesser reserve restraint might be acceptable in the intermeeting period. The contemplated reserve conditions are expected to be consistent with modest growth in M2 and M3 over coming months.

By order of the Federal Open Market Committee, August 22, 1994.

Normand Bernard,

Deputy Secretary, Federal Open Market Committee.

[FR Doc. 94-21071 Filed 8-25-94; 8:45 am]

BILLING CODE 6210-01-F

[1] Copies of the Minutes of the Federal Open Market Committee meeting of July 5-6, 1994, which include the domestic policy directive issued at that meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

Arkansas Banking Company; Formation of, Acquisition by, or Merger of Bank Holding Companies

The company listed in this notice has 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)).

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 to the Reserve Bank indicated for that application 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.

Comments regarding this application must be received not later than September 19, 1994.

A. **Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Arkansas Banking Company*, Jonesboro, Arkansas; to become a bank holding company by acquiring 98.01 percent of the voting shares of the Arkansas Bank-Jonesboro, Jonesboro, Arkansas, and thereby indirectly acquire 89.1 percent of the voting shares of The Arkansas Bank-Walnut Ridge, Walnut Ridge, Arkansas, and 87.59 percent of the voting shares of The Planters Bank-Osceola, Osceola, Arkansas.

Board of Governors of the Federal Reserve System, August 22, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-21048 Filed 8-25-94; 8:45 am]

BILLING CODE 6210-01-F

Banc One Corporation, CoreStates Financial Corp, PNC Bank Corp., KeyCorp, National City Corporation, Mellon Bank Corporation; Applications to Engage in Certain Nonbanking Activities

Banc One Corporation, Columbus, Ohio (Banc One), CoreStates Financial Corp, Philadelphia, Pennsylvania (CoreStates), PNC Bank Corp., Pittsburgh, Pennsylvania (PNC), and KeyCorp, Cleveland, Ohio (KeyCorp), have applied pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) (BHC Act) and § 225.23 of the Board's Regulation Y (12 CFR 225.23), to acquire, through their joint venture subsidiary, Electronic Payment Services, Inc., Wilmington, Delaware (EPS): (1) Substantially all the assets of the Network Services Division (NSD) of Mellon Bank, N.A., Pittsburgh, Pennsylvania, and thereby engage in providing automated teller machine (ATM) services, point of sale (POS) services, and merchant processing services; and (2) certain data processing assets of National City Corporation, Cleveland, Ohio (National City), which include assets relating to the provision of ATM services and POS services. EPS currently is authorized to engage, through its existing operating subsidiaries (EPS Subsidiaries), in certain permissible nonbanking activities. In connection with these transactions, and the transactions described below, EPS will form a series of corporations, EPS 1, Inc., EPS 2, Inc., EPS 3, Inc., and EPS Corp., all of Wilmington, Delaware. EPS Corp. will hold all the shares of the EPS Subsidiaries and engage, through the EPS Subsidiaries, in the activities currently conducted by the EPS Subsidiaries and NSD.

KeyCorp also has applied, pursuant to section 4(c)(8) of the BHC Act, to increase its indirect ownership interest in the EPS Subsidiaries through the acquisition of an interest in EPS 1, Inc., the shares of which will be owned by EPS and a wholly-owned nonbanking subsidiary of KeyCorp. In addition, National City has applied, pursuant to section 4(c)(8) of the BHC Act, to acquire an indirect ownership interest in the EPS Subsidiaries through the acquisition of an interest in EPS 2, Inc., the shares of which will be owned by EPS 1, Inc. and a wholly-owned nonbanking subsidiary of National City, and thereby engage in certain nonbanking activities described below. Finally, Mellon Bank Corporation, Pittsburgh, Pennsylvania (Mellon), has applied, pursuant to section 4(c)(8) of the BHC Act, to acquire an indirect ownership interest in the EPS Subsidiaries through the acquisition of an interest in EPS 3, Inc., the shares of which will be owned by EPS 2, Inc. and a wholly-owned nonbanking subsidiary of Mellon, and thereby engage in certain nonbanking activities described below.

Upon consummation of the above transactions, Banc One, CoreStates, PNC, KeyCorp, National City, and Mellon (collectively, Applicants) each will indirectly control more than 5 percent of the voting shares of a company controlling the EPS Subsidiaries. Applicants maintain that, under this proposal, the EPS Subsidiaries would engage in the following nonbanking activities:

1. Providing data processing and transmission services permissible under § 225.25(b)(7) of Regulation Y (12 CFR 225.25(b)(7)), including certain ATM services,[1] POS services,[2] electronic benefit transfer services, and electronic data interchange services;

2. Providing stored value card services; and

3. Providing merchant processing services.

Applicants seek approval to conduct the proposed activities throughout the United States.

Closely Related to Banking Standard

Section 4(c)(8) of the BHC Act provides that a bank holding company may, with Board approval, engage in any activity "which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto". In determining whether a proposed activity is closely related to banking for purposes of the BHC Act, the Board considers, *inter alia*, the matters set forth in *National Courier Association* v. *Board of Governors of the Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975). These considerations are (1) Whether banks generally have in fact provided the proposed services, (2) whether banks generally provide services that are operationally or functionally so similar to the proposed services as to equip them particularly well to provide the proposed services, and (3) whether banks generally provide services that are so integrally related to the proposed services as to require their provision in a specialized form. See 516 F.2d at 1237. In addition, the Board may consider any other basis that may demonstrate that the activity has a reasonable or close relationship to banking or managing or controlling banks. Board Statement Regarding Regulation Y, 49 FR 806 (1984).

Applicants maintain that the Board previously has determined that the proposed data processing and transmission services and stored value card services, when conducted within the limitations established by the Board in its regulations and prior orders, are closely related to banking within the meaning of section 4(c)(8) of the BHC Act. See 12 CFR 225.25(b)(7); *Banc One Corporation, et al.*, 79 Federal Reserve Bulletin 1158 (1993) (1993 EPS Order). See also Letter dated November 30, 1992, from the Federal Reserve Bank of Cleveland to Robert E. Mannion, Esq.; Letter dated November 30, 1992, from the Federal Reserve Bank of Philadelphia to Allen L. Raiken, Esq. (1992 EPS Approval Letters). Applicants have stated that they will engage in the proposed activities in conformity with the limitations established by the Board in Regulation Y, the 1992 EPS Approval Letters, and the 1993 EPS Order.

Applicants also maintain that the proposed merchant processing services are operationally and functionally similar to the permissible nonbanking activities in which they currently

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[1] Applicants maintain that ATM services include: ATM switching, terminal driving, and gateway services; ATM network branded debit card services; administrative terminal and ATM authorization services; ATM card production and issuance; telephone banking and bill paying services; information terminal and point of banking services; and proprietary ATM services for non-financial institutions.

[2] Applicants maintain that POS Services include: POS switching and terminal driving services; POS electronic data capture and authorization services; POS gateway, terminal software, and utility payment services; and POS terminal sale, rental, and maintenance services.

engage and are permissible data processing activities under § 225.25(b)(7) of Regulation Y. In addition, Applicants state that the Board previously has approved similar merchant processing services as a loan servicing activity permissible under § 225.25(b)(1) of Regulation Y (12 CFR 225.25(b)(1)). See *Citicorp*, 76 Federal Reserve Bulletin 549 (1990).

Proper Incident to Banking Standard

In order to approve the proposal, the Board must determine that the proposed activities to be conducted by EPS and its subsidiaries "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." 12 U.S.C. 1843(c)(8).

Applicants believe that the proposal will produce public benefits that outweigh any potential adverse effects. In particular, Applicants maintain that the proposal will enhance customer convenience and efficiency. In addition, Applicants state that the proposed activities will not result in adverse effects such as an undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices.

In publishing the proposal for comment, the Board does not take a position on issues raised by the proposal. Notice of the proposal is published solely in order to seek the views of interested persons on the issues presented by the applications, and does not represent a determination by the Board that the proposal meets or is likely to meet the standards of the BHC Act.

Any comments or requests for hearing should be submitted in writing and received by William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, not later than September 19, 1994. Any request for a hearing on this proposal must, as required by § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)), be accompanied by a statement of the reasons why 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. The applications may be inspected at the offices of the Board of Governors, the Federal Reserve Bank of Cleveland, or the Federal Reserve Bank of Philadelphia.

Board of Governors of the Federal Reserve System, August 22, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–21051 Filed 8–25–94; 8:45 am]

BILLING CODE 6210–01–P

Norwest Corporation; 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 September 19, 1994.

A. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. Norwest Corporation, Minneapolis, Minnesota; to acquire through its wholly-owned subdiariary, Norwest Mortgage Inc., DesMoines, Iowa, a 50 percent interest in Carlson Mortgage Company, Wakefield, Massachusetts, and thereby engage in real estate lending activities pursuant to § 225.25(b)(1) of the Board's Regulation Y. Norwest proposes to engage in this activity through a joint venture arrangement with Eastern Massachusetts Real Estate, Inc., Wakefield, Massachusetts, doing business as Carlson Real Estate Corporation, a Massachusetts corporation. The geographic scope that this activity will be conducted is Massachussetts.

Board of Governors of the Federal Reserve System, August 22, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-21049 Filed 8-25-94; 8:45 am]

BILLING CODE 6210-01-F

Serge L. Sisler, et al.; Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have 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 the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they 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 that notice or to the offices of the Board of Governors. Comments must be received not later than September 15, 1994.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Serge L. Sisler, Coggon, Iowa, to acquire, as a result of a stock redemption, an additional 25.08 percent (for a total of 56.93 percent), of the voting shares of North Linn Corporation, Coggon, Iowa, and thereby indirectly acquire Linn County State Bank, Coggon, Iowa.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Doris Brumfield, and Stewart M. Brumfield, as trustee to the Valley Bank ESOP, Greenwood, Mississippi, to acquire 3.58 percent of the voting shares

of Valley Capital Corporation, Cleveland, Mississippi, and thereby indirectly acquire The Valley Bank, Cleveland, Mississippi. As a result of this acquisition, Valley Bank ESOP and the Brumfields would control, respectively, 14.96 percent and 13.52 percent (for a total of 28.48 percent) of the voting shares of Valley Capital Corporation.

Board of Governors of the Federal Reserve System, August 22, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-21050 Filed 8-25-94; 8:45 am]

BILLING CODE 6210-01-F

GOVERNMENT PRINTING OFFICE (GPO)

Public Meeting for Federal Agencies and Others Interested in a Demonstration of GPO Access (Pub. L. 103-40), the New Online Federal Register and Congressional Record

Note: This is a republication without change of a notice published on August 25, 1994 at 59 FR 43841.

The Superintendent of Documents will hold three public meetings for Government agencies and others interested in a demonstration of the Government Printing Office's Access system, provided under the GPO Electronic Information Enhancement Act of 1993 (Pub. L. 103-40), the GPO Access Act.

Three meetings will be held on Thursday, September 8, 1994, from 9 to 10 a.m., 10:30 a.m. to 11:30 a.m., 1 p.m. to 2 p.m., in the Carl Hayden Room at the U.S. Government Printing Office (GPO), 732 North Capitol St. NW, Washington, DC 20401. (Union Station metro stop on the red line).

Under Public Law 103-40, the Superintendent of Documents implemented on June 8, 1994 a system of online access to the Congressional Record, the **Federal Register**, and other appropriate information. The purpose of this meeting is to demonstrate the online services made available under the initial phase of the implementation of the Act and to solicit comments from users interested in the system.

The initial online services include access to a WAIS Server at GPO offering the following data bases: the **Federal Register** (including the Unified Agenda), Volume 59 (1994), the Congressional Record (including the History of Bills), Volume 140 (1994), the Congressional Record Index, Volumes 138-140 (1992-1994), and Enrolled Bills from the 103d Congress (1993-1994). The **Federal Register** and Congressional Record data bases provide ASCII text files, with all graphics included as individual files in TIFF format. Both data bases are updated daily. Brief ASCII text summaries of each **Federal Register** entry are also available. The Congressional Record Index provides ASCII text files with all graphics included as individual files in TIFF format. The Enrolled Bills are available as ASCII text files and in the Adobe Acrobat PDF file format. Users with Acrobat viewers can display and print page facsimiles of enrolled bills.

Seating is limited to 60 people per session. Individuals interested in attending should contact the GPO's Office of Electronic Information Dissemination Services by 3 p.m., Tuesday, September 6. The office can be reached by telephone on 202-512-1265, by FAX on 202-512-1262, or by e-mail at help@eids05.eids.gpo.gov. Limited parking is available if arrangements are made in advance.

Michael F. DiMario,

Public Printer.

[FR Doc. 94-20867 Filed 8-24-94; 8:45 am]

BILLING CODE 1505-02-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[OPL-001-N]

Medicare Program; Meeting of the Practicing Physicians Advisory Council

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, this notice announces a meeting of the Practicing Physicians Advisory Council. This meeting is open to the public.

DATES: The meeting is scheduled for September 12, 1994, from 8 a.m. until 5 p.m. e.d.t. (An additional meeting is tentatively scheduled for December 12, 1994.)

ADDRESSES: The meeting will be held in Room 800, 8th Floor of the Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Martha DiSario, Executive Director, Practicing Physicians Advisory Council, Room 425-H, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690-7874.

SUPPLEMENTARY INFORMATION: The Secretary of the Department of Health and Human Services (the Secretary) is mandated by section 1868 of the Social Security Act, as added by section 4112 of the Omnibus Budget Reconciliation Act of 1990 (OBRA '90) (Pub. L. 101-508), enacted on November 5, 1990, to appoint a Practicing Physicians Advisory Council (the Council) based on nominations submitted by medical organizations representing physicians. The Council meets quarterly to discuss certain proposed changes in regulations and carrier manual instructions related to physicians' services, as identified by the Secretary. To the extent feasible and consistent with statutory deadlines, the consultation must occur before publication of the proposed changes. The Council submits an annual report on its recommendations to the Secretary and the Administrator of the Health Care Financing Administration not later than December 31 of each year.

The Council consists of 15 physicians, each of whom has submitted at least 250 claims for physicians' services under Medicare in the previous year. Members of the Council include both participating and nonparticipating physicians, and physicians practicing in rural and underserved urban areas. At least 11 members must be doctors of medicine or osteopathy authorized to practice medicine and surgery by the States in which they practice. Members have been invited to serve for overlapping 4-year terms.

The current members are: Gary C. Dennis, M.D.; Catalina E. Garcia, M.D.; Harvey P. Hanlen, O.D.; Kenneth D. Hansen, M.D.; Isabel V. Hoverman, M.D.; Sandral Hullett, M.D.; Jerilynn S. Kaibel, D.C.; William D. Kirsch, D.E., M.P.H.; Marie G. Kuffner, M.D.; Katherine L. Markette, M.D.; Kenton K. Moss, M.D.; Isadore Rosenfeld, M.D.; Richard B. Tompkins, M.D.; Kenneth M. Viste, Jr., M.D.; and James C. Waites, M.D. The chairperson is Richard B. Tompkins, M.D.

The tenth meeting of the Council will be held on September 12, 1994. The following topics will be discussed at that meeting:

- The 5-year refinement of the relative value units under the physician fee schedule.
- Concurrent care as a claims processing challenge when we receive claims from several physicians who are furnishing services to the same patient during the same time period.
- The nursing facility requirements that mandate visits by physicians

according to a fixed schedule established in regulations (42 CFR 483.40(c)).

• Medicare coverage of, and payment for, experimental technology.

Individuals or organizations who wish to make 10-minute oral presentations on the above issues must contact the Executive Director to be scheduled. For the name, address, and telephone number of the Executive Director, see the FOR FURTHER INFORMATION CONTACT section at the beginning of this notice. The number of oral presentations may be limited by the time available.

Anyone who is not scheduled to speak may submit written comments to the Executive Director. The meeting is open to the public, but attendance is limited to the space available on a first-come basis.

(Section 1868 of the Social Security Act (42 U.S.C. 1395ee) and section 10(a) of Public Law 92–463 (5 U.S.C. App. 2, section 10(a)); 45 C.F.R. Part 11.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program).

Dated: August 15, 1994.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

[FR Doc. 94–21074 Filed 8–25–94; 8:45 am]

BILLING CODE 4120–01–P

Health Resources and Services Administration

Advisory Council; Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92–463), announcement is made of the following National Advisory body scheduled to meet during the month of September 1994:

Name: National Advisory Committee on Rural Health

Date and Time: September 18–21, 1994; 3:30 p.m.

Place: The Washington Marriott Hotel, 22nd and M Streets, NW., Washington, DC 20037, (202) 872–1500.

The meeting is open to the public.

Purpose: The Committee provides advice and recommendations to the Secretary with respect to the delivery, financing, research, development and administration of health care services in rural areas.

Agenda: A new member orientation session is planned for Sunday, September 18, at 3:30 p.m. All members are encouraged to attend in order to provide a smooth transition for the newly appointed members.

During the Plenary Session, the Committee is considering a discussion on issues concerning established health systems (Medicaid) and Native American health systems (Indian Health Service).

The Education and Health Services Work Group and the Health Care Finance Work Group will meet between plenary sessions on developing recommendations and strategies for improving health services delivery in rural areas. The Health Care Financing Work Group will discuss alternatives to historical costs in rural areas; risk adjustment and network development; and telemedicine payment. The meeting will adjourn on Wednesday, September 21, at noon.

Anyone requiring information regarding the subject Council should contact Dena S. Puskin, Executive Secretary, National Advisory Committee on Rural Health, Health Resources and Services Administration, Room 9–05, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, telephone (301) 443–0835, FAX (301) 443–2803.

Persons interested in attending any portion of the meeting should contact Ms. Arlene Granderson, Director of Operations, Office of Rural Health Policy, Health Resources and Services Administration, Telephone (301) 443–0835.

Agenda Items are subject to change as priorities dictate.

Dated: August 23, 1994.

Jackie E. Baum,

Advisory Committee Management Officer, HRSA.

[FR Doc. 94–21053 Filed 8–25–94; 8:45 am]

BILLING CODE 4160–15–P

Social Security Administration

Agency Forms Submitted to the Office of Management and Budget for Clearance

Normally on Fridays, the Social Security Administration publishes a list of information collection packages that have been submitted to the Office of Management and Budget (OMB) for clearance in compliance with Public Law 96–511, The Paperwork Reduction Act. The following clearance packages have been submitted to OMB since the last list was published in the **Federal Register** on Friday, July 29, 1994.

(Call Reports Clearance Officer on (410) 965–4142 for copies of package.)

1. Compliance With Pass-Along—0960–0240. The information obtained by this regulation is used by the Social Security Administration to determine that certain States which administer their own supplementary payments programs have complied with the requirements. The respondents are States which have entered into an agreement with the Secretary to administer their own supplementary payments programs.

Number of Respondents: 26.

Frequency of Response: 11 States @ 1, 15 States @ 4.

Average Burden Per Response: 60 minutes.

Estimated Annual Burden: 71 hours.

2. Waiver of Benefit Payments—0960–NEW. The information on form SSA–149 is used by the Social Security Administration to document the fact that a beneficiary has requested that his or her benefits not be paid. The respondents are beneficiaries who use this form to make such requests.

Number of Respondents: 100.

Frequency of Response: 1.

Average Burden Per Response: 5 minutes.

Estimated Annual Burden: 8 hours.

3. Application for Benefits under a U.S. International Social Security Agreement—0960–0448. The information on form SSA–2490 is used by the Social Security Administration to determine a claimant's eligibility to either U.S. Social Security benefits or benefits from a country which has entered into an agreement with the U.S. The respondents are individuals who have filed for such benefits.

Number of Respondents: 10,000.

Frequency of Response: 1.

Average Burden Per Response: 20 minutes.

Estimated Annual Burden: 3,333 hours.

4. Employment Relationship Questionnaire—0960–0040. The information on form SSA–7160 is used by the Social Security Administration to determine the employment relationship of alleged employees in various occupations. The affected public consists of claimants and their alleged employers when the claimant's employee status is questionable.

Number of Respondents: 47,500.

Frequency of Response: 1.

Average Burden Per Response: 25 minutes.

Estimated Annual Burden: 19,792 hours.

5. Questionnaire About Employment or Self-Employment Outside the United States—0960–0050. The information on form SSA–7163 is used by the Social Security Administration to determine whether work done outside the U.S. by a beneficiary should cause a reduction in benefits. The respondents are beneficiaries who may be subject to deductions because of such work.

Number of Respondents: 20,000.

Frequency of Response: 1.

Average Burden Per Response: 12 minutes.

Estimated Annual Burden: 4,000 hours.

6. Waiver of Right to Appear—Disability Hearing—0960–NEW. The information on form SSA–773 is used by the Social Security Administration to provide a claimant for disability benefits with a structured means to request a waiver of his or her right to a hearing. It also documents the fact that the claimant understands the effects of this decision to waive that right. The respondents are claimants for disability benefits who wish to waive their right to a hearing.

Number of Respondents: 194.

Frequency of Response: 1.

Average Burden Per Response: 15 minutes.

Estimated Annual Burden: 48 hours.

OMB Desk Officer: Laura Oliven.

Written comments and recommendations regarding these information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address: Office of Management and Budget, OIRA, New Executive Office Building, Room 10230, Washington, DC 20503.

Dated: August 20, 1994.

Charlotte Whitenight,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 94–20933 Filed 8–25–94; 8:45 am]

BILLING CODE 4910–29–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

[Docket No. D–94-1069; FR–3748]

Delegation and Redelegation of Authority; Offices of the Assistant Secretaries for Fair Housing and Equal Opportunity and Public and Indian Housing

AGENCY: Office of the Secretary; Offices of the Assistant Secretary for Fair Housing and Equal Opportunity (FHEO) and the Assistant Secretary for Public and Indian Housing (PIH), HUD.

ACTION: Notice of delegation and redelegation of authority.

SUMMARY: This notice delegates and redelegates authority from the Secretary of Housing and Urban Development to certain HUD officials to grant time extensions to Public Housing Agencies and Indian Housing Authorities (HAs) to complete structural changes to dwelling units, in compliance with the regulation at 24 CFR 8.25(c). This regulation implements Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794 *et seq.*), with regard to program accessibility for individuals with disabilities. The Act prohibits discrimination against individuals with disabilities in any program or activity receiving Federal financial assistance. The authority to grant a time extension is jointly delegated to both the Assistant Secretary for FHEO and the Assistant Secretary for PIH. This authority is then retained and jointly redelegated to both the Director, Fair Housing and Equal Opportunity Division, and to either the Director, Public Housing Division (in the case of a Public Housing Agency) or the Administrator, Office of Native American Programs (in the case of an Indian Housing Authority), in the pertinent field offices.

EFFECTIVE DATE: August 15, 1994:

FOR FURTHER INFORMATION CONTACT: William C. Thorson, Director, Maintenance and Supply Division, Office of Construction, Rehabilitation and Maintenance, Office of Public and Indian Housing, telephone (202) 708–4703, Deborah Lalancette, Director, Housing Management Division, Office of Native American Programs, Office of Public and Indian Housing, telephone (202) 708–2980, or Judith Keeler, Director, Office of Program Compliance and Disability Rights, Office of Fair Housing and Equal Opportunity, telephone (202) 708–2618 (voice/TDD), Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410. [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION: The regulation at 24 CFR 8.25(c) requires each Public Housing Agency (PHA) and Indian Housing Authority (IHA) (collectively referred to as HAs) to assess the need for dwelling units within its jurisdictional area which are accessible to individuals with disabilities. Where the assessment demonstrates a need for additional accessible units, the HA must develop a transition plan to achieve the necessary structural changes. In accordance with this regulation, each HA is to have already made such assessment, and developed a transition plan, if required.

24 CFR 8.25(c) provides that each HA must have completed the structural changes necessary to achieve accessibility as identified in the transition plan no later than July 11, 1992. However, the regulation also provides that an HA may obtain an extension of time in meeting this deadline under certain circumstances. Section 8.25(c) provides that the Assistant Secretary for FHEO and the Assistant Secretary for PIH may extend the deadline to as late a date as July 11, 1994 "on a case-by-case determination that compliance within that period would impose undue financial and administrative burdens on the operation of the recipient's public housing and multi-family Indian housing program". This regulation further provides that the Secretary or the Undersecretary may extend the time period for compliance from July 11, 1994, up until July 11, 1995, in "extraordinary circumstances". To facilitate the prompt review of each request, the Secretary is jointly delegating to the Assistant Secretaries for FHEO and PIH, and the Assistant Secretaries are jointly redelegating to certain officials in the field, the authority to grant an extension of time in "extraordinary circumstances" for an HA to complete these structural changes.

Accordingly, the Secretary delegates, and the Assistant Secretaries for FHEO and PIH redelegate, authority as follows:

Section A. Authority Redelegated

The Secretary of Housing and Urban Development jointly delegates to both the Assistant Secretary for FHEO and the Assistant Secretary for PIH, who retain their authority and jointly redelegate to both the Director, Fair Housing and Equal Opportunity Division, and to either the Director, Public Housing Division (in the case of a PHA) or the Administrator, Office of Native American Programs (in the case of an IHA), in the pertinent field offices, the power and authority to grant a time extension in extraordinary circumstances from July 11, 1994, for a period up to one year until July 11, 1995, for an HA to complete structural changes needed (as previously determined pursuant to 24 CFR 8.25(c)) to provide additional units accessible to individuals with disabilities. Where a particular field office does not have a Fair Housing and Equal Opportunity Division, the Director, Fair Housing and Equal Opportunity Division in the field office which has responsibility for the programs for HAs in that jurisdiction shall have the authority with respect to the redelegation within this notice.

Section B. No Authority to Redelegate

The authority granted pursuant to Section A., above, may not be further redelegated pursuant to this delegation.

Authority: Sec.7(d), Department of Housing and Urban Development Act [42 U.S.C. 3535(d)].

Dated: August 15, 1994.

Michael B. Jarvis,

General Deputy Assitant Secretary for Public and Indian Housing.

Paul Williams,

General Deputy Assistant Secretary for Fair Housing and Equal Opportunity.

Henry G. Cisneros,

Secretary of Housing and Urban Development.

[FR Doc. 94–21138 Filed 8–25–94; 8:45 am]

BILLING CODE 4210–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–940–4210–10; CACA 7404, CACA 7425, CACA 7438, CACA 7853, CAS 2320, CAS 2827, CAS 3527, CAS 2293, CAS 4143, CAS 079602, CAS 080442, CAS 066779, CAS 5264]

Notice of Proposed Continuation of Withdrawals; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The United States Department of Agriculture, Forest Service, has proposed to continue withdrawals on 550.57 acres for 20 years within the Klamath National Forest. The segregative effect on these withdrawals remains unchanged.

DATES: Comments should be received on or before November 25, 1994.

ADDRESSES: Comments should be sent to the California State Director, BLM, 2800 Cottage Way, Room E–2845, Sacramento, California 95825.

FOR FURTHER INFORMATION CONTACT: Marcia Sieckman, BLM California State Office, 916–978–4820.

SUPPLEMENTARY INFORMATION:

1. CACA 7404

The land is described as follows:

Mount Diablo Meridian, T. 47 N., R. 9 W., sec. 30, SW¼NE¼NE¼, SE¼NW¼NE¼, NE¼SW¼NE¼, NW¼SE¼NE¼.

The area described contains 40.00 acres in Siskiyou County. The purpose of this withdrawal is to protect the Deer Camp Ranger Station.

2. CACA 7425

The land is described as follows:

Mount Diablo Meridian, T. 45 N., R. 8 W., sec. 2, SW¼SE¼NW¼, N½NE¼SW¼.

The area described contains 30.00 acres in Siskiyou County. The purpose of this withdrawal is to protect the Big Humbug Administrative Site.

3. CACA 7438

The land is described as follows:

Mount Diablo Meridian, T. 45 N., R. 10 W., sec. 21, Portion of NW¼NW¼.

The area described contains 2.52 acres in Siskiyou County. The purpose of the withdrawal is to protect the Scott Bar Ranger Station.

4. CACA 7853

The land is described as follows:

Humboldt Meridian, T. 17 N., R. 7 E., sec. 16, E½NE¼SE¼, NE¼SE¼SE¼.

The area described contains 30.00 acres in Siskiyou County. The purpose of the withdrawal is to protect the Indian Creek Ranger Station.

5. CAS 2320

The land is described as follows:

Mount Diablo Meridian, T. 19 N., R. 7 E., sec. 35, lots 1 and 2, S½NE¼.

The area described contains 156.15 acres in Siskiyou County. The purpose of the withdrawal is to protect the Thompson Cave Area.

6. CAS 2827

The land is described as follows:

Mount Diablo Meridian, T. 38 N., R. 11 W., sec. 21, descr. by metes and bounds.

The area described contains approximately 16.00 acres in Siskiyou County. The purpose of the withdrawal is to protect the East Fork Camping Site.

7. CAS 3527

The land is described as follows:

Mount Diablo Meridian, T. 39 N., R. 11 W., sec. 36, that portion lying above the junction of Shadow Creek and the East Fork of the South Fork of the Salmon River and to Forest Highway 93.

Humboldt Meridian, T. 10 N., R. 8 E., sec. 28, S½NE¼ lot 5, NW¼SE¼ lot 5.

The area described contains approximately 21.00 acres in Siskiyou County. The purpose of the withdrawal is to protect the Shadow Creek Camping Site and the Hotelling Gulch Camping Site.

8. CAS 2293

The land is described as follows:

Mount Diablo Meridian, T. 44 N., R. 11 W., sec. 21, SE¼SE¼SE¼, E½SW¼SE¼SE¼; sec. 28, NE¼NE¼NE¼, E½NW¼NE¼NE¼.

The area described contains approximately 30.00 acres in Siskiyou County. The purpose of the withdrawal is to protect the Spring Flat Campground.

9. CAS 4143

The land is described as follows:

Mount Diablo Meridian, T. 38 N., R. 11 W., (unsurveyed), sec. 21, descr. by metes and bounds.

The area described contains approximately 6.2 acres in Siskiyou County. The purpose of the withdrawal is to protect the East Fork Addition.

10. CAS 079602

The land is described as follows:

Humboldt Meridian, T. 14 N., R. 6 E., sec. 30, SE¼NE¼SW¼, W½NW¼SE¼, (Protraction diagram No. 164 locates land in SW¼, section 28).

The area described contains approximately 30.00 acres in Siskiyou County. The purpose of the withdrawal is to protect the Dillon Jim Campground.

11. CAS 080442

The land is described as follows:

Humboldt Meridian, T. 17 N., R. 7 E., sec. 3, S½SW¼NW¼SW¼, W½SW¼SW¼; sec. 4, S½S½NE¼SE¼, N½SE¼SE¼, SE¼SE¼SE¼; sec. 9, NE¼NE¼NE¼.

The area described contains approximately 75.00 acres in Siskiyou County. The purpose of the withdrawal is to protect the Rhodonite Tree Improvement Administrative Site.

12. CAS 066779

The land is described as follows:

Mount Diablo Meridian, T. 48 N., R. 8 W., sec. 21, NW¼SE¼, N½SW¼SE¼.

The area described contains approximately 60.00 acres in Siskiyou County. The purpose of the withdrawal is to protect the Beaver Creek Fire Station.

13. CAS 5264

The land is described as follows:

Humboldt Meridian, T. 10 N., R. 7 E., (unsurveyed), sec. 13, descr. by metes and bounds, also known as Forks of Salmon Ranger Station.

Mount Diablo Meridian, T. 40 N., R. 10 W., (unsurveyed), sec. 18, descr. by metes and bounds, also known as Idlewild Campground.

Mount Diablo Meridian, T. 39 N., R. 11 W., (unsurveyed), sec. 15, portion SW¼, descr. by metes and bounds, also known as Eddy Gulch Lookout.

Mount Diablo Meridian, T. 40 N., R. 11 W., sec. 29, portion NE¼, descr. by metes and bounds, also known as Sawyers Administrative Site.

Mount Diablo Meridian, T. 39 N., R. 12 W., (unsurveyed), sec. 11, portion NW¼, descr. by metes and bounds, also known as Blue Ridge Lookout.

The area described contains approximately 53.7 acres in Siskiyou County. The purpose of the withdrawal is to protect the above mentioned Forest Service administrative sites.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the land and its resources. A report will also be prepared for consideration by the Secretary of the Interior, the President, and the Congress, who will determine whether or not the withdrawal will be continued and, if so, for how long. The final determination on the continuation of the withdrawal will be published in the **Federal Register.** The existing withdrawals will continue until such final determination is made.

Dated: August 18, 1994.

Nancy J. Alex,

Chief, Lands Section.

[FR Doc. 94–20998 Filed 8–25–94; 8:45 am]

BILLING CODE 4310–40–P

Minerals Management Service

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The collection of information listed below has been submitted to the Office of Management and Budget for reapproval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection and related forms may be obtained by contacting Jeane Kalas at 303–231–3046. Comments and suggestions on the requirement should be made directly to the Bureau Clearance Officer at the telephone number listed below and to the Office of Management and Budget, Paperwork Reduction Project (1010–0075), Washington, DC 20503, telephone 202–395–7340.

TITLE: Gas Transportation and Processing Allowances OMB approval number: 1010–0075.

ABSTRACT: When a company enters into a contract to develop, produce, and dispose of gas and associated products from Federal or Indian lands, that company agrees to pay the United States or Indian Tribe or allottee a share (royalty) of the full value of production from the leased lands. In order to determine whether the amount of royalty tendered represents the proper royalty due, it is necessary to establish the value of allowances being deducted from royalty payments. Allowances are taken for the cost of processing the gas stream to extract associated products, and for the cost of transporting the gas to the processing plant and to the point of sale. The information collected is necessary to evaluate the reasonableness of allowances taken and to ensure that proper royalty payments are made.

Bureau Form Numbers: MMS–4109, MMS–4295.

Frequency: Annually, or when contracts are changed or terminated.

Description of Respondents: Gas product companies.

Estimated Completion Time: Average—3 hours.

Annual Responses: 5,535.

Annual Burden Hours: 16,153.

Bureau Clearance Officer: Arthur Quintana, (703) 787–1101.

Dated: July 20, 1994.

James W. Shaw,

Associate Director for Royalty Management.

[FR Doc. 94–21070 Filed 8–25–94; 8:45 am]

BILLING CODE 4310–MR–P

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32556]

Illinois Central Corporation—Common Control—Illinois Central Railroad Company and The Kansas City Southern Railway Company

AGENCY: Interstate Commerce Commission.

ACTION: Notice of prefiling notification and request for comments.

SUMMARY: Pursuant to 49 CFR 1180.4(b), applicants have notified the Commission of their intent to file an application seeking approval for Illinois Central Corporation's (IC) acquisition of control of and merger with Kansas City Southern Industries Inc., and the resulting common control of Illinois Central Railroad Company and The Kansas City Southern Railway Company by IC. The Commission finds this to be a major transaction as defined in 49 CFR part 1180. Applicants have proposed an accelerated procedural schedule, and the Commission invites interested persons to comment on it.

DATES: Written comments must be filed with the Interstate Commerce Commission no later than September 12, 1994. Applicants' reply is due by September 22, 1994.

ADDRESSES: An original and 20 copies of all documents must refer to Finance Docket No. 32556 and be sent to: Office of the Secretary, Case Control Branch, Attn: Finance Docket No. 32556, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Joseph Dettmar, (202) 927–5660. [TDD for hearing impaired: (202) 927–5721.]

In addition, one copy of all documents in this proceeding must be sent to applicants' representative: Robert P. vom Eigen, Hopkins & Sutter, 888 Sixteenth Street, N.W., Washington, DC 20006.

SUPPLEMENTARY INFORMATION: On July 29, 1994, Illinois Central Corporation (IC), Illinois Central Railroad Company (ICRR), Kansas City Southern Industries Inc. (KCSI), and The Kansas City Southern Railway Company (KCSR) (collectively applicants) filed a notice of intent indicating that IC will file an application seeking Commission approval and authorization under 49 U.S.C. 11343–47 for: (1) IC's acquisition of control of and merger with KCSI; and (2) the resulting common control of ICRR and KCSR by IC.

In this transaction, IC will acquire 100% of the stock of KCSI. The acquisition will occur as part of a transaction in which (1) KCSI will effect a reorganization in which it distributes complete ownership of its financial services and information processing operations to the holders of KCSI's common stock; and (2) IC will place its stock in ICRR into an independent voting trust.[1] Applicants state that, while awaiting approval of the transaction by the Commission, ICRR and KCSR will be operated independently. The parties anticipate that the independent voting trust will terminate upon approval of the transaction by this Commission.

Applicants state that, after the reorganization has occurred, IC and KCSI intend to consummate the merger in which KCSI will be merged with IC and the separate existence of KCSI will cease.

Applicants will use the year July 1, 1993 to June 30, 1994, for purposes of the impact analyses to be filed in their application. Applicants anticipate filing their application on or about November 1, 1994.

The Commission finds that this is a major transaction, as defined at 49 CFR 1180.2(a), as it is a control transaction involving two or more class I railroads. The application must conform to the regulations set forth at 49 CFR part 1180 and must contain all information required there for major transactions, except as modified by any advance waiver. Applicants are also required to submit maps with overlays that show the existing routes of both carriers and their competitors.

By petition filed August 5, 1994, applicants sought approval of a protective order to protect confidential, highly confidential, and proprietary information, including contract terms, shipper-specific traffic data, and other traffic data to be submitted in connection with the control application. A protective order was approved in a decision served August 12, 1994.

Also on August 5, 1994, applicants filed a petition to establish a procedural schedule. The Commission seeks comments now on applicants' proposed procedural schedule. Applicants'

[1] On August 16, 1994, IC requested, under 49 CFR 1013.3(a), an informal opinion from the Secretary of the Commission that the proposed voting trust arrangement will insulate IC from any violation of the Interstate Commerce Act pending approval of the application.

proposed procedural schedule is as follows:[2]

Proposed Procedural Schedule

F Primary application filed.

F+30 Commission notice of acceptance of primary application published.

F+75 Comments on primary application (except DOJ, DOT) due, including first list of protective conditions or other affirmative relief to be sought.

F+90 DOJ, DOT comments on primary application due.

F+105 Second lists of protective conditions due.

F+120 Responsive applications due; opposition to primary application due.

F+150 Commission notice of acceptance of responsive applications published.

F+180 Government parties' evidence due; opposition to responsive applications due; rebuttal with respect to primary application due.

F+205 Responses to government parties' evidence due; rebuttal in support of responsive applications due.

F+220 to F+225 Hearing on all evidence; witnesses to be cross-examined only to the extent specific need is shown in order to resolve material issues of disputed fact.

F+246 Opening briefs due.

F+256 Reply briefs due.

F+270 Oral argument.

F+365 Final decision.

Under the proposal, immediately upon each evidentiary filing, the filing party will place all documents relevant to the filing (other than documents that are privileged or otherwise protected from discovery) in a depository open to all parties, and will make its witnesses available for discovery depositions. Access to documents subject to protective order will be appropriately restricted. Parties seeking discovery depositions may proceed by agreement. Relevant excerpts of transcripts will be received in lieu of cross-examination at the hearing, unless cross-examination is needed to resolve material issues of disputed fact. Discovery on responsive applications will begin immediately upon their filing.

The proposed schedule contains substantially shorter time periods than those provided for in our rules at 49 CFR 1180.4(a)–(e). For example, § 1180.4(e) tracks the statute at 49 U.S.C. 11345(b)(3) and requires that the evidentiary proceedings for a major transaction be completed in 24 months after acceptance of the primary application, with a final decision to be issued within 180 days thereafter.

We invite interested persons to submit written comments on the proposed procedural schedule. Comments must be filed by September 12, 1994. Applicants may reply by September 22, 1994.

Decided: August 22, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, and Commissioners Simmons and Morgan. Commissioner Simmons did not participate in the disposition of this phase of the proceedings.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. 94–21097 Filed 8–25–94; 8:45 am]

BILLING CODE 7035–01–P

[2] In addition to submitting an original and 20 copies of all documents filed with the Commission, the parties are encouraged to submit all pleadings and attachments as computer data contained on a 3.5-inch floppy diskette which is formatted for WordPerfect 5.1 (or formatted so that it can be converted by WordPerfect 5.1). The computer data contained on the computer diskettes submitted are subject to the protective order attached to the Commission's decision served August 12, 1994, and this information is for the exclusive use of Commission employees working directly on review of substantive matters in this proceeding. The flexibility provided by such computer file data will facilitate expedited review by the Commission and its staff.

[Docket No. AB–167 (Sub-No. 1127)]

Consolidated Rail Corporation—Abandonment—Between Schneider, IN and Danville, IL in Lake, Newton, Benton, and Warren Counties, IN and Vermilion County, IL

The Commission has found that the public convenience and necessity permit Consolidated Rail Corporation (Conrail) to abandon its 76.2-mile Danville Secondary line extending from Schneider, IN (milepost 33.0) to Danville, IL (milepost 109.2), in Lake, Newton, Benton, and Warren Counties, IN and Vermilion County, IL, subject to a condition relating to the discontinuance of trackage rights over the line by Soo Line Railroad Company.

A certificate will be issued authorizing abandonment unless within 15 days after this publication the Commission also 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 served on the applicant no later than 10 days from publication of this Notice. The following notation must be typed in boldface on the lower left-hand corner of the envelope containing the offer: "Office of Proceedings, AB–OFA." Any offer previously made must be remade within this 10-day period.

Information and procedures regarding financial assistance for continued rail service are contained in 49 U.S.C. 10905 and 49 CFR 1152.27.

Decided: August 19, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, and Commissioners Simmons and Morgan.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. 94–21183 Filed 8–25–94; 8:45 am]

BILLING CODE 7035–01–P

[Docket No. AB–55 (Sub-No. 488X)]

CSX Transportation, Inc.—Abandonment Exemption and Discontinuance of Trackage Rights Exemption—In Rockbridge County, VA

The Commission, under 49 U.S.C. 10505, exempts from the prior approval requirements of 49 U.S.C. 10903, *et seq.*, the abandonment by CSX Transportation, Inc. (CSXT) of a portion of its railroad from milepost CPJ–9.34 at Loch Laird to milepost CPJ–12.0 at Buena Vista, and to discontinue trackage rights over the Norfolk and Western Railway (N&W) between Glasgow and Loch Laird, in Rockbridge County, VA. The exemption is granted subject to standard labor protective conditions.

Any comments must be filed with the Commission and served on: Charles M. Rosenberger, 500 Water Street, Jacksonville, FL 32202.

This exemption is effective on September 25, 1994. Formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) must be filed by September 2, 1994, and petitions to stay must be filed by September 12, 1994. Requests for a public use condition under 49 CFR 1152.28(a)(2) must be filed by September 15, 1994. Petitions to reopen must be filed by September 20, 1994. For further information, contact Joseph H. Dettmar, (202) 927–5660.

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, D.C. 20423. Telephone: (202) 289–4357/4359. [Assistance for the hearing impaired is available through TDD services: (202) 927–5721.]

Decided: August 17, 1994.

By the Commission, Chairman McDonald, Vice Chairman Phillips, and Commissioners Simmons and Morgan.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. 94–21112 Filed 8–25–94; 8:45 am]

BILLING CODE 7035–01–P

[Docket No. AB–362 (Sub-No. 3X)]

Texas and Oklahoma R.R. Co.—Abandonment Exemption—In Foard and Wilbarger Counties, TX

Texas and Oklahoma R.R. Co. (T&O) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 16.81 mile portion of its rail line between milepost 480.19 near the Texas-Oklahoma State Line in Wilbarger County, TX, and milepost 497.0 near Chillicothe, TX, in Foard County, TX.[1]

T&O has certified that: (1) no local or overhead traffic has moved over the line for at least 2 years; (2) no formal complaint filed by a user of rail service on the line (or by a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period; and (3) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter),[2] 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to use of this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on September 25, 1994, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[3] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[4] and trail use/rail banking statements under 49 CFR 1152.29[5] must be filed by September 6, 1994. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by September 15, 1994, with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any pleading filed with the Commission should be sent to applicant's representatives: Richard H. Streeter, Barnes & Thornburg, 1815 H Street, Suite 800, Washington, DC 20006.

If the notice of exemption contains false or misleading information, the exemption is void *ab initio*.

T&O has filed an environmental report in Docket No. AB–362 (Sub-No. 2X) which addresses the effects of the abandonment, if any, on the environment or historic resources. The Section of Environmental Analysis (SEA) will issue a revised environmental assessment (EA) by August 31, 1994. Interested persons may obtain a copy of the EA from SEA by writing to SEA (Room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief of SEA, at (202) 927–6248. Comments on environmental and historic preservation matters must be filed within 15 days after the EA is available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: August 22, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. 94–21098 Filed 8–25–94; 8:45 am]

BILLING CODE 7035–01–P

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[1] The line segment sought to be abandoned here is included in the 156.49-mile rail line which was proposed for abandonment in *Texas and Oklahoma R.R. Company—Abandonment Exemption—Between The Oklahoma-Texas State Line And Orient Junction (Sweetwater), Texas*, Docket No. AB–362 (Sub-No. 2X), (ICC served Mar. 25, 1994). That request was denied because the Commission was unable to reach a majority. T&O's petition for reconsideration in that proceeding is pending before the Commission.

[2] The Commission's Section of Environmental Analysis has allowed T&O to meet the foregoing requirements based on the environmental and historic report submitted in the Docket No. AB–362 (Sub-No. 2X) because the conditions relating to the line segment involved here have not changed since the previous report was submitted.

[3] A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Commission's Section of Environmental Analysis in its independent investigation) cannot be made prior to the effective date of the notice of exemption. *See Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any entity seeking a stay involving environmental concerns is encouraged to file its request as soon as possible in order to permit the Commission to review and act on the request before the effective date of this exemption.

[4] *See Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987).

[5] The Commission will accept a late-filed trail use request as long as it retains jurisdiction to do so.

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

In accordance with the policy of the Department of Justice, 28 CFR 50.7, notice is hereby given that on July 26, 1994, a proposed Consent Decree in *United States v. IBP inc.*, Civil Action No. 94–4072, was lodged with the United States District Court for the Central District of Illinois. In this action, the United States sought injunctive relief and civil penalties against IBP inc. ("IBP") pursuant to Section 309 of the Clean Water Act ("the Act"), 33 U.S.C. 1319, for violations of Section 301 of the Act, and certain terms and conditions of the National Pollutant Discharge Elimination System ("NPDES") permit for IBP's Joslin, Illinois facility. In addition, the State of Illinois filed a complaint in intervention, asserting claims against IBP for violations of the Illinois Protection Act, Ill. Rev. Stat. 1991 Ch. 111½ ¶ 1009(a), and 35 Ill. Adm. Code 201.141.

The proposed Consent Decree requires IBP to construct an expansion to its current wastewater treatment system to treat ammonia nitrogen, and the proposed Decree establishes a schedule for achieving compliance with the ammonia nitrogen effluent limit in IBP's NPDES permit. During construction of the treatment plant expansion, IBP is required to comply with interim ammonia nitrogen limits specified in the proposed Consent Decree. In all other respects, the proposed Consent Decree requires IBP to treat and monitor pollutants from its Joslin facility in accordance with the terms of its NPDES permit and applicable rules relating to wastewater from meat processing and leather tanning facilities. The proposed Decree also requires IBP to pay a civil penalty of $250,000 to the United States and a separate $30,000 civil penalty to the State of Illinois.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of 30 days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530. All comments

should refer to *United States v. IBP inc.*, DJ Ref. # 90–5–1–1–3730.

The proposed Consent Decree may be examined at the office of the United States Attorney, 100 N.E. Monroe Street, Peoria, Illinois 61602, and at the Office of Regional Counsel, United States Environmental Protection Agency, Region V, 200 West Adams Street, 29th Floor, Chicago, Illinois 60606. Copies of the proposed Consent Decree may also be examined at the Consent Decree Library, 1120 G Street N.W., 4th Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library. In requesting a copy, please enclosed a check in the amount of $5.75 (25 cents per page reproduction costs), payable to the Consent Decree Library.

Joel M. Gross,

Acting Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 94–20997 Filed 8–25–94; 8:45 am]

BILLING CODE 4410–01–M

Notice of Lodging of Settlement Under the Clean Air Act

In accordance with the policy of the Department of Justice, 28 CFR 50.7, notice is hereby given that on August 5, 1994, a proposed Joint Stipulation and Order in *United States v. Styrotech Inc.*, Civil Action No. 4–92–912, was lodged with the United States District Court for the District of Minnesota. This action was brought pursuant to Section 113 of the Clean Air Act ("the Act"), 42 U.S.C. 7413, to obtain injunctive relief and civil penalties for violations of Section 165 of the Act, 42 U.S.C. 7475, and applicable requirements of 40 CFR 52.21 and the Minnesota State Implementation Plan, at an expanded polystyrene manufacturing facility in Minneapolis, Minnesota.

The proposed Joint Stipulation and Order prohibits Styrotech Inc. ("Styrotech") from operating its existing expanded polystyrene manufacturing facility except in compliance with Section 165 of the Act, 40 CFR 52.21, and applicable provisions of the Minnesota State Implementation Plan. In addition, pending issuance of a final air emission facility permit for Styrotech's existing facility, the proposed Joint Stipulation and Order requires Styrotech: (1) to comply with all terms and conditions of draft permit no. 2304–90–OT–1 previously issued by the Minnesota Pollution Control Agency ("MPCA"), and (2) to maintain records concerning specified matters relating to operations at the facility. Further, the Joint Stipulation and Order requires Styrotech to pay a civil penalty of $40,000.

The Department of Justice will receive comments relating to the proposed Joint Stipulation and Order for a period of 30 days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530. All comments should refer to *United States v. Styrotech Inc.*, DJ Ref. # 90–5–2–1–1599.

The proposed Joint Stipulation and Order may be examined at the office of the United States Attorney, 110 South 4th Street, Minneapolis, MN 55401, and at the Office of Regional Counsel, United States Environmental Protection Agency, Region V, 200 West Adams Street, 29th Floor, Chicago, Illinois 60606. Copies of the proposed Joint Stipulation and Order may also be examined at the Consent Decree Library, 1120 G. Street N.W., 4th Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed Joint Stipulation and Order may be obtained in person or by mail from the Consent Decree Library. In requesting a copy, please enclose a check in the amount of $2.50 (25 cent per page reproduction costs), payable to the Consent Decree Library.

Joel M. Gross,

Acting Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 94–20996 Filed 8–25–94; 8:45 am]

BILLING CODE 4410–01–M

Antitrust Division

Proposed Final Judgment and Competitive Impact Statement; United States of America v. AT&T Corp. and McCaw Cellular Communications, Inc.

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United District Court for the District of Columbia in *United States of America* v. *AT&T Corp. and McCaw Cellular Communications, Inc.* Civil Action No. 94–01555 (HHG). The proposed Final Judgment is subject to approval by the Court after the expiration of the statutory 60-day public comment period and compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h).

The Complaint alleges that the propose acquisition by AT&T Corp. ("AT&T") of McCaw Cellular Communications, Inc. ("McCaw") violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, in the markets for cellular service, cellular infrastructure equipment and interexchange service to cellular subscribers.

The proposed Final Judgment contains substantive obligations and restrictions that should substantially mitigate the incentive and ability of the merged AT&T-McCaw to constrain the actions of McCaw's cellular service competitors. The proposed Final Judgment provides for separate subsidiary requirements and restrictions on the flow of certain confidential information within the combined AT&T/McCaw entity; obligates AT&T to continue to deal with its customers on terms in place prior to the merger, and on terms not less favorable than those offered to McCaw; obligates AT&T to assist, and not to interfere, with an incumbent customer's decision to change infrastructure suppliers; and requires a buy-back provision that would reduce the lock-in effect by lowering the cost for a competitor/customer to switch suppliers in the event that AT&T fails to comply with its obligations to its customers under the judgment.

Next, the proposed Final Judgment requires McCaw cellular systems to provide equal access to interexchange competitors of AT&T, which is not now provided in most McCaw systems, thereby increasing competition in the provision of interexchange services to cellular customers.

Finally, the proposed Final Judgment restrains McCaw from providing certain confidential information of other cellular infrastructure equipment suppliers to AT&T's manufacturing division to prevent anticompetitive harm to the cellular infrastructure equipment market.

Public comment is invited within the statutory 60-day comment period. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Richard Liebeskind, Assistant Chief, Communications and Finance Section, Room 8104, U.S. Department of Justice, Antitrust Division, 555 4th Street, NW Washington, DC 20001.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection in Room 3229, Department of Justice, Washington, DC and at the Office of the Clerk of the United States District Court for the District of Columbia, Washington, DC.

Copies of any of these materials may be obtained upon request and payment of a copying fee.

Steven C. Sunshine,

Deputy Assistant Attorney General, Antitrust Division.

Stipulation

United States of America, Plaintiff v. AT&T Corp. and McCaw Cellular Communications, Inc., Defendants. Civil Action No. 1:94–CV01555 Judge Harold Greene Filed: 7/15/94.

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

1. The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent.

2. The parties shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment, unless AT&T or McCaw certify to the Department that this transaction has been abandoned, and withdrew its applicable filing made under the Hart-Scott-Rodino Antitrust Improvement Act, 15 U.S.C. 18a, in which case the proposed Final Judgment or Final Judgment will be withdrawn or vacated and the action dismissed.

3. Plaintiff may withdraw its consent to this proposed Final Judgment at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court. In the event plaintiff withdraws its consent or if the proposed Final Judgment is not entered pursuant to this Stipulation, this Stipulation will be of no effect whatsoever, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

4. In the event of a final and unappealable order determining that entry of this Final Judgment would be contrary to the public interest, or otherwise constituting a decision on the merits that the proposed Final Judgment should not be entered, and absent other agreement between these parties, the parties will continue to abide by and comply with Section III of this Final Judgment until this action is finally adjudicated or dismissed.

5. The Stipulation by the United States to entry of this Final Judgment is not intended to, does not, and shall not be deemed to constitute a statement of position by the United States as to the appropriate scope of local cellular service areas. Notwithstanding any provision of the Final Judgment, the United States may at any appropriate time seek orders from the Court eliminating one or more of the exception to the general definition of Local Cellular Service Areas contained in Section II.Q of the Final Judgment.

6. AT&T and McCaw hereby stipulate that it will not move to modify the Final Judgment, if entered in the form attached hereto, for eighteen months following commencement of this action, except with the consent of the United States.

7. AT&T hereby irrevocably waives any right it may have to appeal or otherwise challenge in any court any determination by the United States or by any independent fact-finder pursuant to Section V.E. of the Final Judgment, if entered in the form attached hereto.

Dated: July 15, 1994.

Anne K. Bingaman,

Assistant Attorney General.

Steven C. Sunshine,

Deputy Assistant Attorney General.

Antitrust Division, U.S. Department of Justice, Washington, DC 20530.

Richard L. Rosen,

Chief.

Richard Liebeskind,

Assistant Chief.

Luin P. Fitch, Jr.,

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Attorneys for McCaw Cellular Communications, Inc.

Final Judgment

United States of America, Plaintiff, v. AT&T Corp. and McCaw Cellular Communications, Inc., Defendants. Civil Action No. 1:94–CV01555 Judge Harold Greene Filed: 7/15/94.

Plaintiff, the United States of America, having filed its complaint herein on July 15, 1994; the parties, by their respective attorneys, having consented to the entry of this Final Judgment; and without this Final Judgment constituting any evidence or admission by any party with respect to any issue of fact or law herein;

Now, therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law, and upon the consent of the parties, it is hereby Ordered, Adjudged, and Decreed as follows:

I

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this action. The Complaint states a claim upon which relief may be granted against the defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

II

Definitions

As used in this Final Judgment:

A. Affiliate means a corporation or partnership in which AT&T or McCaw, as the case may be, has a direct or indirect voting interest of greater than fifty percent, or the right, power or ability to control.

B. AT&T means AT&T Corp. and its Affiliates other than McCaw.

C. AT&T Equipped Cellular System means a Cellular System in which the Cellular Carrier has obtained Cellular Infrastructure Equipment from AT&T.

D. AT&T Network Wireless Infrastructure Unit means the division, subsidiary or other business organization of AT&T's telecommunications equipment manufacturing subsidiary ("AT&T Network Systems") that manufactures Cellular and Wireless Infrastructure Equipment.

E. Cellular Carrier means an entity that is a carrier within the meaning of the Communications Act of 1934 and that provides Cellular Services.

F. Cellular Digital Packet Data Services means a service that is offered in accord with Internet TCP/IP Protocol Suite and OSI Suite as defined by Internet RFC 791 or any functionally equivalent service in which multiprotocol network services providing wireless packet data to wireless communications users are offered by delivering data to a centralized switching or routing point from which the data is transferred or

routed to a destination in the Local Cellular Service Area (which may be an Internet node) designated by the customer or to an Interexchange Carrier chosen by the customer on an unbundled and nondiscriminatory basis at a point within the Local Cellular Service Area in which the centralized switching or routing point is located.

G. Cellular Infrastructure Equipment means cell sites, mobile switching equipment, and other telecommunications products (hardware and software) which are purchased by Cellular Carriers for the provision of Cellular Services. It does not include transmission media or other Telecommunications Equipment not specifically developed for use in a Cellular System (*e.g.*, cable or fiber) unless such equipment is not compatible with other manufacturers' Cellular Infrastructure Equipment. It does include the equipment used to terminate transmission media (*e.g.*, D4 channel banks) and the radio equipment used to transmit telecommunications within a Cellular System.

H. Cellular Services mean the Domestic Public Cellular Radio Telecommunications Services provided pursuant to part 22, subpart K of the rules of the Commission (47 CFR 22.900–22.945), whether provided solely or principally on those frequencies designated in 47 CFR 22.902.

I. Cellular System means the integrated mobile switching, cell sites, and other facilities which are operated or controlled by a Cellular Carrier and used to provide Cellular Services in an area.

J. Commission means the Federal Communications Commission.

K. Control means the power to direct or to cause the direction of the management and policies of a corporation or a partnership, whether through ownership of voting securities, by contract, or otherwise.

L. Development Team means a discrete and identified group of employees responsible for the development of Telecommunications Equipment, i.e., the design and development of technology platforms, products (including associated documentation and training), and associated engineering and testing. The specific responsibilities of Development Teams may be modified in compliance plans filed pursuant to Section VII.A of this Final Judgment.

M. Exchange Access means services, functions, and activities that a cellular carrier performs, or may hereafter choose to perform, in connection with the origination, routing, or termination of interexchange calls.

N. Interexchange Carrier means a firm that is a carrier within the meaning of the Communications Act and that provides Interexchange Services.

O. Interexchange Services means telecommunications service for hire between one of the Local Cellular Service Areas specified in paragraph II(Q) and a point in some other area.

P. Interexchange Traffic Routing means sorting interexchange calls by destination and routing calls over different trunk groups or other facilities depending on the call's destination.

Q. Local Cellular Service means the provision of Cellular Service between points within areas ("Local Cellular Service Areas") in which the Bell Operating Companies or their affiliates are authorized today, or hereafter become authorized, to provide cellular exchange services without any equal access obligation under the provisions of the MFJ, any orders entered under it, or any legislation that supersedes or modifies it, including generic orders that for the purposes of this Final Judgment shall be construed to apply to McCaw Cellular Systems as if such Cellular Systems were Bell Operating Companies' Cellular Systems, except that, for purposes of this order, and subject to further order of this Court: (i) The Spokane (Washington) LATA 676 shall include all of Yakima MSA 191; (ii) the Seattle (Washington) LATA 674 shall include Tacoma MSA 82; (iii) the Portland (Oregon) LATA 672 shall include Eugene MSA 135, Medford MSA 229 and Salem MSA 148; (iv) the Minneapolis (Minnesota) LATA 628 shall include Minneapolis MSA 15, Rochester MSA 288, and St. Cloud MSA 198; (v) the Los Angeles (California) LATA 730 shall include Ventura MSA 73; (vi) the San Luis Obispo (California) LATA 740 shall include Santa Barbara MSA 124; (vii) the Stockton (California) LATA 738 shall include Stockton MSA 107; (viii) the Sacramento (California) LATA 726 shall include Sacramento MSA 35, Redding MSA 254, Yuba City MSA 274, Reno MSA 171, and Chico MSA 215; (ix) the Fresno (California) LATA 728 shall include Visalia MSA 150; (x) the Austin (Texas) LATA 558 shall include Austin MSA 75 and Bryan-College Station MSA 287; (xi) the Waco (Texas) LATA 556 shall include Killeen-Temple MSA 160; (xii) the Shreveport (Louisiana) LATA 486 shall include Texarkana MSA 240, and Longview MSA 206; (xiii) the Lafayette (Louisiana) LATA 488 shall include Lafayette MSA 174; (xiv) the Dallas (Texas) LATA 552 shall include Sherman-Dennison MSA 292; (xv) the Little Rock (Arkansas) LATA 528 shall include Pine Bluff MSA 291; (xvi) the Tulsa (Oklahoma) LATA 538 shall include Tulsa MSA 57, Fayetteville MSA 182, Fort Smith MSA 165, Springfield MSA 163, and Joplin MSA 239; (xvii) the Jacksonville (Florida) LATA 452 shall include Jacksonville MSA 51, Ocala MSA 245, and Tallahassee MSA 168; (xviii) the Gulf Coast (Florida) LATA 952 shall include Tampa MSA 22, Sarasota MSA 167, and Lakeland MSA 114; and (xix) the Pittsburgh (Pennsylvania) LATA 234 shall include Parkersburg MSA 200, Erie MSA 130, Wheeling MSA 178, Johnstown MSA 143, and Steubenville MSA 199.

R. Marketing Account Team means a discrete and identified group of employees of AT&T, within AT&T's subsidiary, division or other business unit responsible for the manufacture and sale of Telecommunications Equipment, who are engaged in selling, and providing related services in connection with selling, Cellular Infrastructure Equipment and other Telecommunications Equipment to one or more specified customers. The duties of the Marketing Account Team shall include sales and account management functions, including customer relationship management, offer and sale of products and services, pricing of products and services to customers, preparation and presentation of bids and proposals, account-level planning and forecasting, basic technical and engineering advice and support, and contract management; sales operations functions, including order processing and management and customer billing; and project management functions, including ensuring that customer satisfaction goals for specific products are met and that terms and conditions of sale are satisfied. The specific responsibilities of Marketing Account Teams may be modified in compliance plans filed pursuant to Section VII.A of this Final Judgment.

S. McCaw means McCaw Cellular Communications, Inc., and its Affiliates, including any McCaw Cellular System.

T. McCaw Cellular System means a Cellular System in which McCaw controls, directly or through its affiliates, a direct or indirect voting interest of more than fifty percent (50%), or the right, power or ability to control, including any Cellular Systems in which AT&T or McCaw acquires such interests after the commencement of this action.

U. McCaw Minority Owned Cellular System means a Cellular System in which McCaw controls, directly or indirectly, a direct or indirect voting

interest of fifty percent or less, and does not have the right, power or ability to control, including any Cellular Systems in which AT&T or McCaw acquires such interests after the entry of this Final Judgment.

V. MFJ means the Modification of Final Judgment entered in *United States v. Western Electric Corp.*, No. 82–0192, on August 24, 1982, 552 F. Supp. 131 (D.D.C. 1982), as subsequently modified.

W. MTSO means Mobile Telephone Switching Office and the equipment used therein.

X. 1. Nonpublic Information means information not in the public domain that is furnished (a) by a Wireless Carrier to AT&T in AT&T's capacity as a supplier of Wireless Infrastructure Equipment or (b) by a Wireless Infrastructure Equipment supplier to McCaw or to McCaw Cellular Systems.

2. To be Nonpublic Information, information must be one of the following:

(a) Information containing costs, profits, or profit margins; plans for development of new products, services, or technologies; customer names; pricing policies, prices, price schedules, or terms; number of subscribers, sales, churn rates, or other output measures; capacity measures; features and capabilities; technology plans or status of implementation; marketing plans; costs of or prices paid for infrastructure equipment and other inputs, including price credits, or adjustments for a cellular carrier's used equipment; plans for expansion; amounts of capital investment; or quantities and types of equipment used by a wireless carrier or sold by a wireless infrastructure equipment supplier;

(b) Other written information designated in writing by the Wireless Carrier or Wireless Infrastructure Equipment supplier as proprietary information by an appropriate legend, marking, stamp, or positive written identification on the face thereof; or

(c) Other oral, visual, or other information that is identified as proprietary information in writing by the Wireless Carrier or Wireless Infrastructure Equipment supplier prior to or contemporaneously with its disclosure to AT&T, or in the case of oral, visual, or other information provided prior to the entry of this Final Judgment, information that is so identified within 180 days of the entry of this Final Judgment.

3. "Nonpublic Information" shall not include

(a) Information already known to AT&T by means of its independent research, development, and analysis activities,

(b) Information that subsequently enters the public domain through no violation by AT&T or McCaw of this Final Judgment or of any other duty imposed upon them by law or contract,

(c) Information that subsequently is disclosed in writing to AT&T by a third party not in breach of a confidentiality agreement with the Wireless Carrier to whose business the information pertains,

(d) Except in the case of information specified in subsection (2)(a) of this Section II.X, (i) information that the party furnishing the information agrees, in writing, may be disclosed, or (ii) information that was first disclosed to AT&T or McCaw over six (6) years previously, or such other period as agreed to in writing by AT&T and the Wireless Carrier or Wireless Infrastructure Equipment Supplier that made the disclosure.

Y. Proprietary Development means development by AT&T of products, features or functions for Cellular Infrastructure Equipment that is not intended to be made available to more than one Cellular Infrastructure Equipment customer not affiliated with each other through substantial common ownership.

Z. Technical information means intellectual property of all types, including, without limitation, patents, copyrights, know-how and trade secrets, including planning documents, designs, specifications, standards, practices and procedures, and training materials.

AA. Telecommunications Equipment means products (hardware or software) other than customer premises equipment purchased by a carrier to provide telecommunications services.

AB. Unaffiliated Cellular Infrastructure Equipment Customer means a Cellular Carrier that is not an Affiliate of AT&T or McCaw nor a McCaw Minority Owned Cellular System but that has purchased or, as of the date of entry of this Final Judgment, has contracted to purchase, AT&T Cellular Infrastructure Equipment for use in providing Cellular Service in a Cellular Service Area.

AC. Unaffiliated Wireless Infrastructure Equipment Customer means a Wireless Carrier that is not an Affiliate of AT&T or McCaw nor a McCaw Minority Owned Cellular System but that purchases or contracts to purchase AT&T Wireless Infrastructure Equipment for use in providing Wireless Service.

AD. United States means plaintiff the United States of America. Unless otherwise delegated by the Attorney General, the authority under this Final Judgment to act on behalf of the United States is delegated to the Assistant Attorney General in charge of the Antitrust Division or to such personnel of the Antitrust Division as the Assistant Attorney General may designate.

AE. Wireless Infrastructure Equipment means the cell sites, mobile switching equipment and other Telecommunications Equipment which is purchased by Wireless Carriers for the provision of Wireless Services. It does not include transmission media or other equipment not specifically developed for use in a Wireless System (*e.g.*, cable or fiber) unless such equipment is not compatible with other manufacturers' Wireless Infrastructure Equipment. It does include both the equipment used to terminate those media (*e.g.*, D4 channel banks) and the radio equipment used to transmit telecommunications within a Wireless System.

AF. Wireless Services, Wireless Systems and Wireless Carriers, respectively, mean those telecommunications services, systems, or carriers that use radio transmission between the customer and the network, and includes cellular, land mobile radio, commercial mobile radio (as defined in 47 U.S.C. 332(d)(1), as amended), specialized mobile radio ("SMR"), personal communications services ("PCS"), and any other mobile radio services, systems, or carriers that has been or might be authorized by the Commission or offered using radio transmission between the customer and the network.

III

Separation of McCaw and AT&T

McCaw and McCaw affiliates that are involved in the operations of Wireless Systems and the provision of Local Wireless Services shall be maintained as corporations or partnerships engaged in such business activities separate from AT&T so long as any provision of this Final Judgment remains in effect. Separation for purposes of this Final Judgment requires the following:

A. McCaw and McCaw affiliates shall be maintained as corporations or partnerships with separate officers and personnel, and separate books, financial, and operating records.

B. McCaw and McCaw affiliates shall retain all Wireless Service licenses and title and control of the Wireless Infrastructure Equipment used by its Wireless Systems to provide Wireless Services.

C. McCaw and McCaw affiliates shall retain responsibility for the operation of their Wireless Systems and the marketing of their wireless services, and may not by contract or otherwise

delegate substantial responsibility for the performance of such business activities to AT&T, provided that AT&T may act as McCaw's agent to the extent authorized in Section IV(F) of this Final Judgment. Nothing in this Final Judgment shall prohibit AT&T from providing general corporate overhead and administrative services to McCaw and McCaw affiliates.

D. AT&T may provide Interexchanges Services, Wireless Infrastructure Equipment and related engineering services, and services related to the marketing of Wireless Services to McCaw and McCaw affiliates subject to the provisions of this Final Judgment, provided that such products and services may be provided only pursuant to filed tariffs or written contracts identifying the products and services to be provided, the principal terms and conditions of their provision, and the prices therefor.

E. A McCaw Cellular System or McCaw Minority Owned Cellular System may use the name "AT&T" or any trademark or trade name of AT&T in its corporate or service names only after such date as it has completed conversion to equal access and balloted existing customers pursuant to Section IV.B and IV.C of this Final Judgment. McCaw, AT&T and McCaw Minority Owned Systems may not use the name "AT&T" or any registered trademark or trade name of AT&T in the national marketing or advertising of any Cellular Service until 60% of the McCaw Cellular Systems (measured by subscribers, and without including McCaw Minority Owned Cellular Systems that provide equal access pursuant to the MFJ) have completed conversion to equal access.

IV

Equal Access

A. Prior to its conversion to equal access under Section IV.B through IV.D, McCaw Cellular Systems may continue existing arrangements for provision of Interexchange Services. No McCaw Cellular System shall alter these arrangements in ways that discriminate in favor of AT&T in the provision of Exchange Access.

B. Each McCaw Cellular System shall, on a phased-in basis and no later than 21 months following the commencement of this action, cease providing Interexchange Services and shall provide customers of each McCaw Cellular System equal access to any Interexchange Carrier that offers service to the system by

1. Providing each customer with Local Cellular Service under prices and terms that do not depend upon the customer obtaining Interexchange Service from AT&T or from any affiliate of McCaw. Except to the extent specifically authorized by Section IV.F.1 of this Final Judgment, McCaw, McCaw Cellular Systems, their employees, and their agents shall not recommend, sell otherwise market the Interexchange Services of any Interexchange Carriers, and shall administer Interexchange Carrier selection procedures on a carrier-neutral and nondiscriminatory basis;

2. Permitting each customer automatically to route, without the use of access codes, all of the customer's originating interexchange communications to the Interexchange Carrier of the customer's designation and to reach other Interexchange Carriers by dialing the appropriate carrier identification code, with each McCaw Cellular System prohibited from imposing any charges on its customers for originating Interexchange calls unless the charges are nondiscriminatory and imposed regardless of the identity of a customer's Interexchange Carrier; and

3. Providing for each of its existing customers to designate the Interexchange Carrier of the customer's choice within 60 days after the System's conversion to equal access, and thereafter requiring each new customer to designate the Interexchange Carrier of the customer's choice. After such date, the McCaw Cellular Systems shall block Interexchange Services to customers who both fail to designate an Interexchange Carrier and place calls without using access codes, except that they may allocate existing customers who fail to make such a designation among Interexchange Carriers in proportion to the number of customers subscribing to each of these Interexchange Carriers.

C. Each McCaw Cellular System shall provide complete lists of its Cellular Service customers' names and addresses to Interexchange Carriers unaffiliated with McCaw or AT&T for use solely in connection with marketing their Interexchange Services to customers of that McCaw Cellular System at least sixty days prior to the system's conversion to equal access and at quarterly intervals thereafter. If customers' names, addresses, telephone number or other information are provided to or used by AT&T for the purpose of marketing Interexchange Services, the lists shall be provided to other Interexchange Carriers at the same time and under the same terms. A McCaw Cellular System shall not provide AT&T with information about a cellular customer's Interexchange Carrier or the customer's Cellular or Interexchange Service usage unless (a) the customer is already a customer of AT&T's Interexchange Services, and (b) the McCaw Cellular System provides other Interexchange Carriers with the same information concerning their customers at the same time and under the same terms.

D. After its conversion to equal access, each McCaw Cellular System shall

1. Provide to all Interexchange Carriers Exchange Access on an unbundled basis that is equal in type, quality, and price to that provided to AT&T. Each McCaw Cellular System shall allow access to MTSOs through switched connections by way of local exchange carrier access tandems, and shall provide to the Interexchange Carrier dialed digits, automatic calling number identification and other information necessary to bill calls, answer supervision, carrier access codes, and testing and maintenance of whatever facilities of the cellular system are used by Interexchange Carriers, regardless of whether any of these services are provided to AT&T. A McCaw Cellular System shall be required to offer to each unaffiliated Interexchange Carrier to establish dedicated access connections to MTSOs, to perform billing services on reasonable terms, to provide interexchange traffic routing services, provide customer location information for use in routing calls, and to perform other activities or functions for Interexchange Carriers in connection with the origination, routing, or termination interexchange calls in the same manner as and on the same terms and conditions, including price, that those services, activities, or functions are provided to AT&T. If a McCaw Cellular System provides information to AT&T to allow it to bill its Interexchange Service customers for Cellular Service, it shall at each unaffiliated Interchange Carrier's option provide sufficient information about the usage and charges for Cellular Service to other Interexchange Carriers to allow them to make commercially reasonable arrangements to bill their customers for Cellular Service.

2. Be prohibited from discriminating in favor of AT&T (a) in providing in a timely manner technical or other information about the Cellular System or its customers, (b) in the interconnection or use of the McCaw Cellular System's service and facilities or in the charges for each element of service, or (c) in the provision of new Exchange Access services and the planning for and construction or

modification of facilities used to provide Exchange Access.

3. Be prohibited from implementing any new Exchange Access service, or imposing any charge on Interexchange Carriers for Exchange Access, unless the service is available and the charge is applicable to all Interexchange Carriers and has been announced a minimum of 60 days before the service is provided or the charge imposed.

E. A Cellular System that becomes a McCaw Cellular System following the entry of this Final Judgment shall comply with the provisions of this Section IV within one year of the date on which it becomes a McCaw Cellular System, or within 21 months of the commencement of this action, whichever is later.

F. 1. Notwithstanding the provisions of this Section IV, and following the dates upon which AT&T, McCaw and McCaw Minority Owned Cellular Systems may use the name "AT&T," its trademarks and trade names pursuant to Section III of this Final Judgment, AT&T may act as McCaw's agent in marketing Local Cellular Services and may jointly market Local Cellular Services, Interexchange Services and other services, provided that

a. AT&T must advise actual or prospective subscribers that they have a right to presubscribe to competing Interexchange Carriers following each McCaw Cellular System's conversion to equal access;

b. AT&T shall be required to state separately the prices, terms, and rate plans for Local Cellular Services and Interexchange Services;

c. AT&T shall not sell or contract to sell Interexchange Services at a price, term, or discount that depends upon whether the customer obtains Local Cellular Service from McCaw; and

d. McCaw or a McCaw Cellular System shall not sell or contract to sell Local Cellular Service at a price, term, or discount that depends on whether the customer obtains Interexchange Service from AT&T.

e. Notwithstanding the provisions of Section III.C and of this Section IV.F, AT&T may act as McCaw's agent in marketing Cellular Services before a McCaw Cellular System or McCaw Minority Owned Cellular System is converted to equal access under this Section IV, provided that AT&T markets the Cellular Service under a McCaw trademark or trade name, AT&T does not market the Cellular Service in connection with AT&T's Interexchange Services, and does not use any AT&T trademark or trade name in marketing McCaw Cellular Service. The procedures and arrangements for marketing Cellular Service under this Section IV.E.1 e shall be described in compliance plans filed pursuant to Section VII.A of this Final Judgment before being implemented, except that arrangements for marketing Cellular Service at AT&T Phone Centers that were in existence before the commencement of this action may be maintained pending the effective date of compliance plans.

2. Nothing in this Final Judgment shall prohibit AT&T from, without separately stating charges for Interexchange Services and terminating Local Cellular Service, providing services in which the calling party pays for calls to a cellular telephone, provided that

a. AT&T obtains any underlying Cellular Services from McCaw Cellular Systems or McCaw Minority Owned Cellular Systems at a generally available rate, no higher than the rate offered to resellers of the cellular service provided by that McCaw cellular system; and

b. The McCaw Cellular Systems or McCaw Minority Owned Cellular Systems (or AT&T) contemporaneously discloses this rate to the other Interexchange Carriers serving that system and describes it in the Equal Access Plan filed for approval by the United States pursuant to section VII.A of this Final Judgment.

G. Where there is insufficient demand by Interexchange Carriers for access to McCaw Cellular Systems within the Local Cellular Calling Areas specified in Section II(Q), McCaw Cellular Systems shall be permitted, upon a showing to and certification by the United States, to offer new services in which access to Interexchange Carriers is provided at one or more centralized points. The showing required and the certification provided pursuant to this Section IV.G shall state specifically the services to be provided, the access arrangements therefor, and the centralized points at which access to Interexchange Carriers is to be provided.

H. Nothing in this Final Judgment shall prohibit McCaw from offering Cellular Digital Packet Data Service.

I. Notwithstanding the requirements of this Section IV, AT&T may provide Interexchange Service to customers of Unaffiliated Cellular Carriers or McCaw Minority Owned Cellular Systems who (1) roam into McCaw Cellular Systems, and (2) have not designated a presubscribed Interexchange Carrier or who have designated a presubscribed Interexchange Carrier that does not provide service to that McCaw Cellular System.

V

Manufacturing

For so long as McCaw is affiliated with the AT&T Network Wireless Infrastructure Unit, AT&T shall have the duties set forth in Section V.A through V.D of this Final Judgment.

A. 1. a. AT&T shall not allow Nonpublic Information of its Unaffiliated Wireless Infrastructure Equipment Customers to be disclosed for any reason to (i) McCaw or any of its directors, officers, or employees; (ii) any McCaw Minority Owned Wireless System (except in the case in which the Nonpublic Information relates specifically to such System); (iii) any person engaged in marketing any McCaw service or AT&T Telecommunications service; (iv) any person employed by a Marketing Account Team responsible for marketing to AT&T, McCaw or any McCaw Minority Owned Cellular System; or (v) any person performing Proprietary Development of Telecommunications Equipment for AT&T, McCaw or McCaw Minority Owned Cellular Systems.

b. AT&T shall not disclose any Nonpublic Information relating to the provision of any Wireless Service by McCaw or AT&T, obtained by AT&T by reason of its provision of Wireless Infrastructure Equipment to McCaw, to any Unaffiliated Wireless Infrastructure Equipment Customer.

c. To the extent that the President or senior officers of AT&T Network Systems or members of AT&T's management executive committee are persons identified in items (ii) through (v) of Section V.A.1(a) of this Final Judgment, they shall be permitted to receive such Nonpublic Information in connection with their capacities as President or senior officers of AT&T Network Systems or members of AT&T's management executive committee, but such persons shall not disclose any such Nonpublic Information to other persons identified in (i) through (v) above.

2. McCaw shall not allow Nonpublic Information of its Unaffiliated Wireless Infrastructure Equipment suppliers to be disclosed for any reason to any person involved in the design, development, fabrication, or marketing of AT&T's Telecommunications Equipment. McCaw shall not allow Nonpublic Information of any unaffiliated Interexchange Carrier to be disclosed for nay reason to any person involved in the design, development, fabrication, or marketing of any AT&T Telecommunications service or product. Access to Nonpublic Information of any unaffiliated Interexchange Carrier shall

be limited to authorized persons within McCaw and within AT&T's Network Wireless Infrastructure Unit having a legitimate need to know such Nonpublic Information in order to conduct their respective businesses.

3. AT&T shall establish, maintain, and strictly enforce procedures designed to prevent the disclosures of Nonpublic Information prohibited by this Final Judgment.

4. a. AT&T shall establish, maintain and strictly enforce separate Marketing Account Teams for (i) McCaw and other AT&T Affiliates providing Telecommunications services and (ii) Unaffiliated Wireless Infrastructure Equipment Customers. Members of Marketing Account Teams for Unaffiliated Wireless Infrastructure Equipment Customers shall not be assigned to any AT&T or McCaw business (i) providing Telecommunications Equipment to AT&T, McCaw or a McCaw Minority Owned Cellular System, or (ii) providing or planning for any AT&T or McCaw Wireless Service, except in compliance with the procedures to be adopted pursuant to Section V.A.4.c of this Final Judgment.

b. If AT&T performs Proprietary Development for Unaffiliated Wireless Infrastructure Equipment Customers, members of the Development Teams who perform such Propriety Development shall not perform Proprietary Development for McCaw or for any AT&T Telecommunications service except in compliance with the procedures to be adopted pursuant to Section V.A.3.c of this Final Judgment.

c. AT&T shall establish, maintain and strictly enforce procedures designed to prevent the use or disclosure of Nonpublic Information of Unaffiliated Wireless Infrastructure Equipment Customers gained as a result of an employee's (i)(A) assignment to a Marketing Account Team responsible for Unaffiliated Cellular Infrastructure Equipment Customers, or (B) involvement in Proprietary Development for an Unaffiliated Cellular Infrastructure Equipment Customer, and (ii)(A) subsequent assignment to a Marketing Account Team responsible for marketing Cellular Infrastructure Equipment to AT&T, McCaw or McCaw Minority Owned Cellular Systems, (B) subsequent assignment to McCaw, McCaw Minority Owned Cellular Systems, or any business providing or planning for any AT&T or McCaw Telecommunications Service, or (C) subsequent involvement in Proprietary Development for McCaw or AT&T.

B. AT&T shall have the following duties to its Unafiliated Cellular Infrastructure Equipment Customers:

1. AT&T shall provide the Cellular Carrier and System with

a. Technical support and maintenance;

b. Installation, engineering, repair, and maintenance services;

c. Additional switching and cell site equipment to be deployed in that system;

d. Upgrades and other AT&T cellular infrastructure equipment developed for use with these systems; and

e. Spare, repair, or replacement parts, in accordance with the same pricing and other business practices that prevailed prior to August 1, 1993. AT&T shall not discriminate in favor of McCaw Cellular Systems or McCaw Minority Owned Cellular Systems in the way in which such services or products are made available to Cellular Carriers or Systems, and the terms on which such services and products are provided shall not vary depending on whether the Cellular System that will use such service or product competes with McCaw or a McCaw Minority Owned Cellular System; and

2. In the event AT&T has discontinued, or hereafter discontinues, the offering of any Cellular Infrastructure Equipment service, part, or product, AT&T shall seek to arrange an alternative source of service or supply for the Cellular Carrier and, if AT&T is unsuccessful, AT&T shall provide the Cellular Carrier with licenses to use (and rights to sublicense) whatever Technical Information is required to provide these services, products, or parts, to the extent AT&T is able to grant such licenses, in order to allow the carrier to obtain the service, part, or product in question from another source. The terms of any such license, including reasonable charges, shall be in accordance with reasonable and nondiscriminatory licensing procedures.

C. 1. When AT&T engages in development of new features and functions for use with AT&T Equipped Cellular Systems installed or contracted for prior to the date of this Final Judgment that, if successful, will be made available to two or more Cellular Carriers that are not affiliated with each other through substantial common ownership. AT&T shall disclose the enhancements to Cellular Carriers not affiliated with AT&T at the time as it discloses them to McCaw, any McCaw Cellular Systems, or any McCaw Minority Owned System, and shall make them available to Unaffiliated Cellular Infrastructure Equipment Customers at the same time as it makes them available to McCaw or any McCaw Minority Owned Cellular System.

2. If AT&T develops for McCaw, a McCaw Cellular System, or a McCaw Minority Owned Cellular System, features or functions that are applicable only to McCaw or to that System because of its adjunct hardware and software or because of its specific operations or network, AT&T shall afford Unaffiliated Cellular Infrastructure Equipment Customers substantially the same opportunity to contract for such development work on substantially the same compensatory basis.

3. If AT&T performs for McCaw, McCaw Cellular Systems, or McCaw Minority Owned Cellular Systems Proprietary Development, AT&T will be required to perform upon reasonable request Proprietary Development for Unaffiliated Cellular Infrastructure Equipment Customers under reasonable terms and conditions not less favorable to the Unaffiliated Cellular Equipment Customer than those provided to McCaw, McCaw Cellular Systems or McCaw Minority Owned Cellular Systems.

D. If a Cellular Infrastructure Equipment Customers has deployed or contracted to deploy an AT&T Equipment Cellular System in whole or in substantial part prior to the date of entry of this Final Judgment, and if that Cellular Infrastructure Equipment Customer wishes to redeploy AT&T Cellular Infrastructure Equipment or, replace, or supplement the AT&T Equipped Cellular System with another manufacturer's switching, cell site and other Cellular Infrastructure Equipment in whole or in part, AT&T shall

1. Provide the Cellular Infrastructure Equipment Customer with such technical assistance and cooperation as may be reasonably necessary in order for the Customer both to accomplish such replacement or redeployment and to have the new manufacturer's equipment interoperate with AT&T products in that area or in an adjacent area, with AT&T providing this assistance in accord with reasonable pricing and business practices, including AT&T's right to receive reasonable compensation for such services and its right not to be required for these purposes to provide competing equipment suppliers with proprietary information that is not necessary to allow the interoperation of AT&T and non-AT&T equipment; and

2. Waive any contractual requirements that it receive prior notice of, or must consent to, redeployment by any customer of AT&T Cellular

Infrastructure Equipment to a new location. In the event of deployment or sale, the Cellular Infrastructure Equipment Customer or new purchaser will succeed to the original purchaser's warranty, license, and other contractual rights, and AT&T's obligations under Sections V.A, V.B, V.C, and V.D of this Final Judgment shall apply to any new purchaser as if it had been the original purchaser.

E. In the event that the United States, in its sole and unreviewable discretion, determines that AT&T has violated any of its duties under Sections V.A through V.D of this Final Judgment to an Unaffiliated Cellular Carrier in any area where that Unaffiliated Cellular Carrier competes with McCaw or a McCaw Minority Owned Cellular System, and where the Unaffiliated Cellular Carrier has deployed or contracted to deploy an AT&T Equipped Cellular System prior to the date of entry of this Final Judgment, AT&T shall be required to offer to buy back the AT&T Cellular Infrastructure Equipment hardware purchased or contracted for by that Unaffiliated Cellular Carrier for use in that Cellular System prior to the date of the entry of this Final Judgment, at their original purchase prices, less depreciation as calculated on a straight line basis over a period of ten years for switches and eight years for all other hardware, to offer to refund the proportionate share of all monies paid for unused portions of any licenses for software to be used with such hardware, and to offer to release the Unaffiliated Cellular Equipment Customer from future obligations relating to Cellular Infrastructure Equipment deployed in such Cellular System. The United States may, in its sole discretion, appoint an independent fact-finder to conduct the investigation or factual determination of any issue raised in connection with any alleged violation, reserving to the United States the right to make a final determination. In the event of any such appointment, the losing party (*i.e.*, the customer or AT&T) shall pay all costs and fees of the fact-finder. In stipulating to the entry of this Final Judgment, AT&T has irrevocably waived any right it may have to appeal, contest or otherwise challenge any adverse determination of the United States pursuant to this Section V.E.

VI

Applicability and Effect

The provisions of this Final Judgment, applicable to each defendant, shall be binding upon said defendants, their successors and assigns, officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with each defendant who receive actual motive of this Final Judgment by personal service or otherwise. Each defendant and each person bound by the prior sentence shall cooperate in ensuring that the provisions of this Final Judgment are carried out. Neither this Final Judgment nor any of its terms or provisions shall constitute any evidence against, an admission by, or an estoppel against any party. The effective date of this Final Judgment shall be the date upon which it is entered

VII

Compliance

A. 1. AT&T will file plans for the implementation of the provisions of this Final Judgment with the United States Department of Justice not later than 90 days after the Final Judgment's entry. AT&T shall file a Structural Separation implementation plan describing its implementation of the provisions of Sections III and V.A.4; an Equal Access implementation plan for each McCaw Cellular System, describing its implementation of Section IV; and a Nonpublic Information implementation plan, describing its implementation of Section V.A.

2. AT&T shall supplement the plans required by Section VII.A.1 as necessary to describe the implementation of Equal Access in subsequently acquired Cellular Systems, and to describe significant changes in the matters reflected in the plans.

3. The plans shall be effective 90 days after filing with the Department, unless disapproved by the Department by written notice to AT&T, identifying the manner in which the plan is insufficient. The Department may in its discretion approve a plan in fewer than 90 days. In the absence of an effective plan, AT&T shall be enjoined as follows:

a. In the absence of an effective Separation plan, AT&T shall comply with Section III of this Final Judgment without modification, and shall not perform Proprietary Development for McCaw.

b. In the absence of an effective Equal Access plan, AT&T may not provide Interexchange Services to customers of McCaw Cellular Systems, except under arrangements that prevailed prior to the merger.

c. In the absence of an effective Nonpublic Information plan, AT&T shall not sell Cellular Infrastructure Equipment to McCaw or McCaw Minority Owned Cellular Systems, except that AT&T may sell Cellular Infrastructure Equipment to such Cellular Systems if they were AT&T Equipped Cellular Systems prior to the commencement of this action.

B. The defendants are ordered and directed to advise their officers and other management personnel with significant responsibility for matters addressed in this Final Judgment of their obligations hereunder. AT&T shall undertake the following with respect to each such office or management employee:

1. The distribution to them, within 30 days of entry of this Final Judgment, or within 30 days of a person's becoming an officer or other management personnel with significant responsibility for matters addressed in this Final Judgment of a written directive setting forth AT&T's policy regarding compliance with this Final Judgment, with such directive to include: (a) An admonition that noncompliance with such policy and this Final Judgment will result in appropriate disciplinary action, which may include dismissal; and (b) advice that AT&T's legal advisors are available at all reasonable times to confer with such persons regarding any compliance questions or problems;

2. The imposition of a requirement that each of them sign and submit to AT&T a certificate in substantially the following form:

The undersigned hereby (1) acknowledges receipt of a copy of the 1994 *United States* v. *AT&T Corp.* Final Judgment and a written directive setting forth AT&T's policy regarding compliance with such Final Judgment, (2) represents that the undersigned has read such Final Judgment and directive and understands those provisions for which the undersigned has responsibility, (3) acknowledges that the undersigned has been advised and understands that noncompliance with such policy and Final Judgment will result in appropriate disciplinary measures determined by AT&T, which may include dismissal, and (4) acknowledges that the undersigned has been advised and understands that non-compliance with the Final Judgment may also result in conviction for contempt of court and imprisonment and/or fine.

VIII

Visitation

A. For the purpose of determining or securing compliance with this Final Judgment, and subject to any legally recognized privilege, from time to time:

1. Upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a defendant, made to its principal office, duly authorized representatives of the Department of Justice shall be permitted access during

office hours of such defendant to depose or interview officers, employees, or agents, and inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

2. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to a defendant's principal office, such defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

B. No information or documents obtained by the means provided in this section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States or the Commission, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by a defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 days' notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant is not a party.

IX

Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

X

Modification

A. If BOC Wireless Systems are relieved in whole or in part of any or all of the comparable equal access or nondiscrimination obligations of the MFJ as a result of legislation, judicial orders, or agency orders that vacate, modify, supersede, or interpret the provisions of the MFJ, the provisions of Article IV of this Final Judgment shall be modified or vacated to provide the same relief to AT&T or McCaw upon their showing that competitive conditions do not require a different obligation for AT&T and McCaw and that his modification is equitable and in the public interest.

B. If AT&T and McCaw seeks modification or removal of the provisions of this Final Judgment upon grounds that include a showing either (1) that enhanced specialized mobile radio services, personal communications services licensed in the 1.8 to 2.1 GHz band, or other services have developed as effective competitive alternatives to the cellular services in existence at the time of entry of the Final Judgment, or (2) that there have been other changes or developments affecting a relevant market, AT&T and McCaw will be entitled to modification of the provisions of Article IV or Article V of this Final Judgment if it shows that intervening changes have made the retention of the provision inequitable, irrespective of whether the intervening changes or developments had been foreseen or were foreseeable when the Final Judgment was entered. AT&T and McCaw have stipulated that they will not move for any modification of this Final Judgment, except with the consent of the United States, for eighteen months following the date of the commencement of this action.

XI

Expiration

The provisions of this Final Judgment, to the extent they remain in effect, shall expire on the date ten years after its entry.

XII

Public Interest

Entry of this Final Judgment is in the public interest.

United States of America, Plaintiff, v. AT&T Corp. and McCaw Cellular Communications, Inc. Defendants. Civil Action No. 94–01555 (HHG) Filed: August 5, 1994.

Competitive Impact Statement

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. 16(b)–(h), plaintiff, the United States, submits this Competitive Impact Statement relating to the proposed Final Judgment for entry with the consent of defendants, AT&T Corp. ("AT&T") and McCaw Cellular Communications, Inc. ("McCaw") in this civil antitrust proceeding.

I.

Nature and Purpose of the Proceeding

On July 15, 1994, the United States filed a civil antitrust complaint, under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, against AT&T and McCaw, alleging that the proposed merger of defendants violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by:

1. Decreasing actual and potential competition in the market for cellular services because the merger would combine McCaw, a cellular service provider with AT&T, the leading supplier of cellular infrastructure equipment. That vertical integration may substantially increase the merged firm's ability and incentive to raise the costs, limit the capacity, or constrain the quality of service of McCaw's cellular service competitors that are dependent upon AT&T for cellular infrastructure equipment.

2. Decreasing competition in the market for cellular infrastructure equipment by providing AT&T with access to competitively sensitive and proprietary information of McCaw's principal equipment supplier, L.M. Ericsson ("Ericsson").

3. Decreasing actual and potential competition in the market for interexchange services to cellular subscribers, because the merger of AT&T and McCaw would combine AT&T, the largest interexchange carrier in the United States with McCaw, one of only two cellular service providers in many markets; and would combine the two largest providers of interexchange service to cellular service customers in many areas served by McCaw.

AT&T is the dominant supplier of interexchange telecommunications service in the United States, providing interexchange service to wireline and cellular telephone customers. AT&T is also the largest supplier of the cellular

infrastructure equipment (switches, cell site radios and related equipment) used by cellular carriers to provide that service in the United States and North America. AT&T, along with the next two largest suppliers—Motorola and Ericsson—account for the vast majority of the installed base of cellular infrastructure equipment in the United States.

McCaw is the largest provider of cellular service in the United States, with ownership interests in cellular systems serving approximately 22 percent of all of the cellular subscribers in the United States. These systems include the following cities: New York, Los Angeles, Miami, Dallas, Houston, San Francisco, Philadelphia, Pittsburgh, Seattle, Portland, St. Louis and Kansas City. McCaw owns and operates a number of these systems in partnership with companies with whom it competes in other service areas. These companies include AirTouch Communications, Inc. (previously PacTel Mobile Services) and BellSouth Corporation. McCaw operates many of its cellular systems under the name "Cellular One," a tradename owned by a joint venture among a number of cellular licensees including McCaw and Southwestern Bell Corp. McCaw also provides interexchange services to customers of its cellular services, primarily over AT&T facilities.

Pursuant to an agreement dated August 16, 1993, AT&T agreed to purchase McCaw. On July 15, 1994, the United States and defendants filed a stipulation by which they consented to entry of a proposed Final Judgment, after compliance with the APPA, 15 U.S.C. 16(b)–(h), designed to eliminate the anticompetitive effects of the proposed merger in each of the affected markets. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify and enforce the Final Judgment, and to punish violations of the Final Judgment.

As explained more fully below, the proposed Final Judgment would substantially mitigate the incentive and ability of the merged AT&T-McCaw to constrain the actions of McCaw's cellular service competitors, by providing mechanisms to insure that AT&T could not use its position as the incumbent supplier to those McCaw competitors that are locked in to AT&T's equipment to disadvantage or discriminate against them in favor of McCaw. These mechanisms include: separate subsidiary requirements and restrictions on the flow of certain confidential information within the combined AT&T/McCaw entity; obligations on AT&T to continue to deal with its customers on terms in place prior to the merger, and on terms not less favorable than those offered to McCaw; obligations to assist and not interfere with an incumbent customer's changing infrastructure suppliers; and a buy-back obligation that would reduce the lock-in effect by lowering the cost for a competitor/customer to switch suppliers in the event that AT&T fails to comply with its obligations to its customers under the judgment.

To address concerns in the interexchange markets, the proposed Final Judgment would require McCaw cellular systems to provide equal access to interexchange competitors of AT&T, which is not now provided in most McCaw systems, thereby increasing competition in the provision of interexchange services to cellular customers.

Finally, to prevent anticompetitive harm to the cellular infrastructure equipment market, the proposed Final Judgment restrains McCaw from providing certain confidential information of other cellular infrastructure equipment suppliers to AT&T's manufacturing division.

II

Events Giving Rise To The Alleged Violation

A. Background

1. Cellular Services Markets

Cellular carriers operate on either of two bands of radio frequencies, referred to as the "A-side" and the "B-side." [1] The FCC awarded one A-side and one B-side license separately in 306 metropolitan areas, referred to as MSAs, and 428 rural areas called RSAs. Initially, the FCC awarded the B-side license to the local telephone company or an affiliate thereof and the A-side license to firms other than the local telephone company.[2] Cellular licenses are transferable, and since the initial awards there has been considerable consolidation of ownership. Telephone companies have acquired many A-side licenses outside of the areas in which they provide local exchange service. Cellular service is fully interconnected with landline telephone networks, and subscribers can both originate calls to and receive calls from landline subscribers, including long distance calls.

Cellular service is a relevant product market and a "line of commerce" within the meaning of Section 7 of the Clayton Act. Unlike conventional landline telephone service, cellular service provides customers with the added feature of mobility, and landline telephone service therefore is not a substitute. The relevant geographic markets are those service areas in which the FCC has licensed cellular carriers to provide cellular service.

With extremely limited exceptions, there are no providers of mobile telephone services other than the two cellular carriers. At the current time, the holders of these cellular licenses, including McCaw, exercise market power in the provision of cellular service. These duopolies are characterized by rapidly growing demand and minimal price competition, resulting in high margins to cellular carriers.

2. The Cellular Infrastructure Equipment Market

A cellular system consists primarily of one or more mobile telephone switching offices ("MTSOs" or "switches") connected to numerous cell sites. A cell site is a radio facility that receives and transmits cellular calls. Cellular carriers provide cellular service by dividing their licensed service areas into "cells"—each with a corresponding cell site—and reusing the radio channels in different cells. The principal components of a cell site are radio units, radio frames and software (referred to collectively as "radio base stations").

A switch is a large central computer facility connected to cell sites, other MTSOs and local and long distance telephone networks. The MTSO controls the "handoff" of calls between the cells and transfers calls between the cellular systems and the wireline networks of local exchange carriers and interexchange carriers. A cellular system in a large metropolitan area like New York City or Baltimore/Washington might typically include two to four switches and more than one hundred radio base stations.

One principal method of expanding the capacity of a cellular system is to increase the number of cells. The creation of these new cells requires the purchase and deployment of an additional radio base station for each new cell. At some point in expanding the capacity of a system it also becomes necessary to add additional switches. Another method of capacity expansion currently being used is to convert the

[1] For purposes of this Competitive Impact Statement, the term "cellular" is used to refer to the mobile and portable radio telephone service today provided by two licensees in each geographic area.

[2] Cellular licenses held by AT&T or the Bell Companies, at the time of AT&T's divestiture of those Bell Companies in 1984, were retained by the Bell Companies and are now generally held by affiliates of their respective parent Regional Holding Companies.

radio transmissions from analog to digital. This conversion requires the deployment of new radios and cell site equipment.

In North America, cellular switches made by one manufacturer are not compatible with radio base stations made by another. Accordingly, a cellular carrier seeking to expand the capacity of a particular system must obtain additional switches and radio base stations from its incumbent cellular infrastructure equipment supplier. Digital conversion requires the deployment of switch and cell site equipment and software that is noncompatible between manufacturers. Enhancements that add customer features or improve a system's capacity or efficiency are added to systems primarily through switch or cell site software upgrades. Because the interfaces between the cellular infrastructure equipment and software are proprietary, the equipment vendor is, today, the only one who can provide these enhancements. In addition, cellular carriers are largely dependent on their equipment vendors for ongoing engineering support and maintenance, as well as efficiency and service enhancing features.

Thus, once a cellular carrier has made the decision to deploy a particular vendor's cellular infrastructure equipment in a particular system, that carrier becomes locked in to that vendor's equipment and must either continue to purchase equipment and software from that same vendor or incur the substantial costs of replacing the deployed switches and radio base stations of the incumbent vendor. As cellular systems grow, so also does the cost of switching vendors.

Equipment providers typically have access to proprietary and competitively sensitive information of their cellular carrier customers. Some of this information is acquired in the performance of installation, maintenance and other services provided by the manufacturers to the cellular carriers. For example, through its access to a cellular carrier's switch, a manufacturer has access to day-to-day operating information about the switch, including usage patterns. Manufacturers must also receive advance notice of planned system expansions so that they may allocate equipment and other resources to that customer. Manufacturers also work closely with their customers in the development of new services and features, sometimes on a proprietary basis, This development work necessarily provides the manufacturer with insights into, and advance notice of, its cellular carrier customer's marketing and sales plans.

Cellular infrastructure equipment is a relevant product market. Cellular infrastructure equipment manufactured for use in North America is based on a different standard than equipment manufactured for use by European cellular providers. Accordingly, equipment used in North America is not compatible with equipment manufactured for use in Europe.

In many of the cities in which McCaw has an interest in the A-side cellular system, the B-side competitor has deployed and is operating its system using AT&T cellular infrastructure equipment. Major markets in which McCaw competes with AT&T customers include, among others, New York, Dallas, San Francisco, Miami, St. Louis, Tampa, Orlando, Salt Lake City, Kansas City and Pittsburgh. McCaw uses Ericsson equipment in the majority of its systems.

AT&T currently has the ability to raise the costs, inhibit the ability to increase system capacity and capabilities and degrade the quality of service of its locked in B-side equipment customers. AT&T could achieve this by increasing the prices of its equipment and software or by withholding or delaying the development or delivery of necessary equipment, software, services or other upgrades.

3. Harm to Competition Arising from the Combination of McCaw's Cellular Services and AT&T's Cellular Infrastructure Equipment Business

The proposed merger may substantially lessen competition in cellular services markets. Although AT&T already has the ability to disadvantage its cellular infrastructure customers, today AT&T has no strong incentive to disadvantage one cellular carrier customer vis-a-vis another, because AT&T is not providing local cellular service. As a result of this merger, however, AT&T would gain the incentive to harm McCaw's competitors that use AT&T cellular equipment, to McCaw's advantage, by exploiting AT&T's control over the costs, capabilities and capacity to those locked-in equipment customers. Thus, the combined AT&T-McCaw would have the incentive and the ability to either raise its cellular service rivals' costs or, through the threat of doing so, reduce its rivals' incentive to compete. In either event the likely outcome is increased prices and lower quality service to consumers of cellular service.

The merger also will give McCaw access to competitively sensitive and proprietary information of McCaw's competitors that AT&T acquires through its role as cellular infrastructure equipment supplier to Macaw's competitors. As described above, this information relates to planned expansions, new service offerings and other efficiency enhancing upgrades. McCaw's competitors could well decide to forgo or limit their expenditures of resources in these areas if they believe that they will not enjoy the competitive benefit of such expenditures because McCaw will have immediate access to their competitive plans. As a result, consumers of cellular service are likely to pay higher prices and receive lower quality service.

The proposed merger may also harm competition in the sale of cellular infrastructure equipment used by North American cellular service providers, by giving AT&T access to competitively sensitive or proprietary information of Ericsson that McCaw acquires through its position as a customer for and user of Ericsson cellular infrastructure equipment.

4. Harm to Competition Arising from the Combination of McCaw's Cellular Services Business and AT&T's Interexchange Business

Interexchange services are telecommunications services that connect calls between different local exchange areas or local cellular service areas. AT&T is the dominant interexchange carrier for both wired and cellular telephone service, with MCI and Sprint and a number of smaller firms having much smaller shares.

The provision of interexchange services to cellular subscribers is a relevant product market. Customers use cellular phones to meet their needs away from landline telephones; access to interexchange service over landline telephones is inconsistent with the needs motivating cellular phone usage and thus is not a good substitute. Cellular subscribers can only access interexchange service providers that have exchange access to that cellular system.

Due to the lack of effective competition in the cellular service markets, McCaw has been able to deny its cellular customers the ability to select their interexchange service provider. In those markets in which McCaw's systems are not controlled by a Bell Company that is subject to equal access requirements,[3] McCaw provides

[3] Cellular companies that are affiliates of Bell Operating Companies ("Bell Companies") are required to provide equal access to interexchange carriers under the consent decree that broke up the Bell System. *United States* v. *Western Elec. Co.*, 578 F. Supp. 643, 647 (D.D.C. 1983); Order, Sept. 27.

interexchange service to its cellular customers on an exclusive basis (typically reselling AT&T service), and does not generally allow its customers to access other interexchange carriers directly. In systems operated by Bell Companies subject to equal access requirements, interexchange service is provided by the interexchange carrier of the customer's choice. Thus, customers may choose between McCaw's A-side bundle of local and interexchange services or the B-side carrier's local cellular service and, where the B-side carrier is a Bell Company subject to equal access, the interexchange service offered by the customer's interexchange carrier of choice. (Where the B-side carrier is not a Bell Company, the customer's choice is between two bundles of local cellular and long distance service.)

The relevant geographic markets are cellular service areas in which McCaw offers bundled cellular and interexchange services. These areas include New York, Miami, Tampa, Minneapolis, Seattle, Pittsburgh, New Orleans, Portland and Sacramento. Each of these markets is highly concentrated. Among Bell Company cellular systems providing equal access, AT&T is the dominant interexchange carrier, with more than 70 percent of subscribers, with MCI and Sprint sharing nearly all of the remainder.[4] McCaw is generally the exclusive provider of interexchange service to customers of its A-side systems that do not provide equal access.

The merger may lessen competition substantially in the markets for the provision of interexchange service to cellular subscribers. The merger would foreclose competition between the two largest providers of interexchange service in the highly concentrated markets in which McCaw currently provides interexchange service to its cellular customers without an equal access obligation. The merger also combines AT&T, the leading provider of interexchange service, with McCaw, which has market power over the provision of interexchange service by virtue of the fact that it controls access by its cellular customers to interexchange services. As a result, competition in the provision of interexchange service to cellular customers in these areas may be substantially lessened and cellular subscribers may pay higher prices for interexchange service.

III

Explanation of the Proposed Final Judgment

The proposed Final Judgment addresses the competitive concerns raised by the proposed merger and AT&T and McCaw in two principal ways. First, to guard against harm to competition in interexchange telecommunications, it requires AT&T to provide all interexchange carriers with equal access to McCaw cellular systems. Second, the proposed Final Judgment contains a group of provisions intended to ameliorate the lock-in faced by AT&T cellular infrastructure equipment customers, which should make it substantially less likely that AT&T can raise the costs of its rivals in wireless service (or threaten to do so), and therefore guard against anticompetitive effects in wireless service markets. Finally, the proposed Final Judgment contains restrictions intended to protect against anticompetitive effects in the cellular infrastructure equipment market.

A. Equal Access

As described above, McCaw currently does not provide equal access to interexchange carriers from its cellular systems. Section IV of the proposed Final Judgment will change these arrangements by requiring McCaw to offer all interexchange carriers equal access to all of its cellular systems, permitting its customers to choose among interexchange carriers. The need for these provisions is predicated on the noncompetitive structure of current cellular service markets and the market power currently possessed by McCaw and other providers of cellular exchange service.

The equal access arrangements prescribed by Section IV are modeled on the analogous provisions of the Modification of Final Judgment in *United States* v. *American Telephone & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) ("MFJ"). They are largely identical to the conditions recommended by the United States for provision of interexchange cellular service by the Bell Companies.[5]

Section IV.B provides for the phased-in conversion of McCaw Cellular Systems to equal access over a 21-month period after the commencement of this action, pursuant to a plan to be approved by the United States according to Section VII.A of the judgment. "McCaw Cellular Systems" are defined in Section II.T to include systems in which McCaw holds voting interests greater than 50 percent or in which it has the right, power or ability to control. "Control" is defined in Section II.K as the power to direct or cause the direction of the management and policies of a corporation or partnership, whether through ownership of voting securities, by contract, or otherwise. McCaw would not, under this definition, be considered to control a corporation or partnership in which another entity held a significantly larger ownership interest unless McCaw had expressly been given the right to control, such as through voting rights or by contract.

Section IV.A provides that, prior to its conversion to equal access, no McCaw Cellular System may alter its arrangements for the provision of interexchange service in ways that discriminate in favor of AT&T in the provision of exchange access. Pursuant to Section III.E, a McCaw Cellular System or McCaw Minority Owned Cellular System may use the name "AT&T" or any trademark or trade name of AT&T in its corporate or service names only after it has completed conversion to equal access and balloted existing customers pursuant to Sections IV.B and IV.C. In addition, neither AT&T, McCaw nor McCaw Minority Owned Cellular Systems may use the name AT&T or any trademark or trade name of AT&T in marketing or advertising cellular service until 60% of the McCaw Cellular Systems, measured by subscribers (and not including Bell Company cellular systems that provide equal access pursuant to the MFJ) have completed conversion to equal access.

Sections IV.B, IV.C and IV.D of the judgment prescribe the basic requirements of equal access. Section IV.B.1 requires each McCaw Cellular System to provide local cellular service under prices and terms that do not depend upon the customer obtaining interexchange service from AT&T or a McCaw affiliate, *i.e.*, on an unbundled basis. Moreover, McCaw, McCaw Cellular Systems and their employees and agents (including AT&T when it acts as agent for a McCaw Cellular System pursuant to Section IV.F of the judgment) may not recommend, sell or otherwise market the interexchange service of any interexchange carriers, and are required to administer interexchange carrier selection procedures on a carrier-neutral and nondiscriminatory basis.

1987 (Southwestern acquisition of Metromedia); Order, October 31, 1986 (BellSouth joint venture with MCCA).

[4] Most but not all of the McCaw systems share the local market with a Bell Company affiliate. In Tampa, and in some smaller cities, McCaw faces GTE, which does not provide equal access.

[5] *See* Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers and Proposed Order, filed July 25, 1994, attached as Exhibit A.

Section IV.B also requires McCaw to ballot its existing customers to permit them to choose an interexchange carrier to which all of the customer's originating interexchange communications will be routed automatically, without the use of any access codes (i.e., on a 1+basis), as well as to permit the customer to access other interexchange carriers by dialing the appropriate carrier identification code (i.e., on a 10–XXX basis). Balloting will occur within 60 days of each McCaw Cellular System's conversion to equal access. If, in the balloting process, any McCaw customer fails to choose an interexchange carrier, those customers may be allocated to interexchange carriers in proportion to the number of customers subscribing to each carrier.[6] Thereafter, interexchange services will be blocked to any new customer that fails to choose a carrier and attempts to place calls without access codes.

To permit all interexchange carriers to have a meaningful opportunity to market their services to customers of McCaw Cellular Systems, those systems will be required to provide interexchange carriers with the names and addresses of their existing customers at least 60 days prior to conversion to equal access, and at quarterly intervals thereafter. Similarly, under Section IV.C, any customer information provided to AT&T by a McCaw Cellular System must be provided to other interexchange carriers at the same time and under the same terms. A McCaw Cellular System may not provide AT&T with information about a customer's interexchange carrier or cellular or interexchange usage unless the customer is already a customer of AT&T's interexchange service and unless it provides the same information at the same time to other interexchange carriers concerning their own customers.

The post-conversion equal access requirements contained in Section IV.D largely parallel the analogous requirements of the MFJ including requirements that each McCaw Cellular System provide interexchange carriers exchange access on an unbundled basis equal in type, quality and price to that provided to AT&T.

That section also provides that if a McCaw Cellular System provides information to AT&T to allow AT&T to bill its interexchange customers for cellular service (subject to the restrictions of Section IV.F), it must at the option of any other interexchange carrier provide that carrier with sufficient information about the usage and charges for cellular service to allow it to make commercially reasonable arrangements to bill its interexchange customers for cellular service. The last sentence of Section IV.D.1 does not impose any additional obligation on AT&T or McCaw to bill for other interexchange carriers, but does require them to provide competing carriers with sufficient information so that they can make commercially reasonable arrangements to perform billing themselves or have billing done by third parties.

The basis for this requirement is the concern that AT&T's acquisition of McCaw could put it in the position of being the only interexchange carrier with the ability to offer prospective customers of wireless interexchange service the option of receiving a single bill for both cellular and interexchange services. Given AT&T's already dominant position in this segment of the interexchange market, this added advantage could be sufficient to further increase AT&T's ability to increase prices or exclude interexchange competitors by virtue of its control of a cellular duopolist. The language used in Section IV.D.1 was adopted in preference to a simple nondiscrimination requirement out of a concern that, given its position as a possibly major provider of billing services to McCaw, arrangements that could be workable for AT&T could be totally uneconomic for other interexchange carriers. Thus, it might not be practical for smaller interexchange carriers to perform all of the rating and processing of local cellular calls if they only provide interexchange service to a relatively small number of McCaw customers. The chosen language was intended to assure that sufficiently refined billing information was provided to such interexchange carriers that they could readily incorporate it with their interexchange bills with a minimum of additional processing and programming required.

Section IV.F. permits AT&T to act as McCaw's agent in marketing local cellular services and in jointly marketing local cellular, interexchange and other services on specified conditions. These conditions, which basically track those the United States has recommended for the Bell Companies if they should be permitted to provide wireless interexchange service, are *first*, if AT&T engages in marketing local cellular service for McCaw, it must advise actual or prospective subscribers of their right to resubscribe to the interexchange carrier of their choice; *second*, AT&T must state the price, terms and rate plans for local cellular and interexchange service separately, meaning that it cannot sell bundled offerings of local cellular and interexchange service; and *third*, AT&T is enjoined from selling interexchange service at a price, term or discount that depends on whether the customer obtains local cellular service from McCaw, and McCaw and McCaw Cellular Systems are enjoined from selling local cellular service at a price, term or discount that depends on whether the customer obtains interexchange service from AT&T.

Notwithstanding the foregoing provisions, AT&T may, without separately stating the charges for interexchange service and terminating local cellular service, offer a "calling party pays" service for calls made to a cellular telephone. Ordinarily, the cellular subscriber receiving the calls pays for the cellular airtime. Section IV.E.2 would permit AT&T to charge a single price for the interexchange portion of such a call and the terminating airtime (paid by the caller, not the called party), under the following conditions: *First*, AT&T must obtain the underlying local cellular service used to terminate the call at a generally available rate which, to prevent against artificially high transfer prices,is no higher than the rate offered to resellers of local cellular service; and *second*, this rate must be disclosed to other interexchange carriers and be described in the Equal Access plan to be filed for approval by the United States. These conditions will allow a potentially useful new service to be provided while assuring that AT&T's competitors will have a fair opportunity to compete with AT&T in providing this service.

Section IV.G provides that if the United States certifies, upon a showing by AT&T, that there is insufficient demand by interexchange carriers for access to McCaw Cellular systems within any Local Cellular Service Area, McCaw Cellular Systems may provide new services in which access is provided to interexchange carriers at centralized points.

Section IV.H permits McCaw to hand off cellular digital packet data transmissions (as specified in Section II.F) to interexchange carriers at centralized points. The United States understands that the transport cost for packetized data, especially that using the Internet Protocol, is small in comparison to other elements of the

[6] The specific balloting process will be described in the equal access plans filed by defendants under Section VII.A of the proposed Final Judgment. It is anticipated that there might be more than one opportunity for each customer to select an interexchange carrier prior to any allocation.

service, and, thus, this service could be economically justified more easily (in more locations) if providers did not need to implement switching or routing points in each local Cellular Service Area. In addition, since transport across the Internet does not involve distance-sensitive charges, it will not make any difference to users where their messages are transfered onto the Internet. Finally, the Internet protocol does not have any position for indicating a customer's choice of access provider and thus it would make use of the CDPD service less convenient and probably more expensive for such users if they were required to include addressing for separate access providers in addition to the customary Internet address normally employed by such users.

Cellular systems in which McCaw has voting interest of fifty percent or less and does not have the right, power or ability to control are defined in Section II.U as "McCaw Minority Owned Cellular Systems." These systems are not subject to most of the equal access requirements of Section IV of the proposed Final Judgment, but are subject to the non-bundling requirements of Section IV.F.[7] Section IV.E provides that if AT&T or McCaw obtains control of a cellular system after entry of the proposed Final Judgment, it will be converted to equal access within one year (or within 21 months after the commencement of this action, whichever is later).

The equal access obligations imposed by the proposed Final Judgment apply to interexchange services, i.e., services that extend beyond the boundaries of a Local Cellular Service Area. Section II.Q of the judgment defines those areas as the areas in which the Bell Companies are permitted under the MFJ, including any orders entered under it or any legislation that supersedes or modifies it, to provide cellular exchange service without an equal access obligation. The majority of McCaw Cellular Systems are configured to provide cellular exchange services in areas that would be permissible for the Bell Companies under the MFJ and waiver orders entered under it. There are, however, 19 McCaw Cellular Systems whose local service areas extend beyond the bounds that would be permitted for a Bell Company. Section II.Q allows "grandfathered" exceptions to the general definition of Local Cellular Service Areas for those systems. As the stipulation expressly notes, by permitting these exceptions, the United States has not concluded that these areas are appropriate local calling areas for cellular service, but agreed to these exceptions for the present time, subject to further order of the Court, for the following reasons.

In some cases, McCaw has a single switch (or several interconnected switches) located in one LATA but connected to some cell sites located outside the LATA. In many of these cases, either no Bell Company is licensed to serve the area in competition with McCaw, or a Bell Company is licensed to serve only part of the area and thus could not feasibly offer service throughout the same area even apart from MFJ constraints.

The FCC currently has under way a proceeding considering whether to impose equal access requirements on all cellular or commercial mobile radio service providers, in which the appropriate scope of local calling areas is an issue. In light of these developments, the United States determined not to require McCaw to reconfigure its existing systems until other proceedings addressing the appropriate scope of local cellular calling areas are concluded. If those proceedings result in determinations that are inconsistent with the exceptions in Section II.Q, or if it otherwise appears that any exceptions are not justified, the United States has reserved the right to seek orders from the Court eliminating any such exceptions. In such a proceeding, AT&T might contend that such exceptions are consistent with prior practice under the MFJ or are otherwise appropriate.

B. Manufacturing

The proposed Final Judgment addresses competitive concerns arising from the fact that the merger will place AT&T, through McCaw, in competition with its other wireless infrastructure equipment[8] customers who rely on AT&T equipment and are locked in to AT&T. Section V of the proposed Final Judgment contains several provisions designed to restrict AT&T's ability and incentive to use its position as equipment supplier to McCaw's wireless competitors to disadvantage those customers/competitors vis-a-vis McCaw.[9]

1. Misuse of Nonpublic Information

Section V.A seeks to prevent the potential for harm to competition that might arise as a result of (1) AT&T gaining access to nonpublic information of a competitor that is a supplier to McCaw or (2) McCaw gaining access to nonpublic information of a competitor that is a customer of AT&T. The details of procedures adopted by AT&T and McCaw to implement the provisions of Section V.A will be set forth in Nonpublic Information and Structural Separation implementation plans to be filed for approval by the United States pursuant to Section VII.A. of the judgment.

As one safeguard against improper disclosure of confidential information, Section V.A.4.a requires AT&T to establish separate Marketing Account Teams to serve (1) McCaw and other AT&T affiliates and (2) unaffiliated wireless infrastructure equipment customers. These Marketing Account Teams, as specified in Section II.R, will be responsible for selling and related services in connection with selling telecommunications equipment, including customer relationship management, sales, pricing, presentation of bids, basic technical and engineering advice, order processing and management, and project management. The United States understands that most of the interaction the AT&T Network Wireless Infrastructure Equipment Unit will have with customers will be by the Marketing Account Teams. The responsibilities of Marketing Account Teams will be specified in the Structural Separation implementation plan. In order to assure effective separation, that plan will

[7] Some of the cellular systems in which McCaw has an interest are deemed "Bell Companies" under the MFJ and are subject to the MFJ's equal access requirements. The United States has proposed an order to the MFJ Court that would impose certain requirements in order to protect the provision of equal access by those systems. Whether these systems are also McCaw Cellular Systems, or are McCaw Minority Owned Cellular Systems, depends on whether McCaw (as well as the Bell Company) controls the system.

[8] Because AT&T is not only a leading supplier of cellular infrastructure equipment, but is also developing and selling infrastructure equipment for other wireless services that are being developed and that may compete with cellular service in the future, many of the provisions of Section V apply to "wireless services" and the infrastructure equipment used to provide those services. "Wireless Service" is defined in Section II.AF to include not just cellular service, but those telecommunications services that use radio transmission between the customer and the network, including cellular, land mobile radio, commercial mobile radio, specialized mobile radio, personal communications services, and any other mobile radio services that have been or might be authorized by the FCC or offered using radio transmission between the customer and the network.

[9] The duties of Section V apply only so long as McCaw is affiliated with an AT&T business unit that manufactures cellular or other wireless infrastructure equipment, as will occur once the merger is consummated. If AT&T, at a point prior to expiration of the decree, were to divest control of either McCaw or its wireless infrastructure equipment manufacturing business, the provisions of Section V would no longer be in effect, except for any buy-back liability under Section V.E accruing as a result of decree violations during the period of affiliation.

provide procedures to prevent the disclosure of nonpublic information in the event that members of Marketing Account Teams serving Unaffiliated Wireless Infrastructure Equipment Customers (defined in Section II.AC as customers that are neither affiliates of AT&T or McCaw nor McCaw Minority Owned Cellular Systems) are assigned to any AT&T or McCaw business that either provides telecommunications equipment to AT&T, McCaw or a McCaw Minority Owned Cellular System, or that provides or plans for any AT&T or McCaw wireless service.

Section V.A.4.b takes steps to assure that nonpublic information of Unaffiliated Wireless Infrastructure equipment customers is not misused by AT&T as a result of any proprietary development work it performs for equipment customers. Section II.Y defines Proprietary Development as the development of products, features or functions for cellular infrastructure equipment that is not intended to be made available to more than one customer or its affiliates. Section V.A.4.b contemplates the formation of Development Teams to conduct Proprietary Development, and requires AT&T develop procedures to prevent the disclosure of nonpublic information in the event that members of Development Teams that do such Proprietary Development for unaffiliated customers perform Proprietary Development for McCaw or for any AT&T telecommunications service. The principal goal of this provision is to assure that AT&T Development Teams that obtain nonpublic information about the business, plans or technology of an unaffiliated equipment customer in the course of performing Proprietary Development work for that customer do not use that information to the benefit of the telecommunications businesses of AT&T or McCaw.

The provisions of Section V.A are intended to prevent the inappropriate disclosure and use of Nonpublic Information obtained by AT&T or McCaw from unaffiliated equipment customers or suppliers. Section II.X contains a definition of Nonpublic Information. That definition identifies or includes various categories of information which, if inappropriately disclosed or used, could cause competitive harm. The most sensitive categories of such information are specified in Section II.X.2(a). Information enumerated in that subsection may not be disclosed even with the consent of the supplier of the information.[10] An unaffiliated customer or supplier may designate in writing as proprietary other documentary information (or, in the case of oral, visual or other information, contemporaneously with the disclosure), and such information will be treated as Nonpublic Information. Information that was provided to AT&T or McCaw prior to entry of the proposed Final Judgment may be designated as such by the supplier of the information within 180 days after entry of the judgment, in which case it will be subject to the same protections as other Nonpublic Information. The definition of Nonpublic Information in Section II.X excludes various categories of information obtained by AT&T by means other than a breach of duty to its customers, as well as information that is over six years old. In addition, an unaffiliated customer or supplier may waive any or all of the protections against the disclosure of Nonpublic Information, except for the categories specified in Section II.X.2(a). This exception is intended to guard against the use of such information for coordination among competitors.

Section V.A.1.a provides that AT&T shall not allow Nonpublic Information of its Unaffiliated Wireless Infrastructure Equipment Customers to be disclosed for any reason to (i) McCaw or any of its directors, officers or employees; (ii) any McCaw Minority Owned Wireless System (except for information relating specifically to such a system); (iii) any person engaged in marketing any McCaw service or any AT&T telecommunications service; (iv) any person employed by a Marketing Account Team responsible for marketing to AT&T, McCaw or a McCaw Minority Owned Cellular System; or (v) any person performing Proprietary Development for AT&T, McCaw or McCaw Minority Owned Cellular Systems. Likewise, AT&T is barred by Section V.A.1.b from disclosing any Nonpublic Information relating to the provision of any wireless service by McCaw or AT&T that it obtains by reason of being an equipment supplier to McCaw to any unaffiliated equipment customer. Under Section V.A.1.c, if certain senior officers of AT&T obtain any such Nonpublic Information, they may not disclose it to other persons identified in Section V.A.1.a.

McCaw is similarly enjoined by Section V.A.2 from allowing Nonpublic Information it obtains from its unaffiliated equipment suppliers to be disclosed for any reason to any person involved in the design, development, fabrication or marketing of AT&T's telecommunications equipment. Likewise, McCaw is enjoined from allowing Nonpublic Information of any unaffiliated interexchange carrier to be disclosed to persons involved in the design, development, fabrication or marketing of any AT&T telecommunications product or service, and access to such Nonpublic Information shall be limited to authorized persons within McCaw and within AT&T's Network Wireless Infrastructure Unit having a need to know such information.

2. Ongoing Support for Locked-In Customers

Section V.B of the proposed final judgment contains provisions designed to prevent AT&T from raising the costs of McCaw's competitors in connection with the provision of such products and services. Since locked-in equipment customers are dependent on AT&T for a variety of critical ongoing support functions and products, Section V.B.1 requires AT&T to provide its unaffiliated cellular infrastructure equipment customers with the following products and services, in accordance with the same pricing and business practices that prevailed prior to August 1, 1993: (a) Technical support and maintenance; (b) installation, engineering, repair and maintenance services; (c) additional switching and cell site equipment to be deployed in that system; (d) upgrades and other AT&T cellular infrastructure equipment developed for use with these systems; and (e) spare, repair or replacement parts.

This provision is intended to assure that AT&T will deal with its unaffiliated equipment customers in the same manner as it did prior to announcement of the proposed merger with McCaw,[11] and that such customers will continue to obtain the products and services they need to provide cellular service, including software upgrades and

[10] This includes information containing costs, profits, or profit margins; plans for development of new products, services or technologies; customer names; pricing policies, prices, price schedules, or terms; number of subscribers, sales, churn rates, or other output measures; capacity measures; features and capabilities; technology plans or status of implementation; marketing plans; costs of or prices paid for infrastructure equipment or other inputs including price credits, or adjustments for a cellular carrier's used equipment; plans for expansion; amounts of capital investment; or quantities and types of equipment used by a wireless carrier or sold by a wireless infrastructure equipment supplier.

[11] August 1, 1993, shortly before the announcement of the merger, was chosen as the benchmark for this comparison to allay concerns that AT&T may have changed some of its pricing practices vis-a-vis McCaw competitors after the merger was announced.

switching and cell site equipment needed to expand the capacity of their systems. AT&T also may not discriminate in favor of McCaw Cellular Systems or McCaw Minority Owned Cellular Systems in the way in which such products or services are made available to cellular systems, and the terms on which such products or services are provided shall not vary depending on whether the system to which they will be provided competes with McCaw or a McCaw Minority Owned Cellular System.

Finally, if AT&T discontinues the offering of any cellular infrastructure equipment service, part or product, it shall either arrange an alternative source of supply for the product or, if unsuccessful, provide any affected cellular carrier with the licenses to use (and rights to sublicense) whatever technical information is necessary to provide such services, parts or products (to the extent AT&T is able to do so), so that the carrier can obtain the service, part or product from another source. Such licenses shall be granted on reasonable and nondiscriminatory terms.

3. Development of New Features and Functions

Section V.C contains provisions designed to prevent AT&T from disadvantaging its locked-in customers that compete with McCaw with respect to development of new features and functions, including Proprietary Development (defined in Section II.Y). Under Section V.C.1, whenever AT&T engages in development of new features or functions for use with AT&T equipped cellular systems that, if successful, will be made available to two or more cellular carriers that are not affiliated with each other (*i.e.*, developments that are not intended for a single customer), AT&T shall disclose such enhancements to unaffiliated carriers at the same time it discloses them to McCaw or McCaw Minority Owned Cellular Systems, and shall make them available to unaffiliated customers at the same time it makes them available to McCaw or any McCaw Minority Owned Cellular System. This section is triggered only by development of features pertaining to systems installed or contracted for prior to the date of entry of the judgment, as it is specifically intended to address a concern relating to existing locked-in customers.

The remainder of Section V.C addresses AT&T's obligations in the event it performs development work specifically for McCaw, a McCaw Cellular System or a McCaw Minority Owned Cellular System. AT&T has advised the United States that, at present, AT&T occasionally develops features or functions that are applicable only to a particular cellular carrier or system because of its adjunct hardware or software or its specific operations or network. If AT&T engages in such development for McCaw, a McCaw Cellular System or a McCaw Minority Owned Cellular System, AT&T must afford unaffiliated customers substantially the same opportunity to contract for such development work on substantially the same compensatory basis. If AT&T performs other Proprietary Development for McCaw, a McCaw Cellular System or a McCaw Minority Owned Cellular System, it will be required upon reasonable request to perform Proprietary Development for unaffiliated customers under reasonable terms and conditions that are not less favorable to the unaffiliated customer than those provided to McCaw, McCaw Cellular Systems or McCaw Minority Owned Cellular Systems. Under Section V.C.3, if AT&T performs Proprietary Development for McCaw (or McCaw Minority Owned Cellular Systems) it must honor any reasonable request by an unaffiliated carrier to perform such development for it, but AT&T is entitled to reasonable compensation and other terms so long as those terms are not less favorable than the terms offered to McCaw or McCaw Minority Owned Cellular Systems.

4. Redeployment of AT&T Equipment

In order to further reduce AT&T's ability to exploit its locked-in equipment customers that compete with McCaw, Section V.D contains provisions that should make it easier for customers that desire to replace AT&T equipment to do so. In the event that a customer has deployed or contracted to deploy an AT&T equipped cellular system prior to the entry of the judgment, and the customer wishes to redeploy the AT&T equipment (*e.g.*, to facilitate its replacement) or to replace or supplement it with another manufacturer's equipment in whole or in part, AT&T is required to provide reasonably necessary technical assistance and cooperation to allow the customer to accomplish such replacement or redeployment and to permit interoperation of the AT&T equipment with the new manufacturer's equipment in that area or an adjacent area (as in an overlay or core swap-out). AT&T is permitted to receive reasonable compensation for providing such assistance, and is not required to provide its equipment competitors with proprietary information that is not necessary to allow the interoperation of their equipment with AT&T's.

In addition, to give AT&T cellular infrastructure equipment customers greater freedom to redeploy AT&T equipment to a new location or sell it, and to make it easier for customers wishing to do so to change equipment suppliers, Section V.D.2 requires AT&T to waive contractual requirements that it receive prior notice of or consent to redeployment. It also provides that, in the event of redeployment or sale, the original warranty, license and other contractual rights will survive and pass to the transferee, as will AT&T's obligations under Sections V.A, V.B, V.C and V.D of the judgment. AT&T's buy-back obligations under Section V.E will not, however, pass to a new purchaser of the equipment, inasmuch as that remedy is especially designed to guard against raising the costs of the locked-in equipment customers that compete with McCaw.

5. Buy-Back

The detailed requirements of Sections V.A through V.D of the proposed Final Judgment are intended to mitigate the effects of lock-in insofar as they make it possible for AT&T to raise the costs of McCaw's rivals, and otherwise adversely affect competition in cellular or wireless service or infrastructure equipment markets. To provide additional assurance that AT&T will abide by these requirements, Section V.E provides that AT&T may be required to buy back the cellular infrastructure equipment it has sold to an unaffiliated customer that competes with McCaw if it violates any of its duties under Sections V.A through V.D.

The buy-back obligation will be triggered if the United States determines that AT&T has violated any of its duties under Sections V.A. through V.D to an unaffiliated cellular carrier in any area(a) where that carrier competes with McCaw or a McCaw Minority Owned Cellular System and (b) where the unaffiliated cellular carrier has deployed or contract to deploy an AT&T equipped cellular system prior to entry of the judgment. Thus, if a carrier currently uses AT&T equipment in a market where it competes with McCaw, and AT&T were to fail to provide software upgrades to that carrier's system in that market in violation of Section V.B, the buy-back obligation of Section V.E might be triggered. If, however, AT&T failed to provide software upgrades to that carrier's system in a market in which that carrier did not compete with McCaw or a McCaw Minority Owned Cellular

System, the buy-back obligation would not be triggered.

If AT&T is required by the United States to buy equipment back from an unaffiliated customer, the price shall be the original purchase price of the equipment purchased or contract for by the carrier for use in that system prior to entry of the judgment, less depreciation as calculated on a straight-line basis over a period of ten years for switches and eight years for all other hardware. These periods were selected as generally consistent with what the United States understood to be the useful lives of such equipment. AT&T shall also refund the proportionate share of all monies paid for unused portions of software licenses, and shall release the customer from future obligations relating to cellular infrastructure equipment deployed in that system.

In order to assure that buy-back is meaningfully available to customers in a reasonably timely manner, Section V.D gives the United States the sole and unreviewable discretion to determine whether that AT&T has violated any of its duties under Sections V.A through V.D of the judgment. An expeditious determination of whether buy-back has been triggered is necessary if the locked-in customer is to decide whether to replace a system, and subjecting that determination to litigation delays would make the buy-back remedy ineffectual. AT&T has irrevocably waived any right to appeal, contest or otherwise challenge the determination of the United States. It is not intended that this section create any private rights on behalf of any AT&T customer, nor that any such customer have any right to appeal, contest or otherwise challenge any determination by the United States pursuant to Section V.E, inasmuch as the purpose of the section is to aid in the enforcement of ad secure compliance with Sections V.A through V.D of the judgment. It is the intention of Section V.E that buy-back be a remedy to ensure compliance with the proposed Final Judgment, and that in determining whether to impose the requirement the United States will consider the seriousness of the violation, its effect on competition, whether it is part of a pattern of noncompliance, and any other relevant factors.

Section V.E also permits the United States, in its sole discretion, to appoint an independent fact-finder to conduct the investigation or factual determination of any issue raised in connection with any alleged violation, reserving to the United States the right to make a final determination. In the event of such an appointment, the losing party (*i.e.*, the customer or AT&T) shall pay all costs and fees of the fact-finder. The United States will not undertake proceedings to determine whether buy-back should be required except on the application of and with the consent of the affected customer, including consent to the payment of costs and fees.

C. Other Provisions

1. Separation Provisions

To help give effect to the equal access and manufacturing provisions of the proposed Final Judgment, Section III requires that, so long as the judgment is in effect, McCaw and McCaw affiliates that are involved in the operation of wireless systems and the provisions of local wireless services shall be maintained as corporations or partnerships separate from AT&T as specified in that section and in the Structural Separation plan to be filed for approval by the United States pursuant to Section VII.A. Section III requires that McCaw and McCaw affiliates shall be maintained as corporations and partnerships with separate officers and personnel and separate books, financial or operating records; retain all wireless service licenses and title and control of the wireless infrastructure equipment used by its systems; and retain responsibility for the operation of their wireless services, and may not delegate substantial responsibility for such business activities to AT&T, provided that AT&T may act as McCaw's agent to the extent authorized in Section IV.F and may provide general corporate overhead and administrative services to McCaw and its affiliates.

In order to facilitate the monitoring of AT&T's compliance with equal access and the manufacturing provisions of Section V of the proposed Final Judgment, Section III.D requires that any interexchange services, wireless infrastructure equipment and related engineering services or services related to the marketing of wireless services AT&T provides to McCaw or its affiliates be provided only pursuant to detailed filed tariffs or written contracts.

Finally, as discussed above, Section III.E limits the use by McCaw and McCaw Minority Owned Cellular Systems of AT&T trademarks and trade names prior to and during the conversion of McCaw Cellular Systems to equal access.

2. Compliance Plans

Section VII.A obliges AT&T, not less than 90 days after entry of the judgment, to file plans for implementation of the judgment's terms with the United States. This framework is drawn from similar procedures established in the MFJ for the implementation of equal access and other nondiscrimination obligations imposed on the Bell Companies, although in this proposed Final Judgment the Department of Justice has the authority to disapprove plans, and such disapproval would have significant consequences. In particular, AT&T must file a Structural Separation implementation plan describing its implementation of Sections III and V.A.4; an Equal Access implementation plan for each McCaw Cellular System, describing its implementation of Section IV; and a Nonpublic Information implementation plan, describing its implementation of Section V.A. AT&T must supplement the plans as necessary to describe the implementation of equal access in subsequently acquired cellular systems and to describe significant changes in the plans. The plans shall be effective 90 days after filing with the United States, unless disapproved by the United States by written notice to AT&T that identifies the manner in which the plan is insufficient. The Department may in its discretion approve a plan in fewer than 90 days.

The requirement to file plans to implement the detailed injunctions, and to obtain the approval of the United States for such plans is intended to give AT&T, McCaw and the United States flexibility to adopt procedures that best accomplish the purposes of the judgment, so long as those procedures conform to the language of the judgment, and will permit the United States to assure that AT&T complies with its obligations under the judgment. In the absence of an effective Structural Separation plan, AT&T must comply with Section III without modification and may not perform Proprietary Development for McCaw. In the absence of an effective Equal Access Plan, AT&T may not provide interexchange services to customers of McCaw Cellular Systems, except under arrangements existing prior to the merger. In the absence of an effective Nonpublic Information plan, AT&T would be enjoined from selling cellular infrastructure equipment to any McCaw Cellular Systems or McCaw Minority Owned Cellular Systems that were not equipped with AT&T equipment prior to the commencement of this action.

3. Modification

The duration of the proposed Final Judgment is ten years. Because it is possible that during that period there could be major changes affecting competition in wireless telecommunications that could be

material to the matters addressed in this judgment, Section X provides certain grounds for modification in addition to the standards provided by the common law applicable to the modification of government antitrust consent decrees.

First, the equal access provisions of the judgment are modeled on those that the United States has recommended be imposed on the Bell Companies if they are permitted to provide interexchange service from their wireless systems. Accordingly, Section X.A permits AT&T or McCaw to seek modification of the equal access provisions of Section IV of the proposed Final Judgment if Bell Company wireless systems are relieved in whole or in part of the comparable equal access and nondiscrimination provisions of the MFJ as a result of legislation, judicial orders or agency orders that vacate, modify, supersede or interpret the provisions of the MFJ. In such an event, the provisions of Section IV of the judgment shall be modified or vacated to provide the same relief to AT&T or McCaw upon their showing that competitive conditions do not require a different obligation for AT&T and McCaw and the modification is equitable and in the public interest.

Section X.B provides that changes in wireless telecommunications markets that could be foreseen at this time shall not be a bar to modification. Specifically, if AT&T or McCaw show that other wireless telecommunications services have developed as effective competitive alternatives to today's cellular services, or that there have been other changes or developments affecting a relevant market, a showing that intervening changes have made retention of a provision of the judgment inequitable shall be sufficient to justify a modification, irrespective of whether those changes were foreseen or foreseeable when the judgment was entered.

Finally, to assure that the procedures, practices and obligations of the proposed Final Judgment are implemented without delay or distraction, AT&T and McCaw have stipulated that they will not move for any modification of the judgment, except with the consent of the United States, for eighteen months following the commencement of the action. The United States will not unreasonably without its consent to modifications, and will consent to motions seeking reasonable modifications that are justified by competitive conditions and are consistent with the purposes of the judgment and the public interest.

IV

Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as the result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust action under the Clayton Act. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in any private lawsuit that may be brought against the defendants.

V

Procedures Available For Modification Of The Proposed Final Judgment

As provided by the APPA, any person believing that the proposed Final Judgment should be modified may submit written comments within the sixty (60) day period from the date of publication in the **Federal Register** to Richard Liebeskind, Assistant Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, 555 Fourth Street, NW., Room 8104, Washington, DC 20001. These comments, and the Department's responses, will be filed with the Court and published in the **Federal Register.** All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent at any time prior to final entry. The proposed Final Judgment provides that the Court retains jurisdiction over these actions, and any party may apply to the Court for any order necessary or appropriate for their modification, interpretation or enforcement.

VI

Alternatives To The Proposed Final Judgment

As an alternative to the proposed Final Judgment, the United States considered litigation to seek an injunction to prevent the proposed merger between AT&T and McCaw. The United States rejected that alternative because the relief in the proposed Final Judgment should prevent the possible occurrence of conduct the effect of which may be substantially to lessen competition in the relevant geographic markets for cellular service, wireless infrastructure equipment and interexchange service to cellular customers. The equal access provisions imposed by the proposed Final Judgment will open McCaw's cellular systems to competition among interexchange carriers. Because the United States believes that the proposed Final Judgment adequately protects against possible anticompetitive effects that might flow from the proposed merger, seeking to enjoin the merger could only serve to prevent the achievement of economic efficiencies and other potential procompetitive effects that might result from the merger of AT&T and McCaw.

VII

Standard For Review Under The Tunney Act For Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed final judgment "is in the public interest." In making that determination, the court *may* consider—

(1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e) (emphasis added). The courts have recognized that the term "public interest" "take[s] meaning from the purposes of the regulatory legislation." *NAACP* v. *Federal Power Comm'n*, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to "preserv[e] free and unfettered competition as the rule of trade," *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the Tunney Act is whether the proposed final judgment would serve the public interest in free and unfettered competition. *United States* v. *American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984); *United States* v. *Waste Management, Inc.*, 1985–2 Trade Cas. ¶66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly

settlement through the consent decree process."[12] Rather,

Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making the public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. ¶61,508, at 71,980 (W.D. Mo. 1977).

It is also unnecessary for the district court to "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) *quoting United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981). Precedent requires that

The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[13]

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

Waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. *Armour & Co.*, 402 U.S. 673, 681 (1971).

The proposed consent decree, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted)."[14]

VIII

Determinative Documents

Although it was not determinative in the Department's deliberations in the sense specified in Section 2(b) of the APPA, 15 U.S.C. 16(b), the United States is attaching as Exhibit B a June 14, 1994 letter from Richard L. Rosen to Michael K. Kellogg, which concerns the equal access provisions recommended by the United States as a condition of Bell Company entry into wireless interexchange service.

Dated: August 5, 1994.

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Steven C. Sunshine,

Deputy Assistant Attorney General,

Constance K. Robinson,

Director, Office of Operations,

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[12] 119 Cong. Rec. 24598 (1973). *See United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. 93–1463, 93rd Cong. 2d Sess. 8–9, *reprinted in* (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[13] *United States* v. *Bechtel*, 648 F.2d at 666 (citations omitted); *see United States* v. *BNS, Inc.*, 858 F.2d at 463; *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States* v. *Gillette Co.*, 406 F. Supp. at 716. *See also United States* v. *American Cyanamid Co.*, 719 F.2d at 565.

[14] *United States* v. *American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C.), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1982) *quoting United States* v. *Gillette Co., supra*, 406 F. Supp. at 716; *United States* v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky 1985).

United States of America, Plaintiff, v. Western Electric Company, Inc. and American Telephone and Telegraph Company, Defendants. Civil Action No. 82–0192 HHG.

Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers

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United States of America, Plaintiff, v. Western Electric Company, Inc. and American Telephone and Telegraph Company, Defendants. Civil Action No. 82-0192 HHG.

Memorandum Of The United States In Response To The Bell Companies Motions For Generic Wireless Waivers

Introduction

The United States submits this memorandum in response to three motions by the Bell Companies for generic wireless relief:

1. The United States would support, if modified, that portion of the motion, dated June 20, 1994, of the Bell Companies for a waiver of the interexchange line of business restriction of Section II(D)(1) of the Decree[1] in connection with their "cellular and other wireless services" (the "BOCs' Motion"),[2] which seeks the authority to provide interexchange services between cellular exchanges subject to equal access. A proposed order is attached to this memorandum.

2. The United States opposes at this time that portion of the BOCs' Motion that seeks to redraw the existing cellular exchange areas to include Rand McNally's Major Trading Area ("MTA"), and adding to those MTAs all prior geographic relief. The United States would support the BOCs' request for certain incidental relief, if clarified, and the attached proposed order contains those clarifications.

3. The United States opposes the motions by BellSouth, dated April 15, 1994, and Southwestern Bell, dated June 20, 1994, to remove Section II(A)'s equal access requirement and Section II(D)(1)'s interexchange prohibition, as applied to their wireless services.

All seven BOCs sought that broader relief—the complete removal of the equal access requirement and the interexchange prohibition—in their waiver request filed with the Department on December 13, 1991. The United States opposes this relief because none of the BOCs can make the showing required to remove or modify the decree's equal access requirements.[3] After extensive investigation and analysis, the Department has determined that the removal of equal access would substantially reduce competition in interexchange services from cellular exchanges, but that provision of resold switched interexchange services subject to rigorous equal access conditions would not be likely to reduce competition, and so advised the BOCs by letter dated June 14, 1994 (copy attached as Exh. 1; exhibits separately bound).

Summary of Argument

Simply put, BellSouth and Southwestern seek to terminate their cellular exchange subscribers' ability to obtain interexchange service from competing interexchange carriers, and to require those subscribers instead to obtain that service from the exchange carrier—subject only to whatever competitive constraint is provided by the existence of a second cellular carrier. The Department concluded that that minimal constraint was insufficient to prevent a reduction of competition in cellular long distance. To the contrary, the market power of each cellular duopolist appears to be sufficient to permit supracompetitive pricing of cellular service; allowing a cellular carrier to provide interexchange service on an exclusive basis would permit that carrier to charge supracompetitive pricing for interexchange services as well. The BOCs' unconstrained ability to abuse control of the local exchange provides additional means to impede competition in interexchange services for cellular customers. See pp. 6–26 below.

If, however, a BOC or its affiliate were to be one of several interexchange carriers available to be chosen by a celluar subscriber, the presence of that additional choice does not appear likely to result in higher prices for long distance—provided that genuine equal access is preserved. If the arrangements under which the exchange carrier provides access were not in fact equal, were discriminatory, or were administered to give the BOCs' own long distance service a significant advantage, the likely effect would be that other interexchange competitors would be excluded unfairly from competing for that business. As a result, absent genuine equal access, the Department is not persuaded that BOC entry into cellular long distance from their cellular exchanges would not reduce competition in the market they seek to enter.

Whether genuine equal access can be preserved when a BOC is providing access to itself and to its competitors is probably the most difficult issue

[1] Modification of Final Judgment, United States v. American Telephone & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982) ("Decree Opinion"), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[2] The record before the Department on the Bell Companies' motion was submitted to the Court with the Bell Companies' June 20, 1994, filing. The principal "wireless" service here at issue is cellular telephony, sometimes referred to by the Court, Congress or the Federal Communications Commission as "mobile radio," "land mobile radio" or, most recently, as "commercial mobile radio service." 47 U.S.C. 332(d)(1), as amended. The term "cellular," describing a radio telephone service in which frequency is reused by dividing a service area into "cells," also describes the technology of services that might come to be offered by potential newcomers to these markets (i.e., licensees of special mobile radio ("SMR") or personal communications services ("PCS") spectrum). However, for simplicity, the mobile and portable radio telephone service today provided by two licenses in each geographic area is referred to in this memorandum as "cellular" service, as distinguished from SMR or PCS services. Other wireless services, specifically paging and radiolocation, are discussed below at pp. 42–45.

[3] As the United States has advised the Court, the legal staff of the Antitrust Division advised the BOCs in May 1993 that it would recommend against removal of equal access, and the BOCs then chose to pursue a waiver limited to line-of-business relief. Memorandum of the United States in Opposition to Motion of BellSouth Corporation for Generic Wireless Relief, pp. 4–5 (Apr. 29, 1994). Thus, there was no request for removal of equal access from BOC cellular exchanges pending when BellSouth or Southerwestern Bell filed their instant motions. Nonetheless, the Department's investigation and analysis of the BOCs' requests has given it ample basis to oppose these motions on the merits, even though these motions are, as the Court has recognized, procedurally improper. Order, July 8, 1994, at 4 & n.2.

presented here.[4] The Department believes that genuine equal access can exist in this situation, and has attempted to define the appropriate equal access arrangements where a Bell Company stands on both sides of the equal access interface. The BOCs have said that certain of these safeguards are acceptable to them, and have asked the Department to explain others.[5] The United States conditions its support for the BOCs' motion on these additional safeguards because, without them, the requested relief does not pass muster under Section VIII(C) of the Decree. See pp. 29–40 below.

The BOCs also request generic modification of cellular exchange areas, purportedly along MTA lines but grandfathering all prior cellular geography relief. The United States urges the Court to defer considering this issue. Wholesale redrawing of the cellular exchange map seems unwise at this time, since the FCC has recently announced that it will be considering this exact issue in its current rulemaking to decide whether to require that all cellular carriers grant equal access to interexchange carriers.[6] Had the BOCs made a compelling showing for the relief they seek, the Court might nonetheless act on that showing. However, the BOCs have not demonstrated that MTAs generally or individually reflect communities for cellular telephony.

If the Commission mandates equal access, and devises a cellular exchange area map, that map may—but probably will not—correspond with the LATA map, as adjusted by the Court in the past. The Court will then be faced with the question whether to modify the Decree map to conform to the FCC map. It would make little sense for the Court to determine whether yet a third map should be adopted, when the Commission is likely to consider the same issue and where inconsistent results would be especially problematic. *See* pp. 46–49 below.

Because the Department's analysis of the BOCs' Motion turns in large measure on the vitality of equal access, Part I of this Memorandum argues that BellSouth and Southwestern have failed to demonstrate that the equal access requirement should be removed. Part II then explains the Department's view that, *subject to appropriate equal access safeguards*, BOC entry into cellular interexchange service should not reduce competition, and then describes those safeguards. Part III discusses the BOC's requests for geographic relief.

Argument

I. The Bellsouth and Southwestern Bell Motions, Seeking to Remove the Decree's Equal Access Obligations as Applied to Cellular Exchange Services, Should be Denied.

The Court has twice determined that Bell Company provision of interexchange service from cellular exchanges without equal access would be unacceptable. Before diverstiture, the Court concluded that "such a development would have been entirely inconsistent with the terms and purposes of the decree, and the Court would not have authorized it." *United States* v. *Western Elec. Co.*, 578 F. Supp. 643, 647 (D.D.C. 1983) ("*Mobile Services Decision*"). And in the *Triennial Review*, the Court again rejected the BOCs' application for authority to provide, without equal access, interexchange services from their cellular exchanges. *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 551 (D.D.C. 1987), *aff'd in part and remanded in part on other grounds*, 900 F.2d 283 (D.C. Cir.), *cert. denied sub nom. MCI Communications Corp* v. *United States*, 498 U.S. 911 (1990). BellSouth and Southwestern again seek that relief.

The Court's Order of July 8 asks BellSouth whether, in light of the filing of its motion to vacate the Decree in its entirety, its motion to exempt wireless services from Section II should be deferred. BellSouth has answered in the negative.[7] The United States does not agree that the Court should indulge BellSouth in its filing of multiple overlapping motions, taxing the resources and patience of the Court.

However, the United States believes that its ressponse to BellSouth's motion, and to the similar motion of Southwestern, will provide a useful framework for analyzing the BOCs' joint motion. In order to understand how equal access should work in preventing competitive harm, it is first necessary to understand why equal access is essential to prevent that harm.

A. *To Remove Equal Access, Movants Must Show at a Minimum that the Removal of Equal Access from their Cellular Exchanges Would Not Reduce Competition in Long Distance Services from those Exchanges.*

The sought-for removal of the Decree's restrictions on cellular exchanges requires to separate modifications, subject to two different standards of review. The removal of the interexchange restriction implicates the familiar standard for contested waivers under Section VIII(C): Will "the entering BOC will have the ability to raise prices or reduce output in the market it seeks to enter"? *Triennial Review*, 900 F.2d at 296.

The removal of the equal access restriction is not governed by Section VIII(C), which by its terms applies only to modifications of the line-of-business restrictions of Section II(D)(1). Instead, the motion to remove equal access is governed by Section VII and the common law standard it incorporates. This Court recently discussed that standard:

> [A] party seeking an opposed modification of a consent decree "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." Such a change may be either a "significant change in factual conditions or in law." Modification may also be appropriate when "enforcement of the decree without modification would be detrimental to the public interest."[8]

Although these are alternative grounds for modificaton, this Court correctly recognized that a contested modification should *not* be granted if the modification is contrary to the public interest. *AT&T/McCaw Decision*, 154 F.R.D. at 9.

Therefore, at a minimum, a modification should not be granted, under either Section VII or Section VIII(C)—where it appears that the result of the modification would be to reduce competition in an affected market. On this application, it is the movants' burden to demonstrate at a minimum

[4] The Court has recognized the dangers of allowing a BOC to provide access to itself and to its competitors. E.g., United States v. Western Elec. Co., 1986–1 Trade Cas. ¶ 66,987, at 62,061 (D.D.C. 1986) ("once a Regional Company is permitted to offer VSR services that are accessed through its own exchange network, it will have every incentive to design the exchange system in a manner that disadvantages suppliers of competing VSR service").

[5] See Memorandum of the Bell Companies in Support of their Motion for a Modification of Section II of the Decree to Permit Them To Provide Cellular and other Wireless Services Across LATA Boundaries, June 20, 1994 ("BOC Mem."), at 15–19.

[6] Notice of Proposed Rulemaking and Notice of Inquiry. *In re Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*. ¶¶ 56–70 (F.C.C. June 9, 1994) (CC Docket 94–54) ("*FCC Equal Access NPRM*").

[7] Response of BellSouth Corp. to the Court's Memorandum Order of July 8, 1994 (July 14, 1994).

[8] *United States* v. *Western Elec. Co.*, 154 F.R.D. 1, 7–8 (D.D.C. 1994; internal citations omitted) ("*AT&T/McCaw Decsion*"), *quoting Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 760 (1992). The Court determined that *Rufo*, rather than *United States v. Swift & Co.*, 286 U.S. 106 (1932), provided the correct standard for evaluating contested modifications of consent decrees "not without considerable hestitation." 154 F.R.D. at 8. As the Court noted, *Swift*, long the standard for modifying antitrust consent decrees, presented "a context strikingly similar to that in this case," unlike *Rufo*, which dealt not with antitrust decrees but with prison reform litigation. *Id.*

that the relief they seek is unlikely to reduce competition in interxchange markets. They plainly have failed to make any such showing. *See* pp. 13–23 below.

B. As this Court Has Held Repeatedly, Cellular Exchange Service Is "Exchange Service" Subject To the Decree's Equal Access Requirements.

Alone among the Bell Companies, BellSouth urges the Court to declare that the Decree's equal access and interexchange provisions "do no apply" to wireless services. (BellSouth Mem. 6, Apr. 15, 1994) BellSouth has not withdrawn this argument, which the United States rebutted in its earlier opposition to BellSouth's Motion (U.S. Mem. 6–10, Apr. 29, 1994) BellSouth nonetheless argues that Section II should not be interpreted to have been intended by the parties and the Court to be limited to the landline local exchange.

As more fully set forth in our prior brief, BellSouth's argument is frivolous. Whether or not the issue was "fully litigated" (BellSouth Mem. 11) as part of a trial that addressed all aspects of the telecommunications industry, the Decree's interpretation is settled.[9] The Decree's terms are not themselves limited to landline telecommunications (see Section IV.O, defining "telecommunications"), and that understanding was set forth in the Department's filings prior to the Decree's entry.[10] AT&T and regional company executives committed prior to divestiture that cellular systems would provide equal access.[11] This Court has repeatedly ruled that cellular services are subject to Section II of the Decree, e.g., Mobile Services Opinion, 578 F. Supp. at 645; Triennial Review, 673 F. Supp. at 551; AT&T/McCaw Decision, 154 F.R.D. at 4, and has likewise entered more than 49 waiver orders premised on the proposition that cellular services are subject to Section II. The Court of Appeals has likewise proceeded on that assumption without questioning this premise. *United States* v. *Western Elec. Co.*, slip op. (D.C. Cir. Nov. 5, 1992) (No. 92–5065) (remanding decision on PacTel's out-of-region cellular service area request for northern Ohio).

Southwestern Bell does not join BellSouth in arguing that Section II does not apply to cellular services—although it comes close, arguing that concerns about market power in cellular "are illegitimate under the decree." (Southwestern Mem. 15) Southwestern argues that "the wireless switch is not an 'essential,' 'bottleneck,' or monopoly facility.'" (Southwestern Mem. 7–11, June 20, 1994)[12] This argument—if it is meant to suggest that the cellular duopoly is not a source of competitive concern because there are two cellular carriers permitted to operate in any particular market[13]—is without merit, whether argued as a matter of decree interpretation or as a matter of competitive analysis.

Landline local exchanges can be used to impede competition between cellular providers. Triennial Review, 673 F. Supp. at 551; see pp. 40–42 below. Cellular carriers and interexchange carriers both rely on local exchange facilities for access, interconnection and transport. The Court has recognized that the dangers from BOC control of an out-of-landline-region cellular system are no greater than BOC control of in-region cellular systems, but has required both to provide equal access and prohibited both from providing interexchange services. United States v. Western Elec. Co., 1986–1 Trade Cas. ¶ 66,987, at 62,055 (D.D.C.) (PacTel/CI"), rev'd on other grounds, 797 F.2d 1082, 1089–91 (D.C. Cir. 1986), cert. denied sub nom. US West Inc. v. United States, 480 U.S. 922 (1987). Applying the Decree's equal access restrictions only to the "landline switch," as the movants propose, would be insufficient to prevent abuse of the landline exchange.[14]

There is no reason to believe that the Decree's purposes end where the local landline exchange ends. The Decree's terms plainly apply to cellular exchanges—as this Court's latest opinion and eight years of consistent application of the Decree to out-of-region BOC exchange services makes clear. This Court has specifically applied Section II's interexchange prohibition and other Decree requirements to an out-of-region cellular system, notwithstanding the fact that the BOC did not control local exchange facilities in the cellular service area. PacTel/CI, 1986–1 Trade Cas. at 62,060. Subsequent orders, including orders sought by BellSouth and Southwestern, have also applied Section II to cellular exchanges where the BOC does not

[9] The Tunney Act contemplates the filing and entry of consent decrees in cases in which no testimony has been taken, 15 U.S.C. 16(a), much less that the issues address had been "fully litigated." If BellSouth were correct, consent decrees otherwise authorized by the Tunney Act could not be enforced.

[10] "As set out in the Department's Competitive Impact Statement, the proposed modification would not prohibit the BOCs from offering either cellular radio or land mobile radio. These types of services fall within the definition of exchange telecommunications." Response to Public Comments, 47 FR 23320, 23335 (May 27, 1992); accord, Mobile Services Decision, 578 F. Supp. at 645 ("mobile radio services are 'exchange telecommunications' within the meaning of Section II(D)(3) of the Decree").

[11] AT&T's Memorandum Replying to the Responses to the Court's Order of April 22, 1983, at 5 & n.* (May 19, 1983); Affidavit of Joseph T. Ambrozy (Mid-Atlantic Region), sworn to May 18, 1983, p. 9; Affidavit of Delbert S. Staley (Northeast Region), sworn to May 18, 1983, p. 15. These representations are quoted at U.S. Mem. 8, Apr. 29, 1994. BellSouth's assertion—ignoring all these statements—that "the contemporaneous statements of the parties further confirm that they did not intend to impose equal access obligations and interLATA restrictions on wireless networks" (BellSouth Mem. 8) is at best uninformed.

[12] AT&T made the same argument in support of its effort to acquire McCaw. Memorandum in Support of AT&T's Motion for a Waiver of Section I(D) of the Decree insofar as it Bars the Proposed AT&T/McCaw merger, pp. 50–57 (May 31, 1994) ("AT&T I(D) Mem."). Before announcing its plans to acquire McCaw, AT&T recognized that the integration of cellular and interexchange services without equal access "would extend the cellular exchange duopoly—and the apparent noncompetitive pricing of cellular 'air time'—into the provision of interexchange services to all cellular customers." AT&T's Opposition to RBOCs' Motion To "Exempt" Wireless Services from Section II of the Decree, p. 7 (Apr. 27, 1992). Two years later, after AT&T announced its proposed acquisition of McCaw, AT&T offered exactly the opposite view. "These [cellular] systems are not monopolies that can be leveraged into long distance and manufacturing markets." AT&T I(D) Mem. 52.

[13] Southwestern argued to the FCC that it would promote competition if the cellular duopolists were awarded all of the new PCS spectrum. "[A] choice among service providers stimulates and ensures competition. * * * [A] choice would exist * * * because there are already at least two such providers in each market." Comments of Southwestern Bell Corp., In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, p. 12 (F.C.C. Nov. 9, 1992) (Gen. Docket No. 90–314). Southwestern makes the same claim here. "[N]o provider has the ability to leverage anything at all, regardless of its incentives. There is always a competing mobile provider down the road." Southwestern Mem. 12. As we show below, two providers is insufficient for genuine competition in these markets, and Southwestern itself observes internally that these duopolies are "highly attractive" because of their "absence of significant price competition." [SWB 218486]

The BOC documents quoted in this memorandum, and exhibits derived from cellular company data cited in this memorandum, have been submitted to the Court under separate cover. Documents produced to the Department in its investigation are grouped by producing party, and within those groupings by document number, and are cited in this memorandum by party name or abbreviation and document number. The exhibit volume has been provided to the Court. It will be provided to any party to this proceeding that signs the non-disclosure agreement the Department submitted to the Court today. The Department plans to file the exhibit volume and to make it available to the public on August 1. We request that any producing party objecting to disclosure of a particular document do so by July 27 so that, if warranted, any confidential documents will be filed under seal.

[14] By contrast, the Department's proposed order adds to the protections against discrimination by the landline exchange by prohibiting the BOCs from building and owning their own interexchange facilities, and limiting them to the resale of switched interexchange services obtained from multiple vendors. See p. 37 & n.50 below.

provide landline local exchange service.[15]

Attempts to limit the applicability of the Decree to the local landline "bottleneck monopoly" read the Decree too narrowly.[16] This request for a modification turns on whether the modification is necessary to the public interest. Rufo, 112 S. Ct. at 760. The determination of the public interest, in this specific context, asks whether eliminating equal access from cellular systems will reduce competition in interexchange markets. The cellular carriers' duopoly status gives them the monopoly or market power—terms the Court of Appeals has used interchangeably[17]—and that market power makes abuse of the cellular exchange an issue of competitive concern.[18]

C. *Allowing a BOC to Provide Interexchange Service from Cellular Exchanges. Without Equal Access. Would Reduce Competition for Cellular Interexchange Service.*

The crux of the BOCs' original waiver application to the Department, seeking the removal of equal access and the unrestricted removal of the interexchange prohibition on their wireless businesses, the BOCs argued that "competition in radio services is extremely robust," that "competition is flourishing in mobile service markets," and that "without a showing of market power, the bell companies are plainly entitled to the relief they seek."[19]

Specifically, all of the BOCs argued in 1991, and the movants argue again, that equal access raises prices for long distance by permitting non-BOC cellular carriers to buy long distance in bulk but charge retail rates; if equal access were eliminated, the cellular duopolists would purportedly compete with each other on long distance, driving down the price. BOC Mem. 45 (Dec. 13, 1991); BOC Reply Mem. 21–26 (Aug. 3, 1992); BellSouth Mem. 22–23; Southwestern Mem. 27. To support this logic, it must be shown that the cellular duopoly is competitive. The facts, however, are just the opposite. Cellular duopolists plainly have market power in cellular service, and the major premise of the BOCs' argument therefore fails. It follows inexorably that if the BOC has market power in cellular service, and can exclude competitors in long distance, it can exclude the benefits of competition that those competitors bring.

1. *Cellular Exchange Service Markets are Not Competitive Today.*

These cellular systems have substantial market power. The FCC has so concluded on four separate occasions in the last three years,[20] and the General Accounting Office has reached the same conclusion.[21] The Department's extensive investigations into the cellular industry likewise indicate that cellular duopolists have substantial market power: "the ability to raise prices or restrict output." *Triennial Review*, 900 F.2d at 296.

The basic structural problem with cellular markets is well known—the fact that they are and have been duopolies with (at least until very recently) absolute barriers to entry. While the FCC's decision to issue two cellular licenses—rather than only one—was motivated by a desire to stimulate competition. *Cellular Communications*, 89 F.C.C.2d 58, 61 (1982), two-firm markets are not particularly competitive.[22] The noncompetitiveness of two-firm markets is exacerbated here by the overlapping alliances of the cellular carriers, so that firms that "compete" with each other in one market are partners in another.[23]

The BOC's internal documents, written at the same time that they were telling the Department that cellular is "robustly competitive," demonstrate that *in the BOCs' view* cellular is comfortably noncompetitive. Southwestern, which argues that "wireless markets today are vigorously competitive" (SWB Mem. 11), observed in 1991—the year it and the other BOCs filed for this waiver—that there was an "absence of significant price

[15] Order, Sept. 27, 1987 (Southwestern acquisition of Metromedia); Order, Oct. 31, 1986 (BellSouth joint venture with MCCA).

[16] Cellular exchanges are "bottlenecks" if they can be used to prevent or deter a customer's access to interexchange carriers, since customers have to go through one of the two cellular exchanges to reach their interexchange carrier. See pp. 19–23 below.

[17] "Whatever it means to 'leverage' one's monopoly power, the DOJ is surely correct that no damage can come to competition—through 'leverage' or otherwise—can occur unless the BOCs can exercise market power." Triennial Review, 900 F.2d at 296 (emphasis added).

[18] Standard economics and antitrust texts recognize that monopoly power and market power are functionally identical concepts. "Pure monopolists, oligopolists and monopolistic competitors . . . all possess some degree of power over price, and so we say that they possess monopoly power or market power." F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 17 (3d Ed. 1990) (hereafter "Scherer & Ross"); accord, e.g., 2 P. Areeda & D. Turner, Antitrust Law ¶¶ 504, 507, at 325, 330 (1978) (hereafter "Areeda & Turner"); D. Carlton & J. Perloff, Modern Industrial Organization 97 (1990) (hereafter "Carlton & Perloff"). Any purported distinction between "monopoly power" and "market power" would hardly be meaningful. See, e.g., Hay, "Market Power in Antitrust," 60 Antitrust L.J. 807, 817–21 (1992). Professor Hay discusses varying definitions of "market power" and "monopoly power" by courts and commenters, noting that at best the distinction appears to be only that "monopoly power" is taken to mean "a high degree of market power." Id. at 817, 818 n. 44, citing Landes & Posner, "Market Power in Antitrust Cases," 94 Harv. L. Rev. 937, 952–60 (1981). Professor Hay concludes that "the key to monopoly (or market) power is the power to control price (i.e., the power to charge prices above the competitive level), and the power to exclude competition is an ingredient of that power to control price." Hay, 60 Antitrust L. J. at 821.

[19] Memorandum of the Bell Companies in Support of their Motion for Removal of Mobile and other Wireless Services from the scope of the Interexchange Restriction and Equal Access Requirement of Section II of the Decree, pp. 6, 16 (Dec. 13, 1991). Contrary to that last claim, the burden is on the *movant* to show a lack of market power. Rufo. 112 S. Ct. at 760 ("a party seeking a modification of a consent decree bears the burden * * *"); *Triennial Review*, 900 F.2d at 296 ("the ultimate burden under section VIII(C) remains on the petitioning BOC").

[20] *FCC Equal Access NPRM*, ¶ 36; Notice of Proposed Rulemaking and Tentative Decision, *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, 7 F.C.C. Rcd 5676, 5702 (1992) ("*PCS NPRM*"); Report and Order, *In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 F.C.C. Rcd 4028, 4029 (1992); *see also* Second Report and Order, *In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 F.C.C. Rcd. 7700, 7744 (1993) ("*FCC PCS Order*"). The FCC's recent decisions—particularly its 1993 PCS Order—were entered after and despite the cellular industry's intensive (but unpersuasive) efforts to argue that the cellular duopoly is competitive. *See* Reply Comments of the Department of Justice, *In re Personal Communications Services*, at 17–22 (F.C.C. Jan. 19, 1993) (citing and rebutting arguments).

[21] Report to Hon. Harry Reid, U.S. Senate, *Concerns About Competition in the Cellular Telephone Service Industry*, pp. 2–4 (Gen. Acctg. Ofc. 1992).

[22] Economic theory generally predicts that prices will be higher and output less in markets with fewer rather than more competitors, or in markets that are more highly concentrated, absent mitigating factors, *See. e.g.*, Scherer & Ross at 277–78; 4 Areeda & Turner, ¶ 910b at 55 ("there is general agreement that beyond some point the smaller the number of firms and the larger the share of the market dominated by one or a relatively few firms, the greater the likelihood of substantial departures from competitive performance, particularly with regard to price"); Stigler, "A Theory of Oligopoly, 72 *J. Political Econ.* 44–61 (1964). Studies indicate that markets dominated by duopolies are particularly troublesome. "Large market shares for the two leading firms seem most decisive for industry price-cost margins, with a depressing effect from a *sufficiently large* third share." Kwoka, "The Effect of Market Share Distribution on Industry Performance," 61 *Rev. Econ. & Statistics* 101, 108 (1979). Many studies have found a statistically significant positive correlation between price and market concentration. *See* Schmalensee, "Inter-Industry Studies of Structure and Performance," *in* 2 R. Schmalensee & R. Willig, *Handbook of Indus. Org.* 987–88 (1989) (collecting studies); L. Weiss, *Concentration and Price* 268 (1989) ("overwhelming support" for concentration-price hypothesis).

[23] For example, AirTouch (the former PacTel cellular properties) is a partner with McCaw in operating a cellular system in San Francisco, and competes against a McCaw/BellSouth system in Los Angeles. BellSouth, McCaw's partner in Los Angeles, is McCaw's rival in Miami. Southwestern Bell partners with McCaw in operating the "Cellular One" marketing organization, but competes against McCaw in Dallas, St. Louis and Kansas City.

competition" in cellular, and that the market is "highly attractive" for that reason. [218486] Southwestern further observed:

The FCC predicted sufficient levels of rivalry from a duopoly. In actuality, the two players in each market have been able to avoid serious competition in this rapid growth environment. [218492]

In the current environment, characterized by rapid growth and limited rivalry, relative position is less relevant than in mature, competitive industries * * * In the future, as new competitors enter the market and subscriber growth eventually levels off, positioning will become increasingly important. [218517]

More recently, Southwestern observed that "new industry entrants will not be *effective* competition before 1996" (emphasis in original). Southwestern assessed that threat of new entrants as "medium," and the bargaining power of buyers as "low"—recognizing that the "threat of substitute products or services [is] low" and that "extensive time periods for regulatory determinations, license awards and infrastructure construction will occur prior to the emergence of effective competitors." [SWB 203264–65]

Other BOCs have made similar observations about cellular markets.

The duopoly structure is a continuation of the status quo. * * * Under this scenario, competitive intensity is greatly reduced. This enables direct cellular competitors to improve margins * * *. In fact, the most significant element of this structure is the probability that profit margins for all competitors would tend to increase under prolonged restricted competition. (AM00385–86, Ameritech, July 1990)

Cellular industry—unusually attractive structural characteristics—government-mandated duopoly providing very high barriers to entry—essentially unregulated with regard to rates and rate of return * * * overall competitive rivalry is low to moderate * * * to date little competition on service pricing. (PT00008–12, Pac Tel, Sept. 1, 1987)

The burgeoning demand for cellular service when coupled with the duopolistic market structure mandated by the FCC has led most investment analysts to conclude that the cellular industry will be even more profitable than cable TV, to which comparisons are constantly made. * * * While BAMS believes that providing quality cellular service requires considerably more investment in the infrastructure of the business * * * than does cable, it must be acknowledged that the investment community has been generally correct in forecasts of thriving cellular revenues. It is also important to note that increased market penetration in the absence of downward price pressures will buy alot of infrastructure. (106707, Bell Atlantic 1989)

In June 1992, six months *after* filing this waiver application asserting that cellular was "robustly competitive," US West observed: "Current duopoly structure and market growth limits competitive intensity." [USW 875]

Cellular carriers often have the ability to raise prices for cellular service, particularly by raising prices in a manner that is less visible to the customer. A review by Southwestern Bell of its cellular markets demonstrate the phenomenon:

Chicago has made a number of changes to improve subscriber revenue. These include: November 1987—changed prime hours from 8 am to 8 pm to 7 am to 9 pm; March 1990 began charging for 'ring time'; * * * December 1990 increased foreign roamer rates from 50¢/min to $2/day and 75¢/min; May 1991 increased basic monthly access charge to $19.95. This impacts about 40% of the base. For the future, with rates in general being so low, it is our intent to continue to increase rates * * * We are also evaluating charges for the Telco interconnection fees associated with their usage. [203139]

Over the past few years, Boston has initiated several key rate changes to improve subscriber revenue per customer. The changes include the following: July 1989 roamer surcharge introduced; April 1990 changed the billing increment from the 6-second rounding to full minute; July 1990 introduced a free of peak plan with a premium monthly access charge; June 1991 increased foreign roamer rates 32%; June 1991 raised monthly access charge $2. * * * [A]t this writing, while we are implementing a rate increase in June 1991. Nynex has filed a tariff which would lower rates and price their plans below ours across the board. Their actions seem illogical and appear to contradict the steps needed to offset declining customer usage. * * * As for the future, SBMS believes there are other opportunities to increase rates in Boston, somewhat dependent on our competitor. * * * With monthly access charges relatively low, SBMS will continue efforts to move this fixed charge upward. [203140–41]

The Washington/Baltimore property historically has had the highest subscriber revenue per customer of all the SBMS properties. * * * Washington/Baltimore was one of the last SBMS properties to fall below the $100/month average subscriber revenue. * * * Plan F, a plan designed to add new customers quickly * * * resulted in a large addition of customers, [but] it was priced so inexpensively * * * that it drove the Washington/Baltimore average downward. Plan F has been subsequently dropped. Despite the obvious failure of Plan F, Washington/Baltimore has introduced a number of changes to improve subscriber revenue per customer * * * Changed the billing increment to full minute rounding; increased roaming rates; * * * changed peak hours * * *; increased access charges on low end plans. Washington/Baltimore's future changes will focus on gradually increasing rates. This will be accomplished mostly through higher access charges and possibly increased per minute rates." [203141–42]

Dallas subscriber revenue per customer has always been good for a large market. * * * Over the last couple of years, the Dallas property has been the SBMS leader in implementing changes to improve subscriber revenue. Subscriber revenue per customer has declined 113.8% since 1988 while peak minute usage per customer has dropped 24%. Major factors contributing to this performance are as follows: Changed from 30 second to full minute billing increments; raised access charges on economy and basic plans; introduced 'free off-peak' which initially resulted in higher peak usage. Once established, eliminated the offering from low-end plans; increased foreign roamer rates * * * Dallas has also increased activation fees, voice mail rates, and other miscellaneous charges. * * * Dallas is also reviewing charging customers the interconnection fees charged by the Telco associated with customer usage. In Dallas, this could be as much as 2¢/min, which would be a significant boost to subscriber revenue. [203143–44]

[In l]ate 1989 [in Oklahoma City,] * * * roaming rates were increased. In early 1990 billing increments were changed to full minute rounding. [203146]

Similar to the other SBMS markets, the West Texas properties have been gradually increasing rates by changing the billing increment, raising access charges and increasing roamer rates. Additional increases in rates will be gradual as in the past so as not to create a competitive disadvantage. Further upward movement of the access charges is the most likely course with the de-emphasis of the economy plans close behind. [203146–47]

Examination of pricing data shows a similar ability to raise prices.[24] A look at BellSouth's pricing practices in Florida, a state in which BellSouth claims to be at a competitive disadvantage against its A block competitor, McCaw,[25] is most revealing. Over the 1990–1993 time period in Miami, the state's largest market, BellSouth's average per minute revenues for cellular service rose 21 percent, while its market share of service revenues rose from 48 percent in 1990 to 50 percent in 1993, despite

[24] The simplest way to examine cellular service prices is to divide service revenues by minutes of use. This calculation permits an observation undistorted by pricing plans and the like, and often is used by the cellular carriers themselves to measure their performance. The pricing information in this memorandum is based on comparing service revenue and minutes of use, based on data provided to the Department by the BOCs and McCaw in connection with our investigations, and is submitted as Exh. 7.

[25] *See, e.g.*, BellSouth Corporation's Opposition To AT&T's Motion for a Waiver of Section of Section I(D) of the Decree Insofar as it Bars the Proposed AT&T-McCaw Merger, pp. 18–22 (June 28, 1994) (claiming that BellSouth is at a competitive disadvantage due to McCaw's "City of Florida" plan that allows its subscribers to have service throughout McCaw's service areas within the entire state at a single "local" price). 16 to 25 percent less over the same period. Despite this disparity, BellSouth retained the greater share of both service revenue (1990's 66 percent share has not surprisingly dropped to 1993's still impressive 55 percent share) and minutes of use.

McCaw's larger share of minutes of use. For the years 1991–1993, BellSouth's per minute revenues were two percent, nine percent, and 15 percent higher than McCaw's, respectively (in 1990, BellSouth was one percent lower). In Jacksonville, over the same 1990–1993 period, BellSouth's per minute revenues rose more than 30 percent, while McCaw's per minute revenues varied from

Nonetheless BellSouth claims that it is at a competitive disadvantage to McCaw by reason of the Decree restrictions. (BellSouth Mem. 28, 33, 41) The Decree does not appear to be preventing BellSouth from charging higher prices than does its rival.

2. *Given the BOCs' Market Power in Cellular Service, Eliminating Equal Access Will Reduce Competition in Cellular Long Distance.*

Today these cellular systems provide equal access, as the Court has required of BOC cellular systems since 1983. A contrary "development would have been entirely inconsistent with the terms and purposes of the decree, and the Court would not have authorized it." *Mobile Service Decision*, 578 F. Supp. at 647. As a result, their subscribers can choose their long distance carrier and have the benefit of whatever competition is present in the long distance market.

Cellular systems "can prevent their customers from reaching the interchange carriers of their choice by programming their switches to send all long distance (calls) to one carrier." [26] Therefore, the operators of those cellular systems could reduce competition for long distance service by denying access to competing carriers and requiring cellular subscribers to obtain long distance at prices not set by competition between those competing carriers, subject to whatever constraint exists through competition in the cellular market. As the BOCs have recognized, non-BOC cellular carriers have done just that,[27] BellSouth and Southwestern seek to do the same.

The Department's investigation indicated that cellular subscribers value the choice that equal access gives them. This is particularly true for larger businesses, which seek to connect their cellular services to private networks offered by interexchange carriers. By doing so, the business user obtains not only access to the features of the private network, but also the very substantial discounts on long distance prices that are sold as part of the service.[28] These are the very discounts that the BOCs seek to obtain (BOC Mem. 26, June 20, 1994); today they can be obtained by customers of equal access systems, but generally not by others. Indeed the availability of equal access from BOC systems has pressured *non*-BOCs (notably McCaw) to offer connections to large customers' private networks, in order to retain their business. Businesses that do not obtain cellular service from equal access cellular systems have no access to these discounts and services, and have been frustrated in their efforts to reduce their cellular long distance costs.[29] While the largest businesses might have the leverage with their cellular providers to gain access for their private interexchange services, smaller businesses and individuals cannot get those benefits—except where equal access requires it.

Southwestern also argues that, even if it has market power, it would have no incentive to raise prices of long distance. "[A] hypothetical provider of mobile services that enjoyed real market power would simply exploit that market power directly; there would be no advantage in attempting to leverage that power into ancillary services such as mobile long distance service or mobile information services." (Southwestern Mem. 8; *see also* BOC Mem. 28) This attempt to argue that there is only "one monopoly rent"[30] is contrary to fact and well reasoned theory.

The fact, as indicated in Southwestern Bell's own documents, is that a successful strategy for raising prices is to focus on ancillary services. *See* pp. 16–18 above. Southwestern Bell has found that it can "aggressively change(e) elements of subscriber revenue to mitigate the effect of lower customer usage" by raising the costs of ancillary services, for example, by "increased monthly access charges * * * slightly higher roaming * * * eliminating 'night hours' and extending peak hours in many of the markets." [SWB 203136–37] If Southwestern Bell finds that the best method of increasing revenue is to raise the price of roaming rates and access charges, it stand to reason that it would find it equally feasible and attractive to rise the rates of long distance charges.

Southwestern's "one monopoly rent" argument is contrary to theory as well as fact. The theoretical model on which Southwestern relies depends, in general, on the presence of many key and restrictive conditions, at least *four* of which are not present here. First, as Southwestern Bell acknowledges, the theory is limited to unregulated monopolists. Cellular duopolists are not universally unregulated: in California, home of 20 percent of the nation's population, cellular prices are regulated.[31] Second, the theory requires that the two inputs (here, cellular service and long distance service) be used in fixed proportions; if the integrator or user can vary the proportions (by making more or fewer long distance calls) the general argument fails. Third, the argument does not apply where the firm cannot price discriminate in the downstream market—the long distance market—without vertical integration. Fourth, and most important, the argument applies only to the situation in which a monopolist is integrating with a firm in a competitive market; here we have decidedly imperfect competition in cellular, and (as the BOCs acknowledge) imperfect competition in long distance. The "one monopoly rent" model does

[26] Mandl Aff. ¶ 6, submitted with AT&T's Motion for a Waiver of Section I(D) of the Decree insofar as it Bars the Proposed AT&T-McCaw Merger (May 31, 1994). *Accord*, BOC Mem. 9–10.

[27] *E.g.*, BOC Reply Mem. 23–24 (Aug. 3, 1992).

[28] "The one segment of the long-distance market that appears most competitive is the market for large customers." P. Huber, M. Kellogg & J. Thorne, *The Geodesic Network II: 1993 Report on Competition in the Telephone Industry* 3.17, *see id.* 3.39–44 (describing means whereby interexchange carriers discount rates to large users); *see also* Kelly Aff. 26–27 (Apr. 29, 1993). *Submitted with* Letter to Richard L. Rosen from Michael H. Salsbury (MCI). Apr. 30, 1993.

[29] For example, Dow Chemical pays 25 to 50 percent more for cellular long distance than for landline long distance because its cellular carrier does not provide equal access. Dow chose to pay these higher prices rather than have its sales people change cellular telephone numbers, which they would have to do if Dow changed carriers. Jacobs Aff. 3–5 (Exh. 8 hereto) "Dow Chemical believes that when cellular providers offer Dow Chemical the option to select the carrier from whom the company purchases long distance cellular service, Dow Chemical benefits in the form of lower cellular long distance prices." *Id.* at 5.

[30] Southwestern quotes AT&T's economists, who made the same argument in support of AT&T's efforts to acquire McCaw: "Since the monopolist can only charge the monopoly rent once, it has no generally applicable incentive to favor its affiliate if another competitor can provide the good or service more efficiently." Southwestern Bell Mem. 9, *quoting* Willig & Bernheim Aff. 9. The argument that vertical integration cannot increase a monopolist's profits is often attributed to Robert Bork, who expanded upon economic theory and popularized this argument among antitrust lawyers. R. Bork, *The Antitrust Paradox* 229 (1978); *see* Scherer & Ross at 522.

[31] Cal Pub. Util. Code § 401 *et seq.*; 17 CPUC 2d 499 (1985) In California, "the Public Utilities Commission has jurisdiction over rates charged for cellular service." *Cellular Plus, Inc. c. Superior Court*, 18 Cal. Rptr. 308, 311 (1993). Cellular carriers must file financial statements, receive approval for wholesale rate increases, and receive approval to install new transmitter sites. *See also* BOC Mem. 28 ("half of the States do not regulate cellular or paging providers at all"; the other half presumably do, even if they "typically impos[e] no price regulation at the retail (*i.e.*, reseller) level"). Regulation of BOC landline exchanges further distorts the "one monopoly rent" argument.

not speak to the situation of integrating oligopolists.[32]

The theory embraced by Southwestern argues that there are no means (except efficiency means) by which monopolists can vertically integrate and increase their monopoly profits. *See* R. Bork, *The Antitrust Paradox*, at 229. That theory has been rejected by economists of all persuasions, who recognize that there are conditions under which a monopolist or oligopolist can vertically integrate and increase its monopoly profits.[33] And it is directly contrary to the observable facts here: Southwestern has raised prices of "ancillary" services, such as roaming, rather than raise more visible prices (*see* SWB 203136–37), and the BOCs all observe that *non*-equal access carriers, such as McCaw, charge top dollar for long distance services that are "ancillary" to their cellular service, rather than simply raising the price of cellular service.

D. *The Movants Have Not Demonstrated any Significant Changed Circumstances Warranting Relief.*

Under *Rufo*, the party seeking modification "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." 112 S.Ct. at 760. As this Court noted, a significant change is a "significant change in factual conditions or in law" that could not have been anticipated at the time the Decree was entered. *AT&T/McCaw Decision*, 154 F.R.D. at 7–8, *quoting Rufo*, 112 S. Ct. at 760.

Since the Court rejected the BOC's application to provide interexchange service from cellular exchanges without equal access in 1987, *Triennial Review*, 673 F. Supp. at 551, the BOCs must show that a significant change since then would warrant their instant motion to provide such service. The changed circumstance necessary, and which has not occurred, would be a substantial increase in competition in wireless services, so that cellular carriers would not have significant market power. *See Decree Opinion*, 552 F. Supp. at 195. They have not established that there has been such a change.

The movants point to two developments to support their argument that there has been a significant change in circumstances. First, they argue that AT&T's acquisition of McCaw, if permitted by this Court and the FCC, will substantially change the cellular business by permitting entry of the nation's largest long distance carrier into the local cellular exchange business. This entry, they argue will place the BOC cellular systems at a substantial competitive disadvantage, thereby harming consumers. Second, they argue that entry into the wireless business is imminent in the form of SMR and PCS. They suggest that entry of these new providers will eliminate the need for equal access to preserve competition in the provision of long distance services to cellular subscribers. Neither of these developments justify the relief the BOCs seek.

The proposed final judgment that the Department has negotiated with AT&T refutes the BOCs' argument that AT&T will have different equal access rules. Rather, that proposed decree and the order proposed for the BOCs' motion applies consistent rules to both the BOCs and AT&T. The terms of the AT&T/McCaw judgment, if approved, would expand the scope of equal access to apply to McCaw cellular exchanges that do not currently provide equal access. As a result, that judgment will eliminate the competitive disadvantage that the BOCs claim they currently face. Ironically, granting the BOCs' motion would create the harm they claim they want to end—placing a cellular provider in a position where it must provide equal access while competing with a provider that need not do so.

The BOCs' other contention is likewise without merit. As yet, there are no SMR or PCS providers of wireless telephony generally available today. It is, of course, possible that at some point these new technologies will offer wireless service in competition with today's cellular duopolists. When it will happen and what effect, if any, it will have on competition in the market for cellular telephone service is now unknown.

The FCC has not yet assigned PCS licenses. Indeed, the Commission has not yet even said when licenses will be awarded. Once the licenses are assigned, the licensees must take a number of time-consuming steps before they can offer service. They must develop the necessary technology, obtain financing and build networks. The very nature of PCS, including the services to be provided and the technology to be employed, is not yet settled.[34] BellSouth itself told the FCC that "cellular systems and new PCS licensees will be competitors only to a very limited degree."[35] It is, of course, impossible to say how long it will take to develop PCS, but it appears that it will be some time before PCS service will have any impact on competition for wireless telephony. Any assertion that PCS has changed the competitive environment is premature at best.

Several firms are in the process of accumulating radio spectrum currently allocated to Special Mobile Radio (SMR) with the stated intention of offering wireless telephone service. While that service might be closer to deployment than PCS, when and if it will be available is not yet known. SMR providers currently offer a dispatch service that is functionally distinct from cellular telephone service.[36]

Three firms are attempting to convert SMR spectrum to wireless telephone use. Nextel Communications Inc. is the only firm that has begun construction of an SMR system that would provide cellular-like telephony service. Nextel has noted that it could still face a number of difficulties, including having substantially less radio spectrum than that allocated to cellular telephone providers (which could cause its costs to be substantially higher), a limited number of equipment suppliers and a current inability to offer nationwide service. Nextel's filing also indicates that its service might not have adequate voice quality.[37]

This voice quality problem has also been noted by McCaw's Chief Operating Officer, who testified that Nextel's voice quality is currently poor. Mr. Barksdale noted that Nextel might have to halve its capacity to improve its voice quality, further increasing its costs.[38] As with PCS, the BOCs' assertion that SMR deployment constitutes a significant

[32] Carlton & Perloff 517, 510.

[33] Carlton & Perloff 510; R. Warren-Bolton, *Vertical Control of Markets* 64, 80 (1978); J. Tirole, *Theory of Industrial Organization* 179–80 (1988); Scherer & Ross at 521–22.

[34] *See* Peterson, "Positioning PCS on the Telecom Landscape," Telephony, 26 (December 13, 1993). Mr. Peterson is Manager of Market Research at Motorola's General System Sector, a prospective PCS manufacturer, and is positioned to be well informed on PCS.

[35] PCS Comments of BellSouth, In the matter of Amendment of the Commission's Rules to Establish New Personal Communications Services 48 n.96 (F.C.C. Nov. 9, 1992). BellSouth relied on a forecast by Telocator that "shows cellular service prices in 2002 remaining 14–67% higher than the price for 'personal telecommunications service' and as much as three times as expensive as telepoint service." *Id.*

[36] Dispatch service is used by fleet dispatchers, such as those that issue assignments to taxicabs and utility repair trucks. Some SMR providers offer interconnection with the public switched telephone network; such service, however, is far less convenient than cellular service and is used infrequently. SMR customers who need mobile telephone service usually have SMR and cellular telephone equipment in their vehicles.

[37] Nextel Communications, Inc., Securities and Exchange Commission, Form S–3, pp. 28, 36 (February 8, 1994).

[38] Deposition of James Barksdale, June 28, 1994, 218–221 (Exh. I hereto). Mr. Barksdale's deposition was taken during the Department's investigation of the AT&T/McCaw transaction. Presumably, Mr. Barksdale had an incentive to emphasize the likelihood of Nextel's success as an entrant into the mobile telephone business.

change in circumstances is, at best, premature.

II. The Boc's Resale of Switched Interexchange Services to Their Cellular Subscribers, Subject to Sufficient Equal Access Safeguards, Should Not Result in an Ability to Raise Prices for Interexchange Service.

The BOC's generic wireless waiver motion, unlike the motions by BellSouth and Southwestern, does not seek a modification of Section II's equal access requirement. The only modification sought is that of Section II(D)(1)'s interexchange prohibition. In light of AT&T's opposition, the standard for review is that of Section VIII(C): whether the BOCs have demonstrated that "there is no substantial possibility that (they) could use (their) monopoly power to impede competition in the markets (they) seek to enter." In the Court of Appeals' formulation, that standard requires the BOCs to demonstrate that they will not "have the ability to raise prices" in those markets. 900 F.2d at 296. The United States believes that, in an environment in which appropriate equal access safeguards prevent discrimination against interexchange competitors, that showing is made.

A. BOC Entry as an Additional Choice, Subject to Equal Access, Should Not Result in an Ability to Raise Prices.

As discussed above (pp. 13–23), the reason that the elimination of equal access would reduce competition is that it would prevent cellular customers from obtaining the benefit of whatever competition there is in the interexchange market.[39] By contrast, if genuine equal access can be preserved, it seems unlikely that BOC entry into cellular long distance, in competition with existing providers, would reduce competition in that market. Their entry might be competitively neutral, or might actually result in lower prices; there does not seem to be a clear reason that—again, subject to genuine equal access—their entry might raise prices.

The BOCs will enter the long distance market with no market share, no existing long distance customers, and no ability to convert their current cellular customers to their own long distance services—except by persuading customers that the BOC offers a better service or the same service at a lower price. To the extent the BOCs offer service at prices below AT&T Tariff 1 prices,[40] their customers (and the customers of other interexchange carriers, who may either demand lower prices or switch to BOC long distance service) benefit. To the extent the BOCs offer service at prices higher than AT&T's highest rates, customers have alternatives.

The interexchange carriers' arguments against the waiver, as made to the Department during its investigation, do not challenge this proposition. They challenge instead whether the BOC's provision of access to itself and its competitors can ever be considered "equal," and whether the BOC's control of the landline exchange overwhelms the analysis.[41] The adequacy of equal access (under the Department's proposal, rather than under the BOC's) is discussed at pp. 29–40 below; whether control of the landline exchange dictates a different result is discussed at pp. 40–42 below.

If genuine equal access is provided, the BOC will not have an unfair advantage over its competitors by reason of its providing access to itself and to its competitors. If they have an equal chance to gain customers, the BOCs' competitors will not be foreclosed from the cellular exchange. If the BOCs can only gain business by charging lower prices, that would not seem likely to lead to the higher prices that the Court of Appeals noted was the test for Section VIII(C). These arguments may seem tautological, but their import is that the focus of the inquiry should be on the question whether, and under what conditions, a BOC cellular system can provide access to itself and its competitors without creating a substantial risk that it will discriminate in providing that access. We now turn to that question.

B. Appropriate Safeguards are Required To Protect Against Discrimination in Access or Presubscription by the Cellular Exchange Operator.

The structure of the Decree rests on equal access. AT&T's discrimination against competing long distance carriers formed the basis of the antitrust violation, and preventing discrimination by the exchange access provider was and is the key to allowing competitive long distance markets to develop. Decree Opinion, 552 F. Supp. at 165. Recognizing that merely enjoining discrimination would be insufficient to prevent that discrimination, the Decree required a permanent separation of AT&T's exchange and long distance businesses, id. at 165, 172, and prohibited the Bell companies from integrating into the long distance business. Id. at 177. However, the Court recognized that the BOCs might lose their monopoly power over time; the Court therefore added Section VIII(C) to the Decree, to permit entry by the BOCs when that entry would be unlikely to reduce competition. Id. at 195.

To determine whether that entry is now appropriate, the Court should consider whether sufficient safeguards exist or have been proposed to prevent the danger that the access provider, in providing access to itself as well as its competitors, could discriminate against those competitors in the provision of exchange access.[42] As in 1982, simply enjoining discrimination is insufficient protection; specific proscriptions are appropriate in light of the dangers presented, and those proscriptions should be adopted in a manner that will make detection and prosecution of any violations reasonably likely.[43]

The Department has considered these questions in the limited context of cellular services, and believes that appropriate safeguards can be devised—although the Department also believes that the safeguards offered by the BOCs are insufficient, and recommends additional safeguards to prevent the discrimination that could reduce competition in cellular interexchange markets.[44]

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[39] There plainly is some competition in interexchange services, notwithstanding the BOCs' arguments. Indeed their arguments are premised on the proposition that competition in bulk long distance, which they seek to purchase, drives prices far below AT&T's regulated Tariff 1 rates. See p. 20 & n.28 above. Even at the retail level, the benefits of divestiture and the equal access regime it created have substantially reduced long distance prices, as the Court has often noted E.g., AT&T McCaw Decision, 154 F.R.D. at 10.

[40] The rates contained in AT&T's Tariff No. 1 (sometimes referred to as "Basket 1" or "MTS" rates) are AT&T's "undiscounted" retail rates, from which AT&T offers discounted rate plans. MCI, Sprint and other long distance carriers likewise offer discounted rate plans based on volume.

[41] AT&T's Further Opposition to RBOCs' Motion to Exempt "Wireless" Services from Section II of the Decree, pp. 11–14 (May 3, 1993); Kelly Aff. 19–21 (MCI submission Apr. 30, 1993).

[42] As noted above, wireless access markets cannot today be considered to be especially competitive. Those markets are nonetheless not nearly as tightly controlled as landline exchange access markets, where local telephone companies appear to have well over 90 percent of the market.

[43] To further the enforcement of these conditions, the Department believes that the grant of authority to provide interexchange services should be subject to the following sanctions. First, that the Court should have the authority to withdraw the waiver if a BOC violates the equal access requirements of the waiver and of the Decree; and, second, that the Court reserve the authority to impose civil fines for violations. Proposed Order, § VIII(L)(5).

[44] The Department does not believe that the BOCs should be prohibited from providing any interexchange services until they can demonstrate that competition would not be reduced were they allowed entry into interexchange services generally. The Department is aware of, and shares, the Court's concern about "piecemeal waivers." Triennial Review, 673 F. Supp. at 545; see also United States v. Western Elec. Co., 777 F.2d 23, 29 (D.C. Cir. 1985), but believes that wireless markets (as defined

The BOCs have said that "for the most part, [the Department's] conditions and clarifications appear to be acceptable, though some clarifications may be necessary." (BOC Mem. 16) We discuss these issues in Section 1, pp. 31–36 below. The BOCs have, however, objected to the Department's resale and marketing restrictions. (BOC Mem. 16–19) We therefore explain our reasoning for those restrictions separately, in Sections 2 and 3, pp. 36–40 below.

1. The Department's Proposed Order Will Substantially Prevent Discrimination in the Provision of Access.

The following specific terms and safeguards appear to be necessary and appropriate to prevent discrimination by a cellular exchange against competing interexchange carriers:

a. *Basic Injunction*. The Department's proposed order states explicitly the basic injunction necessary to protect against discrimination:

> Each BOC local telephone exchange company and Wireless Exchange System shall offer to all interexchange carriers interconnection, exchange access, and exchange services for such access, on an unbundled basis that is equal in type, quality and price to that provided to any interexchange service provided by that BOC or any affiliate thereof.

Proposed Order, § VIII(L)(3)(a)(1).[45] This language, which paraphrases Section II(A) of the Decree, makes clear that the equal access obligation applies to cellular carriers and that the benchmark for discrimination is the access the BOC provides to itself, rather than what it provides to AT&T, the original language of Section II(A). Section VIII(L)(3)(a)(3) of the proposed order also makes explicit the implicit requirement of equal access, that the prices for cellular exchange not vary with the interexchange carrier chosen:

> A BOC or any affiliate thereof shall not sell or contract to sell Wireless Exchange Service at a price, term or discount that depends upon whether the customer obtains interexchange service from the BOC or any affiliate thereof.[46]

In addition, the Department's proposed order explicitly makes Section II(B)'s requirements of nondiscrimination in the provision of technical information, interconnection and provision for planning of facilities binding on BOC commercial mobile service providers. The Department objected to the BOCs' earlier request to be allowed to give themselves preferential routing and collocation. The BOCs' proposed equal access plan as presented to the Court affirms that they will not give themselves those preferences. (BOC Model Equal Access Plan, p. 2). The Department believes that 60 days' notice of changes to the network is reasonably necessary to allow competing interexchange carriers sufficient time to modify their networks, and the BOCs have accepted that requirement. Id.

b. *Services from which Interexchange Service May Be Provided*. The scope of the proposed relief—i.e., the exchange services from which originating interexchange services may be offered—needs to be defined beyond the use of the recently added statutory term "commercial mobile services."[47] The Department proposes to use the term the following definition:

> Wireless Exchange Services mean commercial mobile services, as defined in 47 U.S.C. 332(d)(1); provided, however, that BOC Wireless Exchange Services are limited to services provided by corporations that have been established as separate subsidiaries from the BOC's local telephone exchange companies ("LECs"), and provided, further, that the principal facilities used to provide Wireless Exchange Services, including the MTSO and radio base stations, are physically and operationally separate from LEC facilities.

Proposed Order, Section VIII(L)(1)(c). The purpose of this restriction to "physically and operationally separate" networks is to distinguish wireless networks that are physically separate from the landline exchange, such as today's cellular networks, from networks that might be tightly integrated with the local exchange. It is unclear whether such a PCS service could be offered by anyone other than the local exchange itself, and therefore it might not be appropriate to allow BOCs to provide interexchange services from the network, just as it is not appropriate today for the BOCs to provide interexchange services from their landline exchanges, on these conditions. The BOCs based their proposal, and the Department evaluated this proposal, in light of current cellular architectures, and the Department therefore recommends limiting the waiver to commercial mobile services offered from networks that are fully distinct and separated—both physically and structurally—from the local exchange.[48]

The BOCs should also be authorized to provide certain long distance service for calls inbound to the cellular exchange, and the authority to provide such services is included in the Department's proposed order, which authorizes the provision of

> Call Completion Services, i.e., interexchange services resulting when a caller directs a call to a subscriber of a Wireless Exchange Carrier that has instructed that carrier to forward calls to a location in another exchange area. Such remote locations may include a network address (such as a telephone or paging number) stored at the MTSO, or a voice mailbox or similar storage facility. In such cases, the BOC may provide only the interexchange portion of the call from the point where it is redirected by the subscriber's Wireless Exchange Carrier's MTSO.

Proposed Order, Section VIII(L)(2)(b). This proposal reflects what the BOC's seek: the right to forward calls to the cellular subscriber's chosen destination (including a voice mailbox), according to the subscriber's PIC, rather than that of the call originator. The call originator might have thought he was making a local call, when the subscriber had forwarded her phone to a distant city; the subscriber pays for that long distance segment and, if she chose the

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in the Department's proposed order) are sufficiently discrete to allay these concerns.

[45] The Department's proposed order adds a new Section VIII(L) to the Decree. Section VIII(L)(1) contains definitions. Section VIII(L)(2) provides the authorization for specific interexchange services to be provided in connection with wireless exchange services. Section VIII(L)(3) contains specific equal access requirements related to that authority. Section VIII(L)(4) provides for the filing of compliance plans with the Department, and Section VIII(L)(5) specifies sanctions for violations of the modification or of equal access.

[46] Section VIII(L)(3)(a)(4) imposes an equivalent restriction on the sale of interexchange services; i.e., to the extent a BOC provides interexchange services to the customers of its cellular affiliates and to the customers of competing cellular affiliates, it may not vary the price depending on which cellular exchange service the customer buys. This requirement, which has been questioned by the BOCs (BOC Mem. 22), is necessary to give meaning to the unbundling requirement. Absent this constraint, the BOC could adjust the price of its interexchange service to create combinations of services that its long distance competitors could not match. Moreover, it would be decidedly procompetitive if the BOCs were to compete for long distance from each other's cellular exchanges and from McCaw cellular exchanges. A similar requirement is imposed upon AT&T and McCaw under the consent decree agreed to between them and the United States. AT&T McCaw Decree, § IV.F.I.c.

[47] This term, added by the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103–66, 107 Stat. 312 (1993), defines "commercial mobile services" as "any mobile service * * * that is provided for profit and makes interconnected service (a) to the public or (b) to such classes of eligible users as to be effectively available to a substantial portion of the public * * *." 47 U.S.C. 332(d)(1).

[48] As with the BOCs' proposed form of order, the waiver would not extend to interexchange telecommunications originated on cordless telephones or on "wireless PBXs," i.e., private mobile radio services provided within an office complex or similar environment. (BOC Mem. 12) The BOCs do not intend their relief to extend to the sorts of LEC-provided PCS services excluded by the Department's proposed order (BOC Mem. 12); the Department's proposal makes that limitation explicit on the face of the order.

BOC as her PIC, the BOC would carry the call. (See BOC Mem. 13)

The authority in this paragraph does not include the authority to provide an "800 access to cellular" service, which the BOCs have not sought. However, in the proposed consent decree with AT&T arising from AT&T's proposed acquisition of McCaw, the Department has agreed that AT&T arising from AT&T's proposed acquisition of McCaw, the Department has agreed that AT&T should have the right to market a "calling party pays" cellular service. AT&T/McCaw Decree, § IV.F.2, and competition will be served if the BOCs can offer a similar service.[49]

c. *Entities Bound by the Waiver.* Unlike the BOCs' proposed order, the Department's proposed order applies to any entity that is a "BOC" within the meaning of the Decree. The Department does not proposed to redefine "BOC" for the purposes of this order.

d. *Equal Access plans.* The Department concurs in the BOC's proposal that they provide equal access plans, but Section VIII(L)(4)(b) of the Department's proposed order specifies the matters that those plans should describe:

> Each BOC's compliance plans shall include a plan for implementing equal access on a nondiscriminatory basis in the context where the BOC access provider is also a competing interexchange carrier. These plans shall include detailed procedures for implementing equal access from any Wireless Exchange System where a BOC acquires a controlling interest after the effective date of this Section VIII(L), procedures for identifying to new Wireless Exchange Service customers their choices for interexchange services, the terms and conditions whereby unaffiliated interexchange carriers will be offered the opportunity to interconnect at any BOC Wireless Exchange Systems MTSO, the procedures for disseminating to interexchange carriers any planned changes in network services or plans for implementing new services that may affect such carriers services, procedures for assuring that any personnel of a BOC Wireless Exchange Carrier that is involved in the marketing of interexchange services shall not have access to proprietary information of other interexchange carriers, including but not limited to network interconnection arrangements and lists of interexchange carrier customers or their usage statistics; a plan for the separation of the personnel that market interexchange services from the personnel that administer presubscription; a plan for implementing Calling Party Pays service if the BOC wishes to offer such a service; a plan describing its procedures to assure compliance with Section VIII(L)(2)(e) of this Decree (including a plan for providing nondiscriminatory access to IS–41 or similar databases for all carriers); and a plan for implementing CDPD service.

The effect of these sections is to make clear what matters the equal access plans should discuss, and that there is no authority to provide interexchange services in the absence of an effective plan. A plan is only effective if not disapproved by the Department. The requirement to submit plans and the Department's responsibility to review them—and the Department's right to reject inadequate plans—should relieve the Court of the need to administer the minutiae of equal access, and should provide the BOCs sufficient flexibility in the offering of services, without the need to return to the Court for ministerial matters. Interested parties will have an opportunity to review the equal access plans and to alert the Department to deficiencies they perceive.

2. The Resale Will Eliminate Most Risks of Discriminatory Interconnection.

The Department proposes that the BOCs' authority to provide interexchange services be limited to the resale of switched interexchange services provided by others. The Department has also indicated that its current view is that the BOCs should purchase no more than 45 percent of their interexchange needs from single source.

The BOCs tell the Court, as they told the Department in seeking the Department's support, that "as a practical matter, * * * it is likely that the BOCs will mostly act as resellers of switched services in this context." (BOC Mem. 16) Nonetheless, the BOCs seek the authority to build and use interexchange facilities. The Department believes that limiting the BOCs to switched resale will substantially reduce the dangers of discrimination, and proposed that limitations on that basis.

By limiting the BOCs to reselling switched interexchange services, the BOCs will not be able to construct or operate facilities, and therefore they will be unable to give their own facilities favorable treatment. Since they will be reselling other carriers' services, any discrimination aimed at favoring the BOC's service would be readily apparent at least to the carriers whose services the BOC was reselling. The benefits of that discrimination would flow to that carrier for all of its traffic, and that carrier would be competing with the BOC. Therefore, the risks of discrimination are here accompanied by a proportionately smaller benefit, reducing the likelihood of that discrimination. These dangers are further reduced by the requirement that the BOC obtain not more than 45 percent of any system's interexchange services from any one provider, thereby requiring the BOC to use three carriers and leaving less opportunity for the BOC to discriminate against other carriers, and likewise increasing the difficulty of collusive behavior.[50]

3. Marketing and Unbundling Requirements Are Necessary To Ensure that Presubscription Provides a Genuine Opportunity for Competing Interexchange Carriers.

Meaningful equal access is premised on the idea that procedures can be put in place to provide competing interexchange carriers a reasonable opportunity to complete for customers' business. Merely requiring the BOC to offer presubscription seems insufficient, if the BOC can bundle cellular and interexchange services together in blended, single-price offerings that do not permit customers the opportunity to compare the BOC's offerings with its competitiors'; if the BOC can market its interexchange service together with its cellular service, while requiring the customer to make separate inquiries to discover the availability of competing carriers; or if the BOC can provide a combined bill for its cellular and long distance service, while requiring its competitors' customers to receive and pay two separate bills.

The Department's proposed order prevents these measures, and thus prevents the BOC from marketing or

[49] This service which would be offered to subscribers of Wireless Exchange Carriers would permit use of a number that the subscriber could give out that would permit callers that were willing to pay charges for wireless services to reach the subscriber through the wireless terminal. It is the Department's understanding that the availability of this service may be important to the continued rapid growth of the wireless industry and that the feasibility of this offering is likely to depend on whether the caller will know in advance what the charges for the call will be. Thus, it is contemplated that for this service to be successful, carriers may need to average airtime and toll charges so that a flat per-minute rate may be associated with the service. Thus, an exception to the requirement that separate charges for wireless access and interexchange services is appropriate in this instance.

[50] The BOCs have objected to this requirement as preventing them from obtaining the bulk discounts on long distance services that would make it possible for them to resell interexchange services. (BOC Mem. 17) However, the BOCs have not provided any evidence that the anticipated volumes will not entitle them to substantial discounts under currently filed tariffs, at reasonable volume predictions. The Department has requested further information from the BOCs on this subject. Although the BOCs argue that the 45 percent "condition would prevent the BOCs from putting price pressure on any" interexchange carrier (BOC Mem. 17), the Supreme Court's recent holding that all interexchange carriers must file tariffs, MCI Telecommunications Corp. v. American Telephone & Tel. Co., 114 S. Ct. 2223 (1994), limits the concern that the BOCs would be unable to take advantage of tariffed bulk discounts.

offering services that its interexchange competitors cannot match by reason of the BOC's control of the duopoly cellular exchange. To the extent the BOC designs service offerings that are attractive to customers, and successfully markets them, the BOCs will properly obtain business. But their interexchange competitors will likewise be able to make offerings that might be attractive to customers, on the same basis as the BOCs can.

The specific restrictions, which are set forth in Section VIII(L)(3)(f) and (g) of the Department's proposed order, require a separation of the persons responsible for administering presubscription (referred to as the "wireless exchange sales force") from persons who market the BOC's interexchange services (the "long distance sales force"). However sold, the BOCs would be required to state separately the prices for cellular service and long distance service, and would not be permitted to offer blended or bundled service offerings. Proposed Order, § VIII(L)(3)(a)(5). Nothing would prohibit them from making claims in marketing or advertising that either their cellular service or their long distance service is more favorably priced than their competitors'. If a BOC provides its customers with a single bill for cellular and interexchange service, it would be required to permit similar billing arrangements by its long distance competitors. Proposed Order, § VIII(L)(3)(b).

The Department would not seek to preclude the BOCs from marketing the long distance services it believes they should be allowed to provide, and believes that the long distance sales force should be permitted to sell cellular service as well. However, this sales force should not be given any advantages not also given to the BOC's interexchange competitors: It should receive any cellular customer lists at the same time and under the same terms as the BOCs' competitors, and should not receive any additional information about those customers (eg. their cellular telephone numbers, their usage patterns) unless the same information is provided to competing interexchange carriers.[51] The long distance sales force is also required to advise customers that they have a right to choose interexchange carriers. Proposed Order, § VIII(L)(3)(g)(3).

The "wireless exchange sales force," the group responsible for administering presubscription, includes salespersons in retail stores and those who receive inquiries. Those salespersons, like persons selling BOC cellular service today, would be required to provide the customer with a ballot to select an interexchange carrier, and would not be allowed to sell long distance service or advocate that the customer purchase BOC long distance service. Proposed Order, § VII(L)(3)(f).

The Department does not agree with the BOCs that these restrictions are "unduly restrictive." (BOC Mem. 18) Rather, these marketing and billing restrictions are necessary to allow the BOCs to market their interexchange services while providing their competitors with the opportunity to compete on equal terms, thereby providing consumers with a meaningful opportunity to make an informed choice. By comparison, the BOC proposed order and equal access plan are silent (or at best ambiguous) as to whether bundled service offerings are permitted, and whether competing interexchange carriers will be permitted to create their own bundles.[52] The Department's proposal requires unbundled offers, and requires the BOCs to provide their long distance competitors with customer lists at the same time as that information is provided to their long distance sales force.[53] Under these arrangements, carriers that do not control cellular exchanges, and cannot themselves provide both cellular and long distance service, nonetheless have an opportunity to market long distance services to BOC cellular customers.

C. Appropriate Safeguards Are Also Required To Prevent Abuse of the Landline Exchange.

It is also true, as AT&T has stressed, that the possibility exists that the BOCs could use their control of the local exchange to discriminate against competing interchange carriers, who rely on the local exchange for their access to both the wireline and nonwireline cellular exchanges. Cellular exchanges likewise relies on the local exchange for interconnection to local exchange customers, for access to interexchange carriers, and often for transport between cellular switches and cell sites within the cellular network.

While the dangers of discrimination in these local landline exchange facilities is present, that danger can be constrained by injunction. The Department's proposed order specifically enjoins discrimination by the local exchange, directed either at competing wireless providers or at competing interexchange providers. Proposed Order, § VIII(L)(3)(a) (1), (2). In addition, Section VIII(L)(1)(c) and VIII(L)(2) make clear that the authority to provide interexchange services is limited to the BOC's Wireless Exchange Service, which must be physically and structurally separate from its local telephone operations. The long distance sales force in particular must be a distinct sales force, with separate managers, from any sales force that sells products or services of any local telephone company. Proposed Order, § VIII(L)(3)(g)(1).

These requirements are sufficient to prevent discrimination in this narrow circumstance. Not only would such discrimination be prohibited explicitly, and subject to civil fine and loss of the authority to provide wireless interexchange services, Proposed Order, § VIII(L)(5), but it would also be quite difficult to accomplish effectively, under the restriction that the BOCs be limited to reselling other carriers' switched interexchange services. The resale requirement reduces the risk of discrimination in the local exchange, possibly even more than in the cellular switch. The BOCs will be sending their own long distance traffic over several carriers' facilities, which are also handling traffic originating in the local exchange (for which the BOCs may not compete). In addition, the BOCs will be sending their interexchange calls to interexchange carriers that will

[51] Those carriers would be restricted in their use of that information to the marketing of interexchange services; interexchange carriers affiliated with wireless carriers would not be able to use this confidential information to market wireless services. The largest interexchange carrier, AT&T, is subject to the same separation and marketing restrictions. AT&T/McCaw Decree, Section IV.C.

[52] The BOC order does require that exchange access and exchange services of such access be provided to interexchange carriers "on an unbundled basis, that is equal in type, quality and price to that provided to any interexchange service provided by the Bell company or an affiliate thereof." BOC Proposed Order § I.4,p.3. If there were separations between the cellular and long distance sales operations, this language presumably would prohibit the BOC from "selling" cellular service to an affiliated packager at lower prices than offered to competing interexchange carriers, and the BOC could not bundle cellular and long distance services in combinations that other interexchange carriers could not match. However, in the absence of such separations, it is unclear whether the BOCs' proposed order would in fact prevent discriminatory bundling, and it would be difficult for the Department to determine, in attempting to enforce the conditions to this waiver order, whether the BOC had discriminated. The Department's proposed order makes these discriminations clearly prohibited and more easily detected.

[53] The BOC equal access plan provides that a Bell cellular affiliate "may use customer names, addresses and mobile numbers to market its own interexchange operations only if it provides that information on the same terms and conditions to unaffiliated" interexchange carriers. (BOC Model Equal Access Plan, p. 4) However, absent separation between the cellular and long distance sales forces, there can be no genuine assurance that the BOC will in fact not receive these customer names before its competitors do, and little opportunity to enforce this requirement.

presumably also be serving their own customers that are subscribers of the BOC wireless service. If the quality of transmission, for example, was significantly better for the BOC's customers, it would be readily apparent to the interexchange carrier. In fact, any effort by the BOC to degrade the transmission of competitors' traffic might well result in adversely affecting its own interexchange customers. Moreover, since there are two cellular providers in each market, a BOC considering a strategy of degrading competitors' interexchange connections might be concerned that customers would not associate their service problems with the interexchange service, and thus might switch cellular carriers.

It is also significant that the direct connection option exists for interexchange carriers deciding to obtain exchange access to their wireless customers without routing their calls through the LEC's switched network. The existence of this possibility could well deter discriminatory behavior out of concern that to do so would risk loss of access charge revenues. The benefits of discrimination in these circumstances are slight, and the risks of detection may be more substantial.

D. Provisions for Incidental Relief from the Decree's Equal Access Requirements.

The BOC's motion also seeks some incidental relief from the Decree's equal access requirements in connection with their paging and radiolocation businesses, and in connection with certain aspects of their cellular businesses. Subject to some minor clarification, the Department believes that these modifications (which AT&T has not previously opposed) are in the public interest.

Section VIII(L)(2) of the Department's proposed order, which parallels Section II(a) of the BOCs' proposed order, states that the Decree's equal access and nondiscrimination requirements shall not apply to paging (with acknowledgement) or radiolocation. These are substantially competitive businesses, without the market power of cellular, and the Court has already granted generic interexchange relief for one-way paging.[54] The equal access relief confirmed here was implicit in that paging order, but this order confirms that a BOC paging affiliate may combine interexchange services necessary to provide paging with the paging services itself, and need not hand off interexchange links within the paging network to other carriers. The department's proposed order confirms that this relief does not relive BOC local exchanges of their equal access and nondiscrimination obligations towards unaffiliated paging companies; and that it does not implicitly grant the BOCs' motion for a waiver for 800 access to paging, which is now pending with the Court (and which the Department supports). (U.S. Mem., Feb. 1, 1993)

Section VIII(L)(2)(e) of the Department's proposed order, which parallels Section II(b) of the BOCs' proposed order, provides that BOC cellular systems can transmit IS–41 and comparable administrative messages on a non-equal access basis, so long as they do not discriminate in favor of their own interexchange carrier in doing so. IS–41 is an industry standard that permits cellular systems to signal each other in order to, among other things, locate roaming subscribers and determine whether their cellular phones are available to receive calls. Only if the signaling messages indicate that the call can be completed is a voice path established to complete the call. The proposed order will permit the BOC cellular systems to use IS–41 to locate their subscribers; they will then be required to turn over the call to the customers's PIC (which could be the BOC or an unaffiliated carrier) to complete the call.

Section VIII(L)(2)(3) of the Department's proposed order permits the BOCs to resell other cellular carriers' cellular services, whether or not those other carriers provide equal access. Today the BOC can resell other BOCs' cellular services, but not the services of cellular carriers that bundle cellular and interexchange services. This relief will permit the BOCs to resell the services of non-BOC cellular carriers, and thereby attempt to provide greater regional or national coverage, in competition with other providers who may seek to offer national presence (such as AT&T). This section also addresses the situation in which the customer of a non-equal access cellular system roams into the BOC cellular system. If that customer does not have a PIC, the BOC may complete that customer's long distance calls by using the BOC's long distance services.[55]

The proposed modification, section VIII(L)(2)(f), would permit the BOCs to provide interexchange telecommunications services in connection with the offering of Cellular Digital packet Data Service ("CDPD"). Although not specifically requested by the BOCs, the department is including this service in its Proposed Order in view of the fact that a similar provision was included in the Final Judgment proposed in connection with AT&T's acquisition of McCaw. AT&T/McCaw Decree, § IV.H, *see id.* § II.F. This provision would allow interexchange transport of packetized data from the cell sites to centralized points before it is routed through a switching or routing device that is capable of handing it off onto separate facilities specified by the customer. At this centralized point the modification specifies that the CDPD provider will hand the message off to (or receive a message from) an Internet Node within the same exchange area, or transfer it to a private network facility or interexchange carrier specified by the customer. Interexchange facilities used by a BOC to transport the messages to and from the centralized points must be obtained from an unaffiliated interexchange carrier and the BOCs are not authorized to provide the interexchange carrier service of transporting the messages from the centralized points. The procedures for specifying the selection of the customer interexchange carrier for CDPD must be specified in the BOC's compliance plans before they may implement this provision. The Department's recommendation for this provision is based on our understanding that it will significantly facilitate the early provision of this important service especially in area of relatively low demand.

These provisions give the BOCs the ability to offer and provide cellular services in a reasonably efficient manner, without seriously impairing the objectives of the decree's equal access provisions. None of these modifications will prevent a cellular customer from obtaining interexchange services from the carrier of their choice; these provisions will only permit the BOCs to offer cellular services to more customers more efficiently.

III. The Court Should Defer Consideration of the BOC's Request for Generic Modification of Cellular Exchange Areas

The BOCs also seek relief expanding the areas in which they are permitted to offer local service to Major Trading Areas defined by Rand McNally, plus existing cellular service areas as they have been expanded by the Court in 49 cellular waiver orders, plus adjacent Rural Service Areas ("RSAs"). As a

[54] Memorandum and Order, United States v. Western Elec. Co. (D.D.C. Feb. 16, 1989). Paging with acknowledgement does not seem to be any more likely to pose competitive risks than one-way paging.

[55] This section also permits the BOCs to handle these default calls where the roaming customer has selected an interexchange carrier that does not serve the BOC system.

result, several of the calling areas that would be created by the BOCs' waiver are substantially larger even than MTAs.[56]

Enlarging local calling scopes moves traffic from the interexchange market, which is at least somewhat competitive, to the celluar market, which in the Department's view is less competitive. By AT&T's estimate, fully 25 percent of all interexchange traffic is within MTAs.[57] Thus, the proposed relief could move as much as 25 percent of cellular-originated long distance traffic from more competitive interexchange markets to less competitive cellular markets.

Recognizing the consequences of expanding local calling areas, the Court has held that it would only do so upon a showing of "community of interest," so that the Court could be satisfied that "the public benefits accruing from slight departures from the strict LATA boundaries to accommodate motorists with cellular phones were so substantial that they outweighed, on this limited basis, the dangers to fair competition." [58] Traffic patterns and "metropolitan complexes" have been the Court's primary guideposts in making these exceptions, as the BOCs acknowledge. (BOC Mem. 41)

The BOCs had 23 waivers pending at the end of 1991, when they agreed to hold those waivers in abeyance pending their pursuit of this generic wireless waiver. Many of these waivers, such as BellSouth's waiver for all of the State of Florida,[59] cannot be justified by reference to traffic patterns or metropolitan complexes except in the most attenuated fashion. Rather, MTAs reflect patterns of commercial activity (BOC Mem. 43), not the patterns of personal movement on which the Court has relied. While "patterns of traffic" may exist among any two cities chosen at random (in that someone probably went between them once), MTAs do not purport to represent areas within which people move on a daily basis.[60]

It is also suggested that the FCC's decision to license some PCS spectrum blocks using MTAs indicates that MTAs are appropriate local calling areas. (BOC Mem. 43–44) The FCC has also "embraced" Basic Trading Areas, which are substantially smaller than LATAs. FCC PCS Order ¶ 76, at 7733. None of these determinations of the appropriate size of radio licenses—the context in which the Commission considered MTAs as providing "economies of scale and scope necessary to promote the development of low cost PCS equipment" (BOC Mem. 44, quoting FCC PCS Order ¶ 75, at 7733)—reflects a determination by the Commission of the appropriate local calling ares for cellular systems providing equal access.

That issue will be taken up if the Commission decides to impose equal access on cellular or other wireless carriers, an issue now open for comment before it. The United States proposes that the Court defer redefining cellular local calling areas until the Commission has acted; the BOCs, having argued that the Commission's "embrace" of MTAs in another context is determinative, resist allowing the expert agency to attempt to address this issue.

It would not be sensible for the Court and the Department to embark on this mapmaking project again, at the same time as the Commission is considering the issue. The result could be that, instead of the one cellular calling area map now devised by the Court, there could be three maps: The old adjusted LATA map, the new map drawn by the Court (whether MTAs or something else), and a different map developed by the FCC.

It seems more sensible for the FCC to act first. If the Commission adopts equal access, and draws a map, then the Court can determine whether that map addresses the needs of the Decree and, if so, conform the Decree's cellular LATAs to the FCC's decision. If the FCC determines not to impose equal access, then the Court can revisit this issue—and the BOCs can attempt to make a more persuasive case, or seek a more reasonable alternative. In the meanwhile, the Department will consider the pending cellular geography waivers, which had been deferred, to be ripe for decision, and will advise the BOCs shortly whether it will support or oppose specific waivers.

Conclusion

For the foregoing reasons, the Court should deny the motions of BellSouth and Southwestern Bell for complete removal of the equal access and provisions of the Decree as applied to wireless businesses; and should grant the motion of the Bell Companies for a waiver of the interexchange restriction subject to the terms and conditions set forth in the accompanying proposed order.

July 25, 1994.

Respectfully submitted,

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[56] For example, see the following maps attached to the Affidavit of Peter A. Morrison (June 15, 1994), submitted by the BOCs: Cincinnati-Columbus-Dayton, El Paso, Knoxville, Clarksville, Oklahoma City, Phoenix, Portland, Salt Lake City, Tulsa, Wichita. Although the BOCs' memorandum makes no mention of the fact that they seek relief that is broader than MTAs, that is the effect of their proposed order's provision that, "where a LATA or integrated service area authorized by a prior waiver overlaps two or more major trading areas, the major trading area in which the largest portion of the LATA or integrated service area falls (as determined by geographic area) shall be deemed to include the entire LATA or integrated service territory." BOC Proposed Order, p. 5.

[57] AT&T's Supplemental Opposition to RBOCs' Motion to Exempt Wireless Service from Section II of the Decree, p. 17 (Oct. 25, 1993). This 25 percent estimate would be reduced in light of existing cellular waivers, which have expanded the BOCs' coverage areas. See BOC Mem. 44 ("the switch to MTAs would not involve a very large expansion"). To the extent that current coverage areas approach MTAs in size, less traffic would be "duopolized," but there is likewise less need for relief.

[58] Triennial Review, 673 F. Supp. at 552, quoted, United States v. Western Elec. Co., 1990–2 Trade Cas. ¶ 69,177, at 64,455 (D.D.C. 1990).

[59] Motion of BellSouth Corporation for a Waiver of Section II(D) of the Modification of Final Judgment to Allow BellSouth Corporation To Provide Integrated MultiLATA Cellular Service, May 9, 1991. BellSouth made virtually no attempt to show a community of interest for the State of Florida. Rather, BellSouth relied principally on arguments that its cellular service faces competition. The only evidence of community of interest for the State of Florida that BellSouth offers is that the Department of Transportation has observed that a certain number of vehicles crossed LATA boundaries on a particular day. The fact that vehicles left the Tampa LATA on a particular day provides no support for the proposition that "subscribers will want and expect to be in communication with mobile units in this traffic which regularly crosses from one LATA to another." Mobile Services Decision, 578 F. Supp. at 648, much less that people drive from Tampa to Miami as regularly as they drive from New York City to northern New Jersey. See also Southwestern Bell's Response to Comments (March 1, 1990) ("there is no requirement in Section VIII (c) that a BOC must make a showing that a "community of interest" exists before the Court can grant a MultiLATA cellular waiver").

[60] Thus, for example, the Los Angeles MTA includes Las Vegas; the New York City MTA includes Burlington, Vermont; the San Francisco MTA includes Reno, Nevada; and the Spokane, Washington, MTA includes Billings, Montana—a distance of nearly 1,000 miles (according to Rand McNally).

Re: United States v. Western Electric Co., et al., Bell Companies' Request for a Generic Wireless Waiver

Dear Mr. Kellogg: The Department has concluded its investigation and analysis of the Bell Companies' request, submitted as modified on November 12, 1993, for a waiver of the interexchange line of business restriction of Section II(D)(1) of the Modification of Final Judgment ("MFJ") as applied to their "wireless" businesses, and other relief (the "Generic Wireless Waiver"). The Bell Companies ("BOCs") may proceed to file their motion for that waiver with the Court.

The Department intends to support the Generic Wireless Waiver, as proposed in the Bell Companies' submissions of September 24 and November 12, 1993, only to the extent stated in this letter. The Department reserves its right and responsibility to modify its position if it appears to the Department, in light of comments of interested persons, further investigation or subsequent developments, that a change of position is appropriate. The discussion herein follows the form of the BOCs' proposed order of September 24, 1993, as modified by your letter of November 12, 1993.

I. *Interexchange Services.* the Department intends to support the BOCs' request for a waiver of the interexchange prohibition, subject to the conditions stated in the proposed order and model equal access plan, on the following conditions:

a. That the authority to provide interexchange services is limited to the provision by resale of switched interexchange services. Our current views is that not more than forty-five percent of any BOC cellular system's resold interexchange service should be purchased from any one interexchange carrier.

b. That the conditions on the proposed waiver apply to any entity that is a BOC within the meaning of the MFJ.[1]

c. That the scope of the authority to provide interexchange services is restricted to

(1) Telecommunications originating in a cellular exchange,[2] as currently configured, or other similarly configured networks, distinct from the landline local exchange, wherein radio is used to connect the network with a customer who is not at a fixed location. The BOCs have based their reasoning supporting a waiver and the design of their proposed order and equal access plan on the architecture of their existing cellular systems, and the Department will not support a waiver that is not limited to such systems or systems with similar architectures.

(2) Telecommunications intended by the originator to be directed to a cellular exchange, as described above, but that the cellular exchange subscriber has forwarded to another destination (including a voice mailbox or similar storage facility). The authority to provide interexchange services under this condition is limited to that portion of the interexchange service from the cellular system to which the telecommunication was directed by the originator to the ultimate destination. This condition specifically does not authorize the provisions of interexchange services from the point of origination to the cellular system (e.g., an "800 access to cellular" service), which the BOCs have not sought in this proceeding.

d. That the authority be conditioned on an explicit requirement that:

"Each Bell operating telephone company shall offer to all interexchange carriers exchange access and exchange services for such access on an unbundled basis that is equal in type, quality and price to that provided to any interexchange service provided by the Bell company or any affiliate thereof."

e. That the authority to provide interexchange services be conditioned on an explicit requirement that:

"Each Bell operating telephone company shall not discriminate between any mobile service provided by the Bell company or an affiliate thereof and any nonaffiliated mobile service provider or between an interexchange service provided by the Bell company or an affiliate thereof and any nonaffiliated interexchange carrier in the:

"(a) establishment and dissemination of technical information and interconnection standards;

"(b) interconnection and use of the Bell operating telephone company's telecommunications service and facilities or in the charges for each element of service; and

"(c) provision of new services and the planning for and implementation of the construction and modification of facilities used to provide exchange access."

f. That the authority to provide interexchange services be conditioned on an explicit requirement that:

"Each Bell Operating Company or affiliate thereof providing commercial mobile service within the meaning of 47 U.S.C. 332(d)(1) shall offer to all interexchange carriers exchange access and exchange services for such access on an unbundled basis that is equal in type, quality and price to that provided to any interexchange service provided by the Bell company or any affiliate thereof."

Implicit in this concept and in the concept of equal access is that the price, quality and terms upon which cellular service is offered shall not vary with the customer's choice of interexchange carrier. That proposition should be affirmed explicitly:

"A Bell Operating Company or affiliate thereof shall not sell or contract to sell wireless service at a price, term or discount that depends upon whether the customer obtains interexchange service from the Bell Operating Company or an affiliate thereof."

In addition, the Department believes that the same proposition should apply to the sale of interexchange service:

"To the extent that a Bell Operating Company or affiliate thereof provides interexchange services pursuant to this order to unaffiliated wireless services providers or customers thereof, the Bell Operating Company shall not sell or contract to sell interexchange service at a price, term or discount that depends upon whether the customer obtains wireless service from the Bell Operating Company or an affiliate thereof."

Finally, in order for these guarantees to be meaningful, the Department believes that the Bell Operating Companies should be required to state separately the prices, terms or rate plans for (a) wireless services and (b) interexchange services.

g. That the authority to provide interexchange services be conditioned on an explicit requirement that:

"Each Bell Operating Company or affiliate thereof providing commercial mobile service within the meaning of 47 U.S.C. 332(d)(1) shall not discriminate between any interexchange service provided by the Bell company or an affiliate thereof and any nonaffiliated interexchange service carrier in the:

"(a) establishment and dissemination of technical information and interconnection standards;

"(b) interconnection and use of the Bell Operating Company's or affiliate's telecommunications service and facilities or in the charges for each element of service; and

"(c) provision of new services and the planning for and implementation of the construction and modification of facilities used to provide exchange access."

h. That the BOCs shall file with the Department of a mobile equal access plan, which plan shall not be effective (1) until 90 days after filing, if not disapproved by the Department, or (2) if disapproved by the Department; that there be no authority to provide interexchange services pursuant to this waiver until an equal access plan has become effective; and that the plan at a minimum contains the specifications contained in the BOC Model Equal Access Plan submitted on September 24, 1993, as modified by your letter of November 12, 1993, except in the following particulars:

(1) The Department believes that it is necessary in the provision of equal access that interexchange services not be sold by the persons selling exchange services and who are required to administer presubscription (the "cellular sales force"). It is the Department's contemplation that this restriction would apply to retail store agents and to other BOC salespersons who receive inquiries by prospective subscribers, i.e., salespersons who handle "incoming" prospects or requests for service.

(2) Persons selling long distance services (the "long distance sales force") may sell cellular services and long distance services on the following conditions:

[1] These conditions likewise apply to the relief sought in Sections II(b), II(c) and III of the proposed order, and to the transmission of IS–41 or comparable administrative messages pursuant to Section II(a). The Department recommends that Section II(a) be separated into two sections for ease of reference.

[2] "Cellular exchange" within the meaning of this letter refers to an exchange service offering commercial mobile services, as defined in 47 U.S.C. § 332(d)(1), in the 800 MHz radio bands. The Department understands that such exchange services are provided by companies that are, pursuant to FCC regulation, separate subsidiaries from local telephone exchange companies ("LECs"), and that the principal facilities used to provide cellular exchange service, e.g., switching equipment and radio base stations, are physically and operationally separate from LEC facilities.

(a) That the long distance sales force be a distinct group of individuals, with separate managers, from the cellular sales force and from any sales force that sells products or services of the Bell Operating telephone companies.

(b) That the long distance sales force receive any list of the BOC's wireless customers on the same terms, and at the same time, as that list is received by competing interexchange carriers. The Department anticipates that a BOC cellular carrier will at regular intervals provide all long distance carriers with listings identifying the names, addresses and telephone numbers of all cellular subscribers, regardless of the distribution channel through which the subscriber was retained. It is a condition to the BOCs' direct marketing of cellular long distance that this information be made available to all competing interexchange carriers.

(c) That the long distance sales force must advise actual or prospective subscribers of their right to presubscribe to competing interexchange carriers.

(d) That the long distance sales force not receive any information about the identity of the BOC's wireless customers' interexchange carrier or the wireless customer's cellular or long distance usage, unless the customer is already a customer of the BOC's interexchange service.

(e) That the long distance sales force be a distinct group of individuals, with separate managers, from any sales force that sells the products or services of any Bell Operating telephone company.

(2) The Department understands that the marketing restrictions applicable to "existing customers" (as specified in your letter of November 12, 1993) apply not only to customers existing as of the date of any Order, but also to persons who become customers of the BOC wireless service thereafter. When such persons become customers, marketing of long distance service to such persons are subject to the provisions on "marketing restrictions: new customers"; after such persons become customers, they are subject to the provisions on "marketing restrictions: existing customers." The Department conditions its support of this waiver on this understanding, and on the further condition that the BOC personnel marketing long distance services not receive wireless customer names, addresses and telephone numbers until that information is also available to competing interexchange carriers.

(3) The Department conditions its support for a waiver on the requirement that, if the BOC or its wireless affiliate bills its long distance customers for that service in the same billing as for its wireless exchange service, it makes that billing arrangement available to competing interexchange carriers on reasonable and nondiscriminatory terms. It is the Department's understanding that most BOCs currently make such billing arrangements available to interexchange carriers; if this relief is granted, the Department believes that the BOCs should not be permitted to terminate those arrangements for competing carriers.

(4) The Department opposes any authority pursuant to which the BOC might discriminate in the provision of interexchange routing or in the colocation of interexchange points of presence in cellular MTSOs.

(5) The Department believes that the BOCs should be required to notify competing interexchange providers of changes to existing network services or the addition of new services that affect the interexchange carriers' interconnection at least 60 days prior to implementation.

(6) The Department does not understand the Proposed Order to permit a BOC to treat its long distance service as the default carrier for a customer that fails to make the required selection of an interexchange carrier. The Department understands that customers who fail to select an interexchange carrier will not receive interexchange service from their wireless telephones, and conditions its support for the waiver on that understanding.

Finally, we believe that in this instance it is appropriate to condition the continued provision of interexchange service on compliance with the equal access conditions and requirements of this waiver and of the MFJ. We also believe that the waiver order should grant the Court the authority to impose civil fines, not to exceed $10 million, for violations of equal access conditions and requirements of this waiver or of the MFJ in the provision of interexchange services from wireless exchanges.

II. *Paging, etc.* The Department intends to support the relief specified in Section II of the Proposed Order, subject to the following clarifications:

a. That the "IS–41 or comparable" functions specified in paragraph II(a) not be used to discriminate in favor of the BOC's own interexchange service.

b. That the default traffic specified in paragraph II(c) be explicitly limited to interexchange telecommunications initiated by roaming customers.

III. *Local Calling Areas.* The Department believes that this issue should not be presented to the Court at this time and, if presented, intends in the absence of further developments to urge the Court to defer ruling on this issue. On June 9, 1994, the Federal Communications Commission announced the issuance of a Notice of Proposed Rule Making and Notice of Inquiry, pursuant to which the Commission indicated that it has tentatively concluded that imposing equal access obligations on cellular telephone companies would be in the public interest. The text of the Notice is not yet available to the public or to the Department.

The Department understands that any such equal access obligation necessarily requires the adoption of a map defining local calling areas and delimiting the respective areas of local and long distance service. Therefore, if the Commission acts in accord with its tentative decision, it will need to consider the appropriate local calling areas for cellular service, the issue raised by this portion of the BOCs' proposal. The FCC's conclusions may result in the imposition by regulation of a local calling area map that is different from either (1) the current cellular calling areas, as defined by the MFJ and subsequent orders, and (2) the relief the BOCs seek here. Given the possibility of inconsistent results, it would not be productive for the Court to consider a comprehensive redefinition of local calling areas at the same time that the FCC is considering the same issue. If the FCC does not adopt a final rule on cellular equal access, the Court may then consider whether it wants to make substantial changes to the cellular equal access map. The Department will, during the pendency of the FCC proceeding, evaluate pending calling area waiver requests to determine whether they meet the standards for such relief.

IV. *FCC Preemption.* The Department does not support the relief sought in Section IV of the Proposed Order. If the FCC adopts an equal access order that reasonably achieves the purposes of the Decree, including equal access, but differs in some technical respects in its implementation of those purposes, it may be appropriate for the Department and the Court to consider whether it is necessary or wise to maintain two sets of equal access obligations. However, it would in our view be inappropriate to make that determination before the Commission adopts a final rule on this subject.

Sincerely,

Richard L. Rosen,

Chief, Communications and Finance Section.

Certificate of Service

I, J. Philip Sauntry, Jr., hereby certify under penalty of perjury that I am not a party to this action, that I am not less than 18 years of age, and that I have on this day caused the Competitive Impact Statement of the United States in the matter United States of America v. AT&T Corp., and McCaw Cellular Communications, Inc. to be served on defendants by mailing a copy, postage prepaid, to each of the individuals and organizations at the addresses listed below:

1. John D. Zeglis, AT&T Corp., 295 North Maple Avenue, Basking Ridge, New Jersey 07920.
2. Douglas I. Brandon, McCaw Cellular Communications, Inc., 1150 Connecticut Avenue NW., Washington, DC 20036.

August 5, 1994.

J. Philip Sauntry, Jr.

[FR Doc. 94–20948 Filed 8–25–94; 8:45 am]

BILLING CODE 4410–01–M

Drug Enforcement Administration

Manufacturer of Controlled Substances; Application

Pursuant to § 1301.43(a) of Title 21 of the Code of Federal Regulations (CFR), this is notice that on July 15, 1994, 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 Schedule I controlled substance 2,5-

Dimethoxyamphetamine (7396). Celgene Corporation plans to manufacture small quantities of the above controlled substance utilizing bio-catalysis to develop, manufacture and sell high value-added compounds important to pharmaceutical and agrochemical industries.

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the above application and may also file a written request for a hearing thereon in accordance with 21 CFR 1301.54 and in the form prescribed by 21 CFR 1316.47.

Any such comments, objections, or requests for a hearing may be addressed to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than September 26, 1994.

Dated: August 22, 1994.

Gene R. Haislip,

Deputy Assistance Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 94-21100 Filed 8-25-94; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA-W-29,450]

Gandalf Systems Corp.; Cherry Hill, NJ and Operating in the Following States; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

TA-W-29,450A Connecticut
TA-W-29,450B Georgia
TA-W-29,450C Illinois
TA-W-29,450D Maryland
TA-W-29,450E Massachusetts
TA-W-29,450F Minnesota
TA-W-29,450G North Carolina
TA-W-29,450H Ohio
TA-W-29,450I Pennsylvania
TA-W-29,450J Michigan
TA-W-29,450K Missouri
TA-W-29,450L Texas

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility To Apply for Worker Adjustment Assistance on May 19, 1994, applicable to all workers of the subject firm. The notice was published in the **Federal Register** on June 1, 1994 (59 FR 28429). The certification was amended on June 30, 1994 to include workers in Michigan and Missouri. The amended notice was published in the **Federal Register** on July 8, 1994 (59 FR 35145-6).

At the request of the State Agency, the Department again reviewed its certification for the workers of Gandalf Systems Corporation. New findings show that Gandalf Systems had several field worker separations occurring in Texas.

The intent of the Department's certification is to include all workers who were adversely affected by increased imports. Accordingly, the Department is amending its certification to include worker separations in the below cited States.

The amended notice applicable to TA-W-29,450 is hereby issued as follows:

All workers of Gandalf Systems Corporation, Cherry Hill, New Jersey engaged in employment related to the production of mechanical and circuit board assemblies and all field workers of Gandalf Systems Corporation engaged in employment related to the production of mechanical and circuit board assemblies in Connecticut, Georgia, Illinois, Maryland, Massachusetts, Minnesota, North Carolina, Ohio, Pennsylvania, Michigan, Missouri and Texas who became totally or partially separated from employment on or after January 11, 1993 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

This certification does not apply to workers engaged in regional sales.

Signed in Washington, DC, this 17th day of August, 1994.

Violet L. Thompson,

Deputy Director, Office of Trade Adjustment Assistance.

[FR Doc. 94-21109 Filed 8-25-94; 8:45 am]

BILLING CODE 4510-30-M

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than September 6, 1994.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than September 6, 1994.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC this 15th day of August, 1994.

Violet Thompson,

Deputy Director, Office of Trade Adjustment Assistance.

APPENDIX

Petitioner: Union/workers/firm	Location	Date received	Date of petition	Petition No.	Articles produced
Larson Shingle Co(Co)	Forks, WA	08/15/94	08/01/94	30,200	Red cedar roofing shingles.
Union Pacific Resources Co(Co)	Ft. Worth, TX	08/15/94	08/04/94	30,201	Crude oil, natural gas.
Vought Aircraft Co(UAW)	Dallas, TX	08/15/94	07/27/94	30,202	Aircraft parts.
Turecamo Marine (Co)	Philadelphia, PA	08/15/94	08/02/94	30,203	Tugboats.
Airfoil Textron Lima(Co)	Lima, OH	08/15/94	08/01/94	30,204	Jet engine compressor fan and blades.
Smith Corona Corp (Wkrs)	Cortland, NY	08/15/94	08/03/94	30,205	Typewriters, word processors.

APPENDIX—Continued

Petitioner: Union/workers/firm	Location	Date received	Date of petition	Petition No.	Articles produced
Schlegel of Maryland, Inc (Wkrs)	Chestertown, MD	08/15/94	07/28/94	30,206	Gaskets for automobile doors.
Reserve Oil Corp (Co)	Olney, IL	08/15/94	07/31/94	30,207	Oil drilling.
R & S Tong (Wkrs)	Odessa, TX	08/15/94	07/12/94	30,208	Oil service.
Meridian Oil, Inc (Co)	Ft. Worth, TX	08/15/94	08/01/94	30,209	Administrative service-oil industry.
Magtrol, Inc (Wkrs)	West Seneca, NY	08/15/94	08/04/94	30,210	Disk drive spindles.
Alumax Mill Products (BBF)	Morris, IL	08/15/94	08/05/94	30,211	Aluminum coil and sheet.
Knight Engineering & Plastics (Wkrs).	Warwood, WV	08/15/94	08/05/94	30,212	Plastic caps for spray cans.
Electro Magnetic Processes (Wkrs).	Chatsworth, CA	08/15/94	06/13/94	30,213	Telemetry antenna systems.
Dresser Industries (Wkrs)	Dallas, TX	08/15/94	07/27/94	30,214	Oilfield packers and oilfield tools.
Babcock & Wilcox Special Metals (USWA).	Koppel PA	08/15/94	06/28/94	30,215	Boiler/steam tubing.
AEG Transportation Systems (Co)	Pittsburgh, PA	08/15/94	08/04/94	30,216	Automated transit systems.
Portland Provision Meat Co (Co)	Portland, OR	08/15/94	07/25/94	30,217	Process meats.
ADI Wireline, Inc (Co)	Ft. Morgan, CO	08/15/94	08/01/94	30,218	Wireline services.
Atlas Ballistic Products (Wkrs)	Houston, TX	08/15/94	07/28/94	30,219	Distribution and sales of oilwell explosives.

[FR Doc. 94-21110 Filed 8-25-94; 8:45 am]

BILLING CODE 4510-30-M

[TA-W-29,742]

Sunnyside Coal Co.; Sunnyside, UT; Notice of Revised Determination on Reconsideration

On July 25, 1994, the Department issued an Affirmative Determination Regrading Application for Reconsideration for former workers of the subject firm. The affirmative notice regarding application was published in the **Federal Register** on August 15, 1994 (59 FR 41795).

The workers produced coal which was used to make coke for steelmaking operations. Worker separations occurred in 1993 and 1994. The mine closed in March 1994.

On reconsideration the Department contacted Sunnyside's major customer of coal. The customer reported using Sunnyside's coal to make coke. This process involves baking the coal, not burning or consuming it as fuel. The baking process releases all the volatiles, leaving a residue called coke which is used in steelmaking operations. New findings on reconsideration show that Sunnyside's major customer increased its imports of coke in the period relative to the petition while ceasing its purchases of coal from Sunnyside.

Departmental regulations at 29 CFR 90.2 state that an imported article is like or directly competitive with a domestic article at an earlier or later stage of production and a domestic article is like or directly competitive with an imported article at an earlier or later stage of production, if the importation of the article has an economic effect on the producers of the domestic article comparable to the effect of importing the article in the same stage of production as the domestic article. Accordingly, imported coke is directly competitive with domestically-produced coal in that coking is a later stage in the processing of coal.

Conclusion

After careful consideration of the new facts obtained on reconsideration, it is concluded that the former workers of the Sunnyside Coal Company in Sunnyside, Utah were adversely affected by increased imports of articles like or directly competitive with coal produced at the Sunnyside Coal Company in Sunnyside, Utah.

All workers of Sunnyside Coal Company, Sunnyside, Utah who became totally or partially from employment on or after March 24, 1993 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 18th day of August 1994.

Richard Gilliland,

Director, Office of Program Management, Unemployment Insurance Service.

[FR Doc. 94-21111 Filed 8-25-94; 8:45 am]

BILLING CODE 4510-30-M

Employment Standards Administration; Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 267a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be

impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon and Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Ave. NW., room S-3014, Washington, DC 20210.

Modification to General Wage Determinations Decisions

The number of decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parenteses following the decisions being modified.

Volume I

New York
NY940006 (Feb. 11, 1994)
NY940010 (Feb. 11, 1994)
NY940012 (Feb. 11, 1994)
NY940060 (Feb. 11, 1994)

Volume II:

Pennsylvania
PA940001 (Feb. 11, 1994)
PA940003 (Feb. 11, 1994)
PA940014 (Feb. 11, 1994)
PA940023 (Feb. 11, 1994)
PA940025 (Feb. 11, 1994)
PA940030 (Feb. 11, 1994)
PA940031 (Feb. 11, 1994)
PA940032 (Feb. 11, 1994)
PA940040 (Feb. 11, 1994)
PA940052 (Feb. 11, 1994)
PA940063 (Feb. 18, 1994)

Volume III:

Florida
FL940004 (Feb. 11, 1994)

Volume IV:

Indiana
IN940001 (Feb. 11, 1994)
IN940006 (Feb. 11, 1994)
Wisconsin
WI940004 (Feb. 11, 1994)
WI940009 (Feb. 11, 1994)

Volume V:

Iowa
IA940002 (Feb. 11, 1994)
IA940003 (Feb. 11, 1994)
IA940005 (Feb. 11, 1994)
IA940009 (Feb. 11, 1994)
IA940010 (Feb. 11, 1994)
IA940013 (Feb. 11, 1994)
IA940016 (Feb. 11, 1994)
IA940032 (Feb. 11, 1994)
IA940047 (Feb. 18, 1994)
Missouri
MO940001 (Feb. 11, 1994)
MO940002 (Feb. 11, 1994)
MO940004 (Feb. 11, 1994)
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General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon and Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the county. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which included all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, D.C. This 19th Day of August 1994.

Alan L. Moss,

Director, Division of Wage Determination.

[FR Doc. 94-20827 Filed 8-25-94; 8:45 am]

BILLING CODE 4510-27-M

LEGAL SERVICES CORPORATION

Grant Awards for Special Projects to Center for Law and Education, National Employment Law Project and National Health Law Program.

AGENCY: Legal Services Corporation.

ACTION: Announcement of intention to award grants.

SUMMARY: The Legal Services Corporation hereby announces its intention to award one-time, nonrecurring grants in amounts indicated to the Center for Law and Education ($15,000), the National Employment Law Project ($10,000) and the National Health Law Program ($75,000).

The one-time grants will be awarded pursuant to authority conferred by section 1006(a)(3) of the Legal Services Corporation Act of 1974, as amended. This public notice is issued with a request for comments and recommendations within a period of thirty (30) days from the date of publication of this notice. The grant award will not become effective and grant funds will not be distributed prior to expiration of this 30-day period.

DATES: All comments and recommendations must be received by 5pm on or before September 26, 1994.

ADDRESSES: Comments should be sent to the Office of Program Services, Legal Services Corporation, 750 First Street, NE, 11th Floor, Washington, DC 20002–4250.

FOR FURTHER INFORMATION CONTACT: Phyllis Doriot, Office of Program Services, (202) 336–8825.

SUPPLEMENTARY INFORMATION: The Legal Services Corporation is the national organization charged with administering federal funds provided for civil legal service to the poor. Each Center is a recipient of LSC funding for the provision of support services to all direct delivery legal services recipients. The Center for Law and Education's project will support and improve advocacy on education and training programs funded under the Higher Education Act. The National Employent Law's "Job, Employment, Education and Training (JET) Pilot Project" proposes to collaborate with local advocates in Philadelphia to develop and implement a comprehensive and coordinated research and advocacy project on increasing job opportunities. The Health Care Law Proposal submitted by the National Health Law Program envisions facilitating the work of legal services programs in gathering data on proposed changes in laws affecting recipients of public benefits and distributing information to affected programs.

Dated: August 22, 1994.

Leslie Q. Russell,

Assistant to the Director Office of Program Services.

[FR Doc. 94–21067 Filed 8–25–94; 8:45 am]

BILLING CODE 7050–01–P

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Cooperative Agreement for Mayors' Institute on City Design

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 assist in planning, organizing, and implementing the activities of the Mayors' Institute on City Design. The Mayor's Institute is a series of forums dedicated to the improvement of the design of American cities. The Institute's activities include two semi-annual two and one half day conferences (institutes), publication of a semi-annual newsletter, alumni programs at two to four national mayors' conferences, coordination of the activities of four regional institutes, and maintenance of institute accounts and archives. The national office of the Mayors' Institute on City Design which will be supported by the Cooperative Agreement will direct these activities, while the national institutes themselves may take place at other suitable locations as determined by the Endowment and the successful recipient of the Cooperative Agreement. The initial period of the Cooperative Agreement will be one year with potential renewal for an additional two years. Funding is limited to $200,000 for the first year. Those interested in receiving the Solicitation package should reference Program Solicitation PS 94–14 in their written request. Requests must be accompanied by two (2) self-addressed labels. Verbal requests for the Solicitations will not be honored.

DATES: Program Solicitations PS 94–14 is scheduled for release approximately September 12, 1994 with proposals due October 12, 1994.

ADDRESSES: Requests for the Solicitation should be addressed to the National Endowment for the Arts, Contracts Division, Room 217, 1100 Pennsylvania Ave., N.W., Washington, D.C. 20506.

William I. Hummel,

Director, Contracts and Procurement Division.

[FR Doc. 94–20999 Filed 8–25–94; 8:45 am]

BILLING CODE 7537–01–M

NUCLEAR REGULATORY COMMISSION

Membership on the Executive Resources Board

AGENCY: Nuclear Regulatory Commission.

ACTION: Appointment to the Executive Resources Board for the Senior Executive Service.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has announced the following appointments to the NRC Executive Resources Board.

The following individuals are appointed as members of the NRC Executive Resources Board responsible for providing institutional continuity in executive personnel management by overseeing NRC's Senior Executive Service (SES) and Senior Level System (SLS) merit staffing, succession planning, and position management activities.

New Appointees

Karen D. Cyr, General Counsel, Office of the General Counsel

William T. Russell, Director, Office of Nuclear Reactor Regulation

Carlton R. Stoiber, Director, Office of International Programs

James L. Milhoan, Deputy Executive Director for Nuclear Reactor Regulation, Regional Operations & Research, Office of the Executive Director for Operations

In addition to the above new appointments, the following members are continuing on the ERB:

James M. Taylor, Executive Director for Operations

Hugh L. Thompson, Jr., Deputy Executive Director for Nuclear Materials Safety, Safeguards and Operations Support, Office of the Executive Director for Operations

Robert M. Bernero, Director, Office of Nuclear Materials Safety and Safeguards

Patricia G. Norry, Director, Office of Administration

Paul E. Bird, Director, Office of Personnel

Stuart D. Ebneter, Regional Administrator, Region II

John B. Martin, Regional Administrator, Region III

Eric S. Beckjord, Director, Office of Nuclear Regulatory Research

Edward L. Jordan, Director, Office for Analysis and Evaluation of Operational Data

EFFECTIVE DATE: July 8, 1994.

FOR FURTHER INFORMATION CONTACT: James F. McDermott, Secretary, Executive Resources Board, U.S. Nuclear Regulatory Commission, Washington, DC 20555 (301) 415–7516.

Dated at Rockville, Maryland, this 22 day of August, 1994.

For the U.S. Nuclear Regulatory Commission.

Paul E. Bird,

Director, Office of Personnel.

[FR Doc. 94–21054 Filed 8–25–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–321]

Georgia Power Co. Consideration of Issuance of Amendment to Facility Operating License, Proposed no Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–57 issued to the Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia (the licensee) for operation of the Edwin I. Hatch Nuclear Plant, Unit 1, located in Appling County, Georgia.

The proposed amendment would make a one-time change to Technical Specification (TS) 3.9.C for Hatch Unit 1 regarding the emergency diesel generator (DG) operability requirements during reactor shutdown conditions. Current TS 3.9.C requires two DGs be operable during reactor shutdown when a core or containment cooling system is required to be operable. The proposed amendment would revise the current requirement such that only one emergency DG is required to be aligned to its associated core or containment cooling system during a specific time of the outage. During this time period the decay heat removal (DHR) system will be in service. The DHR system, which is completely independent of the existing shutdown cooling system, is powered by the Baxley substation and has it own DG as a backup power supply.

The licensee is requesting this one-time change for the fall 1994 Unit 1 refueling/maintenance outage to perform local rate testing on the residual heat removal system loops and maintenance on DG 1A. Other limitations are: (1) the other DG will be aligned to its corresponding core or containment cooling system, (2) the reactor cavity is flooded, and (3) the fuel pool gates are removed.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

This proposed change does not involve a significant hazards consideration because it does not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

Although the proposed change slightly increases the probability of a loss of RHR [Residual Heat Removal] shutdown cooling, the probability of the total loss of decay heat removal for the core is not increased. Upon an LOSP [Loss-of-Offsite Power], coupled with the failure of one DG, RHR shutdown cooling (with two RHR pumps and their respective DGs available) will still be available. One diesel out of service, as will be the case on outage days 5 and 6, an LOSP, coupled with a diesel failure, will render RHR shutdown cooling unavailable. However, on outage days 5 and 6, the DHR system is also affected by the LOSP, its backup diesel can be manually placed into service. Furthermore, the RHR shutdown cooling system is susceptible to a single failure on loss of suction path (inadvertent closure of either value E11–F008 or F009 even without an LOSP).

However, on outage days 5 and 6, the RHR and DHR systems will be available for decay heat removal; thus, the unit will not be susceptible to either single failure with respect to core decay heat removal.

This proposal does not involve any changes to the secondary containment, secondary containment ventilation systems, the standby gas treatment system or any other radiological release control systems. Therefore, the consequences of a loss of decay heat removal event are not increased.

This evolution is being performed in the refueling mode of operation, outside the realm of FSAR [Final Safety Analysis Report] assumed accidents, except for a refueling accident. Since this proposal does not involve changes to any fuel handling mechanisms, the probability of a refueling accident is not increased. Furthermore, this proposal does not involve any changes to the operation or maintenance of any safety-related component designed to prevent or mitigate the consequences of previously analyzed events.

Therefore, based on this discussion, the proposed Technical Specifications change does not increase the probability or consequences of any previously analyzed accident or transient.

2. Create the possibility of a new or different event from any previously analyzed.

This proposed change does not introduce any new modes of operation. All affected system; i.e., the RHR systems, DGs, and the DHR system, will be operated within their design specifications. Although the nonsafety-related DHR is a relatively new system, it was installed, successfully tested, and used for decay heat removal during the Spring 1994 Unit 2 outage. Therefore, no failure modes that have not been previously considered are introduced by this proposed change.

3. Significantly reduce the margin of safety.

The proposed decay heat removal configuration, which will be in use during outage days 5 and 6, uses the DHR system as the primary decay heat removal mechanism, with RHR loop A as a backup. Although the DHR system is not designed as a safety-related system, it is conservatively designed with sufficient heat removal capacity and redundancy to provide full heat removal capacity in a variety of conditions. In fact, testing during the Unit 2 Spring 1994 outage showed that even early in the outage (approximately day 3) the DHR system is fully capable of handling the decay heat load of the reactor and the spent fuel pool. Additionally, even though the DHR system takes a suction from, and discharges to, the spent fuel pool, adequate natural circulation is firmly established between the pool and the reactor vessel such that adequate decay heat removal is taking place for both the pool and the reactor. This was demonstrated via special test performed during the Spring Unit 2 refueling outage. In addition, duplicates of major components are provided so that loss of any one component does not result in loss of system function. Therefore, as far as decay heat removal capability is concerned, the margin of safety is not reduced.

As discussed previously, if an LOSP occurs, failure of DG 1C will result in a total loss of RHR shutdown cooling capacity, since RHR loop 1B will be out of service for LLRT. However, a loss of decay heat removal will not occur, since the DHR system is in service and is supplied power for the Baxley, Georgia, substation. However, if the Baxley power supply should fail, the DHR system has its own backup diesel that can be placed in service manually within 4-hour period. Therefore, the margin of safety associated with an LOSP is not reduced as a result of this proposal.

Furthermore, the configuration of decay heat removal systems on days 5 and 6 in is compliance with the existing Unit 2 Specifications, which only require one RHR pump and one DG in Condition 5

(Specifications 3.9.12 and 3.8.1.2, respectively). Thus, the margin of safety, with respect to the exiting Unit 2 Specifications, is not reduced.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the **Federal Register**, and notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By September 26, 1994, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room located at the Appling County Public Library, 301 City Hall Drive, Baxley, Georgia 31513. 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 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 a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

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 Herbert N. Berkow: petitioner's name and telephone number, date petition was mailed, Edwin I. Hatch Nuclear Plant, Unit No. 1, and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated August 16, 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 Appling County Public Library, 301 City Hall Drive, Baxley, Georgia 31513.

For the Nuclear Regulatory Commission.

Kahtan N. Jabbour,

Project Manager, Project Directorate II–3, Division of Reactor Projects-I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94–21214 Filed 8–25–94; 8:45 am]

BILLING CODE 7590–01–M

PHYSICIAN PAYMENT REVIEW COMMISSION

Commission Meeting

AGENCY: Physician Payment Review Commission.

ACTION: Notice of meeting.

SUMMARY: The Commission will hold its next public meeting on Thursday, September 22, 1994, and Friday, September 23, 1994 at the Embassy Suites Downtown Hotel, 1250 22d Street NW., Washington, DC, in the Consulate Room. The meetings are tentatively scheduled to begin at 9 a.m. each day. Among the topics to be discussed are the changing structure of the health care market, Medicaid managed care, adjustments to the AAPCC, antitrust issues related to joint physician behavior and laws affecting relationships between physicians and managed care organizations, risk adjustment, the effect of Medicare relative price changes on site of service, and an overview of the Commission's 1994–95 workplan. Several other topics may be added to the final agenda, which will be available on September 16, 1994.

ADDRESS: Please note that the Commission has a new address: 2120 L Street, NW./Suite 200/Washington, DC 20037. The telephone number is the same: 202/653–7220.

FOR FURTHER INFORMATION CONTACT: Lauren LeRoy, Deputy Director, or Annette Hennessey, Executive Assistant, at 202/653–7220.

SUPPLEMENTARY INFORMATION: Agendas for the meeting will be available on Friday, September 16, 1994 and will be mailed out at that time. To receive an agenda, please direct all requests to the receptionist at 202/653–7220.

Paul B. Ginsburg,

Executive Director.

[FR Doc. 94–21018 Filed 8–25–94; 8:45 am]

BILLING CODE 6820–SE–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–34554; International Series Release No. 702, File No. SR–Amex–94–18]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 by the American Stock Exchange, Inc., Relating to the Listing and Trading of Options on the Israeli Index

August 19, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. § 78s(b)(1), notice is hereby given that on May 31, 1994, the American Stock Exchange, Inc. ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. On August 2, 1994, the Exchange filed Amendment No. 1 to the proposed rule change, the subject matter of which supersedes the original proposal.[1] On August 8, 1994, the Exchange filed Amendment No. 2 ("Amendment No. 2") to the proposal to clarify how the index will be weighted when the composition of the index changes from its current number of eleven components.[2] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to trade options on the Amex/Oscar Gruss Israel Index ("Israeli Index" or "Index"), a new stock index developed by the Amex in conjunction with Oscar Gruss & Son, Inc. based on Israeli stocks (or ADRs thereon) trades on the Amex, New York Stock Exchange ("NYSE"), or that are National Market ("NM") securities traded through the National Association of Securities Dealers Automated Quotation system ("NASDAQ").

The text of the proposed rule change 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 Amex 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 Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Amex has developed a new index called The Amex/Oscar Gruss Israel Index, based entirely on shares of widely held Israeli stocks and American Depository Receipts ("ADRs") traded on the NYSE, or that are NM securities. The Index contains securities of highly capitalized companies with major business interests in Israel. These include companies which are incorporated in Israel, whose offices are located in Israel, or whose research and development activities are concentrated in Israel.

Index Calculation and Maintenance

The Index is calculated using a "modified" equal dollar weighting methodology. Five of the eleven

[1] In the original proposal, the Amex originally sought approval of a narrow-based, capitalization-weighted index comprised of ten components.

[2] *See* Letter from Nathan Most, Senior Vice President, New Products Development, Amex, to Michael Walinskas, Derivative Products Regulation, SEC, dated August 5, 1994.

component securities have been given a higher weighting in the Index in order to more closely approximate the weight the industry represented by that component has in the Israeli stock market. For example, ECI Telecom Ltd. and Teva Pharmaceutical Industries, which are the largest capitalized components in the Index, will have a higher weight in the Index, but not as high as if the Index were capitalization weighted. The Amex believes that this "modified" equal dollar weighting methodology allows the Index to be a more accurate reflection of the Israeli market since it provides a higher weighting for the larger capitalized components, yet does not permit those stocks not dominate the Index. The Exchange believes that this method of calculation is important given the great disparity in market value of a few of the Index's components. It has been the Exchange's experience that options on market value weighted indexes dominated by one or two components are less useful to investors, since the index will tend to represent the one or two components and not the group as a whole.

The following is a description of how the "modified" equal dollar weighting calculation method works. As of the market close on June 17, 1994, a $100,000 portfolio comprised of eleven Israeli component securities was established representing a hypothetical "investment" (rounded to the nearest whole share) of $12,000 in the five largest capitalized Index components and $6,667 in each of the six remaining Index Components. The value of the Index equals the current market value (*i.e.*, based on U.S. primary market prices) of the sum of the assigned number of shares of each of the Index components divided by the Index divisor. The Index divisor was initially determined to yield the benchmark value of 213.00 at the close of trading on June 17, 1994. Each quarter thereafter, following the close of trading on the third Friday of March, June, September and December, the Index components will be ranked in descending market capitalization order and the Index portfolio adjusted by changing the number of whole shares of each component stock so that the five largest capitalized stocks in the Index represent 60% of the Index value, and the remaining 40% of the Index value is evenly distributed over the remaining securities. If the number of components in the Index changes from eleven securities, the Amex will continue to weight the five components with the highest market capitalization 12%. The remaining components will then be weighted equally.[3] For example, if two new components are added to the Index, the five securities with the highest market capitalizations will be assigned 12% weightings while the remaining eight securities in the Index would be weighted 5%.

The Exchange has chosen to rebalance following the close of trading on the quarterly expiration cycle because it allows an option contract to be held for up to three months without a change in the Index portfolio while at the same time, maintaining the "modified" equal dollar weighting feature of the Index. If necessary, a divisor adjustment is made at the rebalancing to ensure continuity of the Index's value. The newly adjusted portfolio becomes the basis for the Index's value on the first trading day following the quarterly adjustment.

The Amex states that it has had experience making regular quarterly adjustments to a number of its indexes and has not encountered investor confusion regarding the adjustments, since they are done on a regular basis and timely, proper and adequate notice is given. An information circular is distributed to all Exchange members notifying them of the quarterly changes. This circular is also sent by facsimile to the Exchange's contacts at the major options firms, mailed to recipients of the Exchange's options related information circulars, and made available to subscribers of the Options News Network. In addition, the Exchange will include in its promotional and marketing materials for the Index a description of the "modified" equal dollar weighting methodology. As noted above, the number of shares of each component stock in the Index portfolio remains fixed between quarterly reviews except in the event of certain types of corporate actions such as the payment of a dividend other than an ordinary cash dividend, a stock distribution, stock splits, reverse stock splits, a rights offering distribution, reorganization, recapitalization, or similar event with respect to the component stocks. In a merger or consolidation of an issuer of a component stock, if the stock remains in the Index, the number of shares of that security in the portfolio may be adjusted, to the nearest whole share, to maintain the components' relative weight in the Index at the level immediately prior to the corporate action. In the event of a stock replacement, the average dollar value of the remaining portfolio components in the same weighting tier as the stock being replaced will be calculated and that amount "invested" in the stock of the new component, to the nearest whole share. In all cases, the divisor will be adjusted, if necessary, to ensure Index continuity.

The Amex will calculate and maintain the Index, and pursuant to Exchange Rule 901C(b) may at any time or from time to time substitute stocks, or adjust the number of stocks included in the Index, based on changing conditions in Israel. However, the Exchange will not decrease the number of Index component stocks to less than nine or increase the number of component stocks to greater than fourteen without prior Commission approval.

The value of the Index will be calculated continuously and disseminated every 15 seconds over the Consolidated Tape Association's Network B.

Expiration and Settlement

The Exchange proposes to trade cash-settled, European-style Index options (*i.e.*, exercises are permitted at expiration only). The Exchange also proposes that Israeli Index options will have trading hours from 9:30 a.m. to 4:10 p.m. EST. As with other index options traded on the Amex, the options on the Index will expire on the Saturday following the third Friday of the expiration month ("Expiration Friday"). The last trading day in an option series will normally be the second to last business day preceding the Saturday following the third Friday of the expiration month (normally a Thursday). Trading in expiring options will cease at the close of trading on the last trading day.

The Index value for purposes of settling a specific Israeli Index option will be calculated based upon the primary exchange regular way opening sale prices for the component securities.[4] In the case of NM securities, the first reported sale price will be used. As trading begins in each of the Index's component securities, its opening sale price is used in the calculation. Once all of the component stocks have opened, the value of the Index is determined and that value is used as the settlement value of the option. If any of the component stocks do not open for trading on the last trading day before

[3] *See* Amendment No. 2.

[4] In the case of ADRs, the primary exchange refers to the primary exchange for the ADR and not the underlying security. Telephone conversation between Claire McGrath, Special Counsel, Derivative Securities, Amex, and Stephen Youhn, Derivative Products Regulation, SEC, on Aug. 19, 1994.

expiration, then the prior day's last sale price is used in the calculation.

The Exchange plans to list options series with expirations in the three near-term calendar months and in the two additional calendar months in the March cycle. In addition, longer term option series having up to thirty-six months to expiration may be trade. In lieu of such long-term options on a full-value Index level, the Exchange may instead list long-term, reduced-value put and call options based on one-tenth (1/10th) the Index's full-value. In either event, the interval between expiration months for either a full-value or reduced-value long-term option will not be less than six months.

Eligibility Standards for Index Components

The Index's component securities all have major business interests in Israel, and have been selected on the basis of their market capitalization, trading liquidity, and representation of Israeli business industries. The Amex believes the components represent the largest and most liquid of all Israeli securities trading in the U.S., and that the Index tracks closely the performance of larger broad market Israeli indexes, such as the Oscar Gruss Israel Index, which contains all of the more than 50 Israeli securities currently traded in the U.S. This index is carried in the Israeli press as well as by Bloomberg L.P., a major U.S. data vendor.

In choosing among Israeli stocks that meet the minimum criteria set forth in Exchange Rule 901C, the Exchange will select stocks that: (1) have a minimum market value in U.S. dollars of at least $75 million, except that for each of the lowest weighted component securities in the Index that in the aggregate account for no more than 10% of the weight of the Index, the market value may be at least $50 million; (2) have an average monthly trading volume in the U.S. markets over the previous six month period of not less than 500,000 shares (or ADRs); (3) have at least 85% of the numerical Index value and at least 80% of the total number of component securities meeting the current criteria for standardized option trading set forth in Exchange Rule 915; and (4) are reported securities that trade on either the NYSE, Amex (subject to the limitations of Rule 901C), or are NM securities.

The Amex will ensure that no more than 20% of the weight of the Index is represented by ADRs overlying foreign securities that are not subject to comprehensive surveillance sharing agreements.[5] Currently, no Index components have the majority of their trading volume occurring on an exchange with which the Amex does not currently have in place an effective surveillance sharing agreement.

Exchange Rules Applicable to Stock Index Options

Amex Rules 900C through 980C will apply to the trading of regular and long-term contracts based on the Index. These Rules cover issues such as surveillance, exercise prices, and position limits. Surveillance procedures currently used to monitor trading in each of the Exchange's other index options will also be used to monitor trading in options on the Index. The Index is deemed to be a Stock Index option under Rule 901C(a) and a Stock Index Industry Group under Rule 900C(b)(1). With respect to Rule 903C(b), the Exchange proposes to list near-the-money (*i.e.*, within ten points above or below the current index value) options series on the Index at 2½ point strike (exercise) price intervals when the value of the Index is below 200 points. In addition, the Exchange proposes to establish, pursuant to Rule 904C(c), a position limit of 7,500 contracts on the same side of the market.

The Exchange seeks to have the ability to utilize its Auto-Ex system for orders in Index options of up to 50 contracts. Auto-Ex is the Exchange's automated execution system which provides for the automatic execution of market and marketable limit orders at the best bid or offer at the time the order is entered. The Exchange believes the ability to use Auto-Ex for orders of up to 50 contracts will provide customers with liquid markets and expeditious executions. The Amex represents that it has the necessary systems capacity to support new series that would result from the introduction of Israeli Index Options.[6]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–94–18 and should be submitted by September 16, 1994.

[5] *See* Amendment No. 2.

[6] *See* Letter from Warren I. Kaiser, Senior Vice President, Information Technology, Amex, to Michael Walinskas, Derivative Products Regulation, SEC, dated August 8, 1994. Additionally, the Options Price Reporting Authority ("OPRA") has stated that it has the necessary systems capacity to support those new series of index options that would result from the introduction of Index options and Index LEAPS. *See* Memorandum from Joe Corrigan, Executive Director, OPRA, to Charles Faurot, Managing Director, Market Data Services, Amex, dated August 8, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–21010 Filed 8–25–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34556; File No. SR–BSE–94–07]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to the Reporting of Outside Assets and Liabilities Attributable to Broker-Dealers.

August 19, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. § 78s(b)(1), notice is hereby given that on May 2, 1994, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change[1] as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. On August 16, 1994, the Exchange submitted Amendment No. 2 to the proposed rule change.[2] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Boston Stock Exchange seeks to adopt a rule requiring broker-dealers assigned to the Exchange as their Designated Examining Authority to report to the Exchange all outside assets and liabilities attributable to the broker-dealer. The text of the proposed rule is as follows:

Chapter XXII—Financial Reports and Requirements—Aggregate Indebtedness—Net Capital

Reporting of Assets and Liabilities Attributable to Broker-Dealers

Sec. 2(n) Broker-Dealers assigned to the Boston Stock Exchange as their Designated Examining Authority ("DEA") are required to:

(1) Submit to the Exchange Financial and Operational Combined Uniform Single Report ("FOCUS") reports, in compliance with Securities and Exchange Commission Rule 17a–5, which must include all assets and liabilities attributable to the broker-dealer.

(2) Report to the Exchange on a quarterly basis (or more often as deemed appropriate by the Exchange) the following:

(a) All assets and liabilities attributable to the broker-dealer or held by another entity for the broker-dealer's account. This shall include:

(i) All checking accounts, brokerage accounts, debts, etc. in the broker-dealer's name or guaranteed by the broker-dealer; and

(ii) Liabilities of other entities, broker-dealers or individuals assumed by the broker-dealer;

(b) A description of any outstanding litigation or contracts which may have a material financial impact on the broker-dealer or its business; and

(c) A pro-forma consolidated capital computation of assets and liabilities of any subsidiary or affiliate for which the broker-dealer guarantees, endorses or assumes directly or indirectly the obligations or liabilities.

(3) Immediately notify the Exchange of any financial matters, including but not limited to litigation and contracts, which may have a material impact on its capital and/or its equity requirements pursuant to Exchange Rules.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to ensure that all broker-dealers assigned to the Exchange as their Designated Examining Authority ("DEA") provide the Exchange with reports of all outside assets and liabilities attributable to the broker-dealer. This will enable the Exchange to independently review and confirm the capital computations and consolidated financial condition of Exchange DEA assigned broker-dealers, thereby enhancing its oversight responsibilities in conjunction with the Commission's more stringent reporting requirements under the Net Capital Rule.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act, in that the rule is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriated and publishes its reasons for so finding or (ii) as to

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[7] 17 CFR 200.30–3(a)(12) (1993).

[1] On May 12, 1994, the BSE filed Amendment No. 1 which corrects a technical mistake in the original rule filing in the text of the Rule, which no longer applies because in Amendment No. 2 the BSE reformulated the proposed rule change. *See* letter from Karen Aluise, Assistant Vice President, Boston Stock Exchange, to Sandy Sciole, Branch Chief Commission, dated May 5, 1994.

[2] In Amendment No. 2 the Exchange submitted a revised Exhibit 2 to its filing. *See* letter from Karen Aluise, Assistant Vice President, Boston Stock Exchange, to Amy Bilbija, Commission, dated August 10, 1994.

which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the BSE. All submissions should refer to File No. SR–BSE–94–07 and should be submitted by September 16, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–21009 Filed 8–25–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34565; File No. SR–CBOE–94–02]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the Chicago Board Options Exchange, Inc., Relating to Equity and SPX RAES Participation Requirements

August 19, 1994.

On January 22, 1994, the Chicago Board Options Exchange, Inc. ("CBOE 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 proposal to amend its rules to impose fees on market makers who fail to observe certain participation duties on the Retail Automated Execution System ("RAES") for equity and Standard & Poor's 500 Index ("SPX") classes of options. Among other things, the CBOE proposes to amend CBOE Rules 8.16, "RAES Eligibility in Equity Options" and 24.16, "RAES Eligibility in SPX/NDX," to impose the following fees for failures to satisfy the rules' log-off requirements:[3] (1) a fee of $100.00 for each of one to three failures within one twelve-month period; (2) a fee of $250.00 for each of four to six failures within one twelve-month period; and (3) a fee of $500.00 for each of seven or more failures within one twelve-month period. In addition, the proposal provides that members who fail to meet the log-on requirements of CBOE Rules 8.16(b) or 24.16(b) ordinarily will be suspended from participation on RAES at the applicable trading station for a period extending to 21 consecutive business days.[4]

Notice of the proposed rule change was published for comment in the **Federal Register** in Securities Exchange Act Release Nos. 34270 (June 28, 1994), 59 FR 34457 (July 5, 1994) and 34329 (July 7, 1994), 59 FR 35954 (July 14, 1994). No comments were received on the proposal.

The CBOE states that the purpose of the proposed rule change is to impose fees on members who fail to observe the RAES log-off requirements set forth in CBOE Rules 8.16(a) and 24.16(a). The proposed fees for equity and SPX RAES are identical in amounts and graduated structure to the fees approved recently for failures to comply with the log-on and log-off requirements for Standard & Poor's 100 Index ("OEX") options.[5] For OEX options, and as proposed for SPX and equity options, the fee amounts increase in relation to the number of times each calendar year that a member does not log off as required.

As is the case for fees applicable to OEX RAES participants under existing CBOE Rule 24. 17, "RAES Eligibility in OEX," the proposed fees do not constitute disciplinary action, although the CBOE's review procedures in Chapter XIX, "Hearings and Review," of the CBOE's rules will be available for review of fees assessed under the proposal. The CBOE states that the Commission has noted the appropriateness of such fees and appeal rights in a related context.[6]

In addition to establishing a fee schedule for failures to comply with log-on and log-off requirements, the CBOE proposes to issue a Regulatory Circular that will reaffirm the nature of CBOE market makers' RAES log-on and log-off responsibilities in equity and SPX options classes and describe the consequences that attach to any market maker's failure to observe these responsibilities. The Regulatory Circular addresses four points. First, CBOE Rules 8.16(a)(iii) and 24.16(a)(iii) require any market maker who has logged onto RAES at a trading station on any given trading day to log off RAES whenever the market maker leaves the trading crowd for more than "a brief interval." The Regulatory Circular interprets "a brief interval" to mean "five consecutive minutes." Under this interpretation any market maker who signs onto RAES at a particular trading station during a trading session must log off the system prior to leaving that station for more than five consecutive minutes. The CBOE believes that this interpretation should eliminate ambiguity about the amount of time a market maker may be away from the trading crowd without signing off RAES.

Second, the Regulatory Circular notes that graduated fees will be assessed under CBOE Rules 8.16(a) and 24.16(a) for failures to observe the RAES log-off requirement.

Third, the Regulatory Circular reflects the MPC's designation pursuant to CBOE Rules 8.16(b) and 24.16(b) that the expiration month log-on requirements reflected in those rules will be enforced in all classes of equity and SPX options for which RAES is

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[1] 15 U.S.C. § 78s(b)(1) (1982).

[2] 17 CFR § 240.19b–4 (1993).

[3] CBOE Rules 8.16(a)(iii) and 24.16(a)(iii) require a market maker participating in RAES for equity or SPX options to continue on the system only as long as he is present in the trading crowd and to log off RAES when he leaves the trading crowd, unless the departure is for a brief interval.

[4] CBOE Rule 8.16(b) states that in option classes designated by the Market Performance Committee ("MPC"), any market maker who has logged on RAES at any time during an expiration month must log on the RAES system in that option class whenever he is present in that trading crowd until the next expiration. CBOE Rule 24.16(b) states that unless exempted by the MPC, any market maker who has logged on RAES at any time during an expiration month must log on the RAES system in SPX/NDX whenever he is present in that trading crowd until the next expiration.

[5] *See* Securities Exchange Act Release No. 34376 (July 14, 1994), 59 FR 37109 (order approving File No. SR–CBOE–94–12) ("OEX RAES Approval Order").

[6] Specifically, in approving a CBOE proposal that included procedures for contesting the fees assessed for delayed submission of trade data, the Commission stated that "Although such formalized procedures are unusual for challenging fee assessments, they actually make the imposition of the fee fairer by allowing members to challenge erroneous fee charges. Moreover, these procedures are reasonably designed to afford a member assessed a fee the opportunity to challenge the veracity of the assessments." *See* Securities Exchange Act Release No. 30001 (November 26, 1991), 56 FR 63529 (order approving File No. SR–CBOE–90–06). *See also* OEX RAES Approval Order, *Supra* note 5.

available. Accordingly, any market maker who has logged onto RAES in accordance with CBOE Rules 8.16(a) or 24.16(a) during an expiration month for a given class of options must log on whenever present at the applicable trading station, until the next expiration.

Fourth, the Regulatory Circular reflects a determination by the MPC, pursuant to its authority under CBOE Rules 8.16(d) and 24.16(d), that any market maker who fails to meet the log-on requirements under CBOE Rules 8.16(b) or 24.16(b) ordinarily will be suspended from participation on RAES at the applicable trading station for a period extending to 21 consecutive business days.[7]

The CBOE believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5), in particular, in that it is designed to enable the CBOE to enforce compliance with the Act, to promote just and equitable principles of trade, and to protect investors and the public interest by assuring that equity and SPX options market makers are aware of and meet their responsibilities pertaining to RAES.

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) in that it is designed to facilitate transactions in securities and to protect investors and the public interest.[8] The Commission believes that the graduated fee schedule for failures to comply with the RAES log-off requirements and the imposition of suspensions for failures to meet the RAES log-on requirements established in CBOE Rules 8.16(b) and 24.16(b) are designed to maintain the integrity of the RAES system for equity and SPX options. The fees and suspensions, together with the provision specifying that a market maker must log off RAES when leaving the trading crowd for more than "a brief interval" of five minutes, are designed to ensure that there is adequate market maker participation at all times in SPX and equity RAES and that market makers are properly logged on to the system. The presence of an adequate number of market makers protects investors and contributes to the maintenance of fair and orderly markets by helping the Exchange to maintain the continued availability of RAES for SPX and equity options, thereby contributing to the effective and efficient execution of public investor orders at the best available prices.

In addition, the Commission believes that the proposed Regulatory Circular should facilitate compliance with SPX and equity RAES requirements by explaining market makers' RAES log-on and log-off requirements and the fees and suspensions provided for failures to satisfy those requirements. The Commission also believes that the graduated fee schedule should encourage compliance with the log-off requirements and may increase the Exchange's ability to deter repeat offenders. Likewise, the Commission believes that the provision establishing suspensions for failures to comply with the RAES log-on requirements should deter participating market makers from abandoning their commitment to RAES for other than good cause.[9]

Finally, the Commission believes, as it has concluded in the past,[10] that the right to appeal the fees and suspensions imposed under the proposal pursuant to Chapter XIX of the CBOE's rules[11] should help to safeguard the procedural rights to SPX and equity RAES participants. In addition, the Commission believes that the CBOE's Regulatory Circular should help to safeguard the procedural rights of SPX and equity RAES participants by providing them with additional notification and clarification of their RAES log-on and log-off responsibilities.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–CBOE–94–02), is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

[FR Doc. 94–21058 Filed 8–25–94; 8:45 am]

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[7] In contrast to this suspension provision, the OEX RAES Approval Order provides that members who fail to observe the RAES log-on requirements for OEX options are subject to a fee. The CBOE has determined that suspensions, not fees, are the appropriate mechanisms to promote compliance with RAES log-on requirements for equity and SPX options. The CBOE states that it may introduce fees for failures to observe the log-on requirements for equity and SPX options at a later date if experience so dictates.

[8] 15 U.S.C. § 78f(b)(5) (1982).

[9] The Commission notes that under CBOE Rules 8.16 and 34.16 the CBOE retains the discretion to bring full disciplinary proceedings. The Commission expects the CBOE to bring full disciplinary proceedings where appropriate, for example, in cases of egregious or repeated violations of the SPX and equity RAES requirements.

[10] *See* OEX RAES Approval Order, *supra* note 5.

[11] *See* Letter from Michael Meyer, Schiff Hardin & Waite, to Yvonne Fracticelli, Attorney, Options Branch, Division of Market Regulation, Commission, dated August 19, 1994.

[12] 15 U.S.C. § 78s(b)(2) (1982).

[13] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–34552; International Series Release No. 703; File No. SR–CBOE–94–19]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to the Listing and Trading Options on the CBOE Emerging Markets Index

August 19, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 30, 1994, the Chicago Board Options Exchange ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. On August 18, 1994, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

As provided in Exchange Rule 24.2, "Designation of the Index,"[4] the CBOE proposes to list for trading options on the CBOE Emerging Markets Index ("Emerging Markets Index" or "Index"). The text of the proposed rule change is available at the Office of the Secretary, CBOE, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

[3] In Amendment No. 1, the Exchange proposes to treat the CBOE Emerging Markets Index as a narrow-based index for purposes of margin and position limit treatment. Pursuant to CBOE Rule 24.4A, the position limits for the CBOE Emerging Markets Index would initially be set at 10,500 contracts. *See* Letter from Eileen Smith, Director, Product Development, Research Department, CBOE, to Brad Ritter, Attorney, Office of Market Supervision, Division of Market Regulation, Commission, dated August 18, 1994 ("Amendment No. 1").

[4] Exchange Rule 24.2 provides, in part, that the Commission must approve a particular index upon which options are traded.

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 CBOE has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to permit the Exchange to list and trade cash-settled European-style[5] index options on the Emerging Markets Index. The Index will initially consist of 25 closed-end funds which invest in the stocks of firms in the emerging Asian and Latin American economies. According to the Exchange, no proxy for the performance of these emerging economies is currently available in the U.S. derivatives markets. The Exchange believes, therefore, that options on the Index will provide investors with a low-cost means of participating in the performance of these markets and/or hedging against the risk of investing in the Asian and Latin American emerging markets.

Index Design

The Emerging Markets Index will initially consist of 25 closed-end funds.[6] All of the closed-end fund components of the Index currently trade on the New York Stock Exchange.

As of June 15, 1994, the closed-end funds comprising the Index ranged in market capitalization from a low of $49.4 million to a high of $1.146 billion. The average capitalization as of that date was $146 million. The closed-end fund accounting for the largest percentage of the total weighting of the Index on that date was the Chile Fund Inc. (9.07%), while the smallest was the Korea Equity Fund Inc. (1.98%).

Calculation

The Index is price-weighted and reflects changes in the prices of the components relative to the base date of December 31, 1991. The Index value is calculated by summing the prices of the component securities and then dividing by a divisor that yielded an index value of 100.00 as of that date. The value of the Index at the close on June 15, 1994, was 151.69.

The Index will be calculated by CBOE or its designee on a real-time basis using last-sale prices and will be disseminated every 15 seconds by the Exchange. If a component closed-end fund is not currently being traded, the most recent price at which the closed-end fund traded will be used in the Index calculation.

Maintenance

The Index will be maintained by the Exchange. To maintain continuity in the Index following an adjustment to a component security, the divisor will be adjusted. Changes which may result in divisor changes include, but are not limited to, certain rights issuances.

The Exchange states that the Index will be reviewed on approximately a monthly basis by the CBOE staff. The Exchange may change the composition of the Index at any time or from time to time to reflect the changes affecting the components of the Index or the emerging Asian and Latin American markets generally. If it becomes necessary to remove a component from the Index, every effort will be made to add a closed-end fund that preserves the character of the Index. In such circumstances, the CBOE will take into account the capitalization, liquidity, volatility, and name recognition of the proposed replacement closed-end fund. The Exchange will most likely maintain 25 closed-end funds in the Index at all times.

Long-Term Index Options

In addition to Index options on the full-value of the Index, the Exchange also proposes to list long-term Index option series ("LEAPS") as provided in CBOE Rule 24.9, and reduced-value Index LEAPS for which the underlying value would be computed at one-tenth (1/10) of the value of the Index. The current and closing Index value of any such reduced-value Index LEAPS will, after such initial computation, be rounded to the nearest one-hundredth. Other than the reduced value, all other specifications and calculations for the reduced-value Index LEAPS will remain the same.

Exercise and Settlement

Index options will have European-style exercise and will be "A.M.-settled index options" within the meaning of the rules in Chapter XXIV of the Exchange's rules.[7] The CBOE proposes to amend Rule 24.9 to refer specifically to Emerging Markets Index options. The Exchange states that the proposed Index options would expire on the Saturday following the third Friday of the expiration month. Thus, the last day for trading in an expiring series will be the second business day (ordinarily a Thursday) preceding the expiration date.

Exchange Rules Applicable

Except as modified in the proposal, the Rules in Chapter XXIV of the Exchange's Rules regarding narrow-based indexes will be applicable to Index options.[8] Pursuant to Exchange Rule 24.4A, Index option contracts based on the Emerging Markets Index will be subject to the position limits of 10,500 contracts.[9] For purposes of position and exercise limits, Index LEAPS will be aggregated with Index options on a one for one basis. Under the proposal, ten reduced-value Index LEAPS contracts will equal one full-value Index option or Index LEAP for purposes of aggregating positions. The Exchange represents that it has the necessary systems capacity to support new options series that would result from the introduction of Index options and Index LEAPS.

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it will provide investors with an opportunity to invest in options based upon the Emerging Markets Index pursuant to rules designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market, and protect investors and the public interest.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

[5] European-style options can only be exercised during a specified period before the options expire.

[6] The components of the Index are the: Asia Pacific Fund; Asia Tigers Fund Inc.; China Fund Inc.; Greater China Fund Inc.; Jardine Fleming China Region Fund Inc.; Morgan Stanley India Fund; Indonesia Fund Inc.; Jakarta Growth Fund Inc.; Korea Fund Inc.; Korea Equity Fund Inc.; Malaysia Fund Inc.; First Philippine Fund Inc.; Singapore Fund Inc.; ROC Taiwan Fund; Taiwan Fund Inc.; Thai Fund Inc.; Latin American Discovery Fund Inc.; Latin American Equity Fund Inc.; Latin America Investment Fund Inc.; Argentina Fund Inc.; Brazilian Equity Fund Inc.; Brazil Fund Inc.; Chile Fund Inc.; Mexico Equity and Income Fund Inc.; and Mexico Fund Inc.

[7] Under CBOE Rule 24.9, A.M.-settled index options are settled based on an index value derived from opening prices on the last day of trading prior to expiration.

[8] *See* Amendment No. 1, *supra* note 3.

[9] *Id.*

[10] 15 U.S.C. 78f(b)(5) (1988).

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes it reasons for so finding or (ii) as to which the Exchange 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. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR–CBOE–94–19 and should be submitted by September 16, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–21007 Filed 8–25–94; 8:45 am]

BILLING CODE 8010–01–M

[11] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–34553; International Series Release No. 701; File No. SR–CBOE–94–20]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to the Listing and Trading Options on the CBOE Emerging Asian Markets Index

August 19, 1994

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 30, 1994, the Chicago Board Options Exchange ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. On August 18, 1994, the Exchange filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

As provided in Exchange Rule 24.2, "Designation of the index,"[4] the CBOE proposes to list for trading options on the CBOE Emerging Asian Markets Index ("Emerging Asian Markets Index" of "Index"). The text of the proposed rule change is available at the Office of the Secretary, CBOE, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange 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 CBOE has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to permit the Exchange to list and trade cash-settled, European-style[5] index options on the Emerging Asian Markets Index. The Index will initially consist of 16 closed-end funds which invest in the stocks of firms in the emerging Asian economies. According to the Exchange, no proxy for the performance of these emerging economies is currently available in the U.S. derivatives markets. The Exchange believes, therefore, that options on the Index will provide investors with a low-cost means of participating in the performance of these markets and/or hedging against the risk of investing in the Asian emerging markets.

Index Design

The Emerging Asian Markets Index will initially consist of 16 closed-end funds.[6] All of the closed-end fund components of the Index currently trade on the New York Stock Exchange.

As of June 15, 1994, the closed-end funds comprising the Index ranged in market capitalization from a low of $49.4 million to a high of $589.4 million. The average capitalization as of that date was $214.5 million. The closed-end fund accounting for the largest percentage of the total weighting of the Index on that date was the Thai Fund Inc. (10.60%), while the smallest was the Jakarta Growth Fund Inc. (3.52%).

Calculation

The Index is price-weighted and reflects changes in the prices of the components relative to the base date of December 31, 1991. The Index value is calculated by summing the prices of the component securities and then dividing by a divisor that yielded an index value of 100.00 as of that date. The value of the Index at the close on June 15, 1994, was 155.07.

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

[3] In Amendment No. 1, the Exchange proposes to treat the CBOE Emerging Asian Markets Index as a narrow-based index for purposes of margin and position limit treatment. Pursuant to CBOE Rule 24.4A, the position limits for the CBOE Emerging Asian Markets Index would initially be set at 10,500 contracts. *See* Letter from Eileen Smith, Director, Product Development, Research Department CBOE, to Brad Ritter, Attorney, Office of Market Supervision, Division of Market Regulation, Commission, dated August 18, 1994 ("Amendment No. 1").

[4] Exchange Rule 24.2 provides, in part, that the Commission must approve a particular index upon which options are traded.

[5] European-style options can only be exercised during a specified period before the options expire.

[6] The components of the Index are the: Asia Pacific Fund; Asia Tigers Fund Inc.; China Fund Inc.; Greater China Fund Inc.; Jardine Fleming China Region Fund Inc.; Morgan Stanley India Fund; Indonesia Fund Inc.; Jarkarta Growth Fund Inc.; Korea Fund Inc.; Korea Equity Fund Inc.; Malaysia Fund Inc.; First Philippine Fund Inc.; Singapore Fund Inc.; ROC Taiwan Fund; Taiwan Fund Inc.; and Thai Fund Inc.

The Index will be calculated by CBOE or its designee on a real-time basis using last-sale prices and will be disseminated every 15 seconds by the Exchange. If a component closed-end fund is not currently being traded, the most recent price at which the closed-end fund traded will be used in the Index calculation.

Maintenance

The Index will be maintained by the Exchange. To maintain continuity in the Index following an adjustment to a component security, the divisor will be adjusted. Changes which may result in divisor changes include, but are not limited to, certain rights issuances.

The Exchange states that the index will be reviewed on approximately a monthly basis by the CBOE staff. The Exchange may change the composition of the Index at any time or from time to time to reflect the changes affecting the components of the Index or the emerging Asian markets generally. If it becomes necessary to remove a component from the Index, every effort will be made to add a closed-end fund that preserves the character of the Index. In such circumstances, the CBOE will take into account the capitalization, liquidity, volatility, and name recognition of the proposed replacement closed-end fund. The Exchange will most likely maintain 16 closed-end funds in the Index at all times.

Long-Term Index Options

In addition to Index options on the full-value of the Index, the Exchange also proposes to list long-term Index option series ("LEAPS") as provided in CBOE Rule 24.9, and reduced-value Index LEAPS of which the underlying value would be computed at one-tenth (1/10th) of the value of the Index. The current and closing Index value of any such reduced-value Index LEAPS will, after such initial computation, be rounded to the nearest one-hundredth. Other than the reduced value, all other specifications and calculations for the reduced-value Index LEAPS will remain the same.

Exercise and Settlement

Index options will have European-style exercise and will be "A.M.-settled index options" within the meaning of the rules in Chapter XXIV of the Exchange's rules.[7] The CBOE proposes to amend Rule 24.9 to refer specifically to Emerging Asian Markets Index options. The Exchange states that the proposed Index options would expire on the Saturday following the third Friday of the expiration month. Thus, the last day for trading in a expiring series will be the second business day (ordinarily a Thursday) preceding the expiration date.

Exchange Rules Applicable

Except as modified in the proposal, the Rules in Chapter XXIV of the Exchange's Rules regarding narrow-based index will be applicable to Index options.[8] Pursuant to Exchange rule 24.4A, Index option contracts based on the Emerging Asian Markets Index will be subject to position limits of 10,500 contracts.[9] For purposes of position and exercise limits, Index LEAPS will be aggregated with Index options on a one for one basis. Under the proposal, ten reduced-value Index LEAP contracts will equal one full-value Index option or Index LEAP for purposes of aggregating positions. The Exchange represents that it has the necessary systems capacity to support new options series that would result from the introduction of Index options and Index LEAPS.

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act, in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it will provide investors with an opportunity to invest in options based upon the Emerging Asian Markets Index pursuant to rules designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market, and protect investors and the public interest.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR–CBOE–94–20 and should be submitted by September 16, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–21006 Filed 8–25–94; 8:45 am]

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[7] Under CBOE Rule 24.9, A.M.-settled index options are settled based on an index value derived from opening prices on the last day of trading prior to expiration.

[8] *See* Amendment No. 1, *Supra* note 3.

[9] *Id.*

[10] 15 U.S.C. 78f(b)(5) (1988).

[11] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34-34563; File No. SR-CHX-94-15]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Order Granting Accelerated Approval to Proposed Rule Change and Amendment No. 1 to Proposed Rule Change Relating to Corporate Governance Issues

August 19, 1994.

On June 23, 1994, the Chicago Stock Exchange, Inc. ("CHX" 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 amend certain provisions of its Constitution relating to corporate governance issues. On June 30, 1994, the Exchange submitted to the Commission Amendment No. 1 to the proposed rule change in order to narrow the scope of the original filing.[3]

The proposed rule change, including Amendment No. 1, was published for comment in Securities Exchange Act Release No. 34379 (July 14, 1994), 59 FR 37110 (July 20, 1994). No comments were received on the proposal. This order approves the proposed rule change on an accelerated basis.

The CHX's Board of Governors ("Board") is responsible for managing the business of the Exchange and is vested with all the powers necessary for the government of the Exchange, the regulation of the business conduct of members and member organizations and the promotion of the welfare, objects and purposes of the Exchange.[4] Currently, the Board consists of twenty-four elected Governors, plus the Vice Chairman of the Board and the President of the Exchange.[5] Of the twenty-four Governors, sixteen must be members, general partners of member firms or officers of member corporations ("member Governors"); and eight must be unaffiliated with the Exchange or any broker-dealer in securities ("non-member Governors").[6] The CHX Constitution also requires that nine of the sixteen member Governors be from the Chicago area, at least three of whom must be active on the floor of the Exchange, and that seven member Governors be from outside the Chicago area.[7]

The CHX proposes to amend its Constitution to achieve a governance structure under which the Exchange and its wholly-owned subsidiaries, the Midwest Clearing Corporation ("MCC") and the Midwest Securities Trust Company ("MSTC"),[8] will be able to operate as a single, coherently run business.[9] In effect, the proposed rule change will enable the same individuals to serve on the Boards of the Exchange, MCC and MSTC.

Under the proposed amendments to the CHX Constitution, five Governors will be added to the Exchange's Board, for a total of twenty-nine elected Governors plus the Vice Chairman and the President.[10] The proposed rule change also will create a new category of Governor to represent MCC and MSTC participants in the governance process.[11] Thus, upon approval and implementation of these proposals, the Board will include one additional non-member Governor and four Governors who are general partners or officers of a participant of MCC or MSTC ("participant Governors").[12]

In terms of their qualifications, participant Governors must have securities clearance and/or settlement expertise, background or responsibilities. To ensure that floor members are not over-represented on the Board, the Exchange has stated that management will use its best efforts to ensure that the newly created participant Governor positions will not initially or thereafter be filled by floor members.[13]

Finally, the Exchange proposes to allow a participant Governor to be re-categorized as a member Governor, or a member Governor to be re-categorized as a participant Governor, so long as both positions are within the same class.[14] The proposed rule change will provide this increased flexibility only if the Governor being recategorized otherwise meets the qualifications for his or her new position.

According to the CHX, the proposed rule change is consistent with Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, to remove impediments and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

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, with the

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[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b-4 (1991).

[3] *See* letter from David T. Rusoff, Attorney, Foley & Lardner, to Sandra Sciole, Special Counsel, Division of Market Regulation, SEC, dated June 29, 1994 ("Amendment No. 1").

[4] *See* Article III, Sec. 1 of the CHX Constitution.

[5] *See* Article III, Sec. 2 of the CHX Constitution. The Chairman of the Board is appointed by the Board from among the elected Governors. *Id.* Since 1992, the Chairman has served in a non-management capacity and has been primarily responsible for Board oversight of mangement performance. *See* Securities Exchange Act Release No. 31633 (December 22, 1992), 57 FR 62402 (December 30, 1992) (File Nos. SR-MSE-92-12 and SR-MSE-92-13). The Vice Chairman of the Board is elected by the membership and must be active on the floor of the Exchange. *See* Art. III, Sec. 2 of the CHX Constitution. The Vice Chairman has the power, subject to Board approval, to appoint individuals to serve on certain Exchange committees. *See* Art. VI, Sec. 3 of the CHX Constitution. Finally, the President of the Exchange is appointed by the Board to serve at its pleasure. The President is the chief executive officer of the Exchange and cannot be a member or affiliated with a member organization during his or her incumbency. *See* Art. VI, Sec. 4 of the CHX Constitution.

[6] *See* Article III, Sec. 2 of the CHX Constitution. For purposes of Board elections, the twenty-four Governors are divided into three classes, as follows: there are five member Governors and three non-member Governors in Classes I and III; there are six member Governors and two non-member Governors in Class II. *Id.*

[7] *See* Article IV, Sec. 4(b)(i) of the CHX Constitution.

[8] For discussion of corresponding amendments to the By-Laws of MCC and MSTC, *see* Securities Exchange Act Release No. 34427 (July 21, 1994), 59 FR 38653 (July 29, 1993) (File Nos. SR-MCC-94-07 and SR-MSTC-94-09) ("MCC/MSTC Proposal").

[9] The CHX has indicated, however, that the Exchange and its subsidiaries will continue to be separate legal entities. Telephone conversation between David T. Rusoff, Attorney, Foley & Lardner, and Beth A. Stekler, Attorney, Division of Market Regulation, SEC, on August 10, 1994.

[10] The proposed rule change will not affect the powers of the CHX Board, *see supra* note 4 and accompanying text, or the method of selection and duties of the Exchange's senior officers. *See supra* note 5.

[11] The Exchange has proposed conforming changes to other Constitutional provisions in order to reflect the creation of the new participant Governor category. *See, e.g.*, Article IV, Sec. 5 ("Limitation on Service") and Sec. 7 ("Nominations by Members").

[12] The five new Governors will be divided among the three classes, *see supra* note 6, as follows: there will be one participant Governor in Classes I and II, and two participant Governors in Class III; the additional non-member Governor will be placed in Class II.

[13] In the event that a floor member is elected to fill a participant Governor position, the Exchange has stated that it will promptly notify the Commission. In addition, if the Exchange's best efforts do not succeed in ensuring that floor members do not fill participant Governor positions, the Exchange is committed to revisit this issue. *See* letter from David T. Rusoff, Attorney, Foley & Lardner, to Sharon Lawson, Assistant Director, Division of Market Regulation, SEC, dated July 8, 1994 ("July 8 Letter").

[14] *See supra*, notes 8 and 14. According to the Exchange, the President will recommend and the Board (or Executive Committee) must approve the recategorization of a Governor. The CHX has stated that, after initial implementation of the proposed rule change, the recategorization provision mainly will be used to help fill vacancies on the Board. Telephone conversation between David T. Rusoff, Attorney, Foley & Lardner, and Beth A. Stekler, Attorney, Division of Market Regulation, SEC, on August 17, 1994. A recategorization will not affect the qualifications for serving in a given Board position or the length of the Governor's term.

requirements of Section 6(b).[15] In particular, the Commission believes the proposal is consistent with Sections 6(b)(1), 6(b)(3) and 6(b)(5) of the Act. Section 6(b)(1) of the Act requires that an exchange be organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the Act, the rules and regulations thereunder and the rules of the exchange. Section 6(b)(3) of the Act requires that the rules of an exchange assure the fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors represent issuers and investors and not be associated with a member of the exchange or a broker-dealer. Finally, Section 6(b)(5) of the Act requires, among other things, that the rules of an exchange be designed, in general, to protect investors and the public interest.

In the Commission's opinion, changes in the composition of the board of governors of a national securities exchange typically raise difficult regulatory issues, due to the board's special role and responsibilities in managing the business of an exchange and in ensuring that the exchange fulfills its obligations under the Act.[16] Accordingly, before the Commission can approve a proposed board reorganization, the Commission must be satisfied that all exchange constituencies, including the public, are fairly represented in its governance.[17]

After careful review, the Commission believes that the CHX proposal should allow the Exchange and its subsidiaries to operate more efficiently. In addition, the Commission has concluded that the proposed rule change strikes an appropriate balance between the various constituencies of the CHX[18] and, therefore, is consistent with the Act's requirements. The Commission's reasons for reaching these conclusions are set forth in more detail below.

The Commission recognizes that the CHX and its clearing corporation and trust company subsidiaries generally are viewed as parts of one "Exchange complex." Among other things, the CHX, MCC and MSTC share certain facilities, systems and financial services.[19] Under the current governance structure, however, the CHX has found that having different Governors serve on the Board of each organization can complicate strategic planning for the "complex" and may create certain inefficiencies in the development and implementation of policy.[20] In order to address these issues, the proposed rule change will enable the same individuals to serve on the Board of the CHX and its subsidiaries.[21] The Commission therefore believes that the CHX proposal should foster greater coordination in decision making among the Exchange, MCC and MSTC.

More importantly for purposes of the Act's requirements, the Commission finds that the new Board will continue to be representative of the CHX and its various constituencies.[22] Specifically, the Commission has concluded that, as a practical matter, the proposed rule change should maintain existing levels of public participation on the CHX Board and should prevent floor domination of the governance of the Exchange.[23]

First, although the Commission would be concerned by a significant increase in the proportion of securities professionals on an exchange's board, the Commission does not believe that the CHX proposal favors professionals at the expense of the public. The Commission notes that the CHX Board presently consists of sixteen member (*i.e.*, industry) Governors and eight non-members (*i.e.*, public) Governors. As amended, four participant Governors and one non-member Governor will be added to the Board, for a total of twenty industry and nine public representatives. On that basis, the Commission agrees with the Exchange's argument that the proposed rule change will, in effect, maintain the current balance between those constituencies.[24] The Commission therefore finds that the CHX proposal is consistent with the fair representation and the protection of investors and the public interest.

Similarly, based on certain commitments made by the CHX, the Commission is satisfied that the proposed rule change will not be used as an indirect means to achieve floor domination of the Board. The Commission recognizes that many MCC or MSTC participants are also CHX members and, in that capacity, may be active on the floor of the Exchange. Due to the Commission's long-standing concerns, Exchange management has committed to use its best efforts to ensure that the participant Governor positions will not be filled by floor members upon implementation of the proposed rule change or in the future.[25] The Commission believes that these commitments should be sufficient to prevent floor members' interests from being over-represented in the governance of the Exchange. Finally, although the proposal will allow Governors to be recategorized, the Commission expects the CHX to exercise its discretion in a manner which is consistent with the above commitments.[26] On the conditions set

[15] 15 U.S.C. 78f(b) (1988).

[16] For discussion of the powers of the CHX Board, *see supra*, notes 4–5 and accompanying text.

[17] The Commission previously has indicated that allowing a single constituency to dominate exchange governance may be inconsistent with the requirements of the Act. *See, e.g.*, Securities Exchange Act Release No. 22058 (May 21, 1985), 50 FR 23090 (May 30, 1985) (File Nos. SR–CBOE–84–15 and SR–CBOE–84–16) (disapproving proposed rule change to increase the minimum number of floor directors on the Board of the Chicago Board Options Exchange ("CBOE") and approving proposed rule change to provide for election of a floor member to be the CBOE's Executive Committee Chairman) ("CBOE Order"). *See also* Securities Exchange Act Release Nos. 31633 (December 22, 1992), 57 FR 62402 (December 30, 1992) (File Nos. SR–MSE–92–12 and SR–MSE–92–13) (approving proposed rule change to increase diversity of representation on the Exchange's Nominating Committee, Executive Committee and Audit Committee, to limit the position of Vice Chairman to floor members and to revise the duties of the Exchange's other senior officers) ("1992 Exchange Order"); and 33901 (April 12, 1994), 59 FR 18586 (April 19, 1994) (File No. SR–CHX–93–28) (approving proposed rule change to provide, among other things, more flexibility in the appointment of Governors to the Executive and Finance Committees).

[18] For purposes of this order, the Commission has limited its discussion to the adequacy of representation of Exchange constituencies (*i.e.*, the public, floor members and "upstairs" members). For further discussion of the adequacy of representation of participants, *see* MCC/MSTC Proposal, *supra* note 8.

[19] Telephone conversation between David T. Rusoff, Attorney, Foley & Lardner, and Beth A. Stekler, Attorney, Division of Market Regulation, SEC, on August 17, 1994.

[20] *Id.*

[21] As noted above, however, the exchange, the clearing corporation and the trust company will continue to be separate legal entities and to hold separate Board meetings. *See supra*, note 9.

[22] As noted above, *see supra* note 18, the Commission's analysis herein is limited to the impact of the proposed rule change on the relative representation of the public, floor members and "upstairs" members on the CHX Board.

[23] Prior Commission decisions regarding corporate governance, *see supra* note 17, largely have turned on these principles. *See, e.g.*, CBOE Order and 1992 Exchange Order.

[24] Under the proposed reorganization, public Governors will constitute 31% of the CHX Board, as opposed to 33% of the existing Board, which is a minor change.

[25] *See* July 8 letter, *supra*, note 13. In the event that a floor member is elected to fill a participant Governor position, the Exchange has stated that it will promptly notify the Commission. In addition, if the Exchange's best efforts do not succeed in ensuring that floor members do not fill participant Governor position, the Exchange is committed to revisit this issue. *Id.*

[26] According to the CHX, because both positions must be in the same class, *see supra* note 14, the recategorization of a Governor will not affect (*i.e.*, increase or decrease) the length of his or her term. Telephone conversation between David T. Rusoff, Attorney, Foley & Lardner, and Beth A. Stekler, Attorney, Division of Market Regulation, SEC, on August 18, 1994. If the Board fills a vacancy among the Governors, however, that individual only serves until the next annual election meeting. *See* Art. III.

forth above, the Commission is satisfied that the Board composition should be sufficiently diverse for it to carry out its obligations under the Act.

The Commission finds good cause for approving the proposed rule change, including Amendment No. 1, prior to the thirtieth day after the date of publication of the notice of filing thereof. The CHX proposal is designed to achieve a more coherent governance structure while maintaining fair representation of Exchange constituencies and protecting investors and the public interest. Accelerated approval thereof will allow these benefits to be realized as soon as possible. In addition, the proposed rule change was published in the **Federal Register** for the full statutory period and no comments were received on any aspect of the proposal.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[27] that the proposed rule change (SR–CHX–94–15), including Amendment No. 1, is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[28]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–21060 Filed 2–25–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34555; File No. SR–CSE–94–01]

August 19, 1994.

Self-Regulatory Organizations; Notice of Filing of Amendment No. 1 to Proposed Rule Change by Cincinnati Stock Exchange, Inc. Relating to the Exchange's Quality of Markets Policy

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 August 1, 1994, the Cincinnati Stock Exchange, Inc. ("CSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") Amendment No. 1 to the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CSE hereby proposes to amend its prior filing regarding the CSE's policy governing Quality of Markets. The following is the text of the proposed rule change, with italics representing new language to be added and brackets representing deleted language:

D. Non-Preferencing Designated Dealers

(a) ITS Inbound Activity

[The percentage of a non-preferencing member firm's total monthly CSE trade activity which consists of ITS inbound executions shall equal at least 5%]

The percentage of a non-preferencing member firm's total monthly CSE trade activity which consists of ITS inbound executions shall equal or exceed the average percentage achieved by preferencing Designated Dealers that manually enter quotations. If there exist no preferencing Dealers on CSE that are manually entering quotations, then the percentage of a non-preferencing member firm's total monthly CSE trade activity which consists of ITS inbound executions shall equal at least 5%. For the purpose of comparing ITS inbound activity, a rolling three-month average will be used to derive the percentage for the DDs entering manual quotations and these will be compared to the next month's percentages achieved by those member firms using computer-generated quotations.

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

On February 25, 1994, the CSE filed proposed changes to its quality of markets policy.[1] The proposal calls for the elimination of autoquoting and the adoption of objective standards to ensure that CSE specialists are contributing to the national market system. In response to comments on the filing, the Exchange proposes to amend one component of its new policy, the Intermarket Trading System ("ITS") inbound execution requirement. Specifically, the requirement, as amended, would require that all Designated Dealers who computer-generate their quotations, whether or not they preference order flow, generate the same percentage of ITS inbound activity as preferencing Designated Dealers who manually generate quotes. The Exchange believes that such an approach would more fairly allocate the burden of improved performance across all of its specialists.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is intended to promote just and equitable principles of trade.

B. Self-Regulatory Organization's Statement on Burden on Competition

The CSE does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received with respect to Amendment No. 1 to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file size copies thereof with the

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Sec. 1 of the CHX Constitution. If a recategorization creates a vacancy and that vacancy is filled by the Board, the Exchange membership will retain the right to elect a Governor to serve the remainder of that term.

[27] 15 U.S.C. 78s(b)(2) (1988).

[28] 17 CFR 200.30–3(a)(12) (1992).

[1] The rule change was published for public comment in Securities Exchange Act Release No. 33849 (April 1, 1994), 59 FR 16870 (April 8, 1994).

Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CSE. All submissions should refer to File No. SR–CSE–94–01 and should be submitted by September 16, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–21008 Filed 8–25–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34562; File No. SR–NASD–94–39]

Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to a Security Application Fee for The PORTAL Market

August 19, 1994.

I. Introduction

On June 22, 1994, the National Association of Securities Dealers, Inc., ("NASD" or "Association"), filed with 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 amend The PORTAL Market Rules, Schedule I to the NASD By-Laws ("PORTAL Rules"), to add a security application fee with respect to securities submitted for designation in The PORTAL Market.

The proposed rule change was published for comment in Securities Exchange Act Release No. 34297 (July 1, 1994), 59 FR 35398 (July 11, 1994). No comments were received on the proposal.

[1] 15 U.S.C. § 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

II. Description of the Proposal

The present proposal amends the NASD's PORTAL Rules to add a security application fee that would be charged to PORTAL participants who apply to the NASD so that, when appropriate, a security may be designated in The PORTAL Market.

The Nasdaq Stock Market, Inc., operates The PORTAL Market for the quotation of securities that are restricted securities, as defined in Rule 144(a)(3) under the Securities Act of 1933 ("Securities Act"), or are securities that are treated as if restricted.[3] In order to qualify for inclusion in The PORTAL Market, a security that is restricted or treated as if restricted must be eligible to be sold pursuant to Rule 144A under the Securities Act,[4] be in negotiable form, and be assigned a CUSIP or other security identification number that is different from any identification number assigned to any unrestricted securities of the same class. Designation of a security as a PORTAL security permits the security to be assigned a CUSIP number by Standard & Poor's Corporation and be cleared and settled through the Depository Trust Company.

Pursuant to section 2 of the PORTAL Rules, any PORTAL participant may submit an application for security designation. "PORTAL participants" include PORTAL dealers, PORTAL brokers, and PORTAL investors. The first two categories of PORTAL participants are required to be brokers and dealers registered with the Commission under Section 15 of the Exchange Act and members of the NASD. The third category of PORTAL participants are institutional investors that are not members of the NASD that meet the definition of "qualified institutional buyer" under Rule 144A.

The PORTAL Market has processed over one thousand applications for designation as a PORTAL security. The NASD has operated The PORTAL Market since its initiation June 1990 without the imposition of any fees on users. Under the present proposal, the NASD will adopt a filing fee of $2,000 per security application submitted plus $200 for each security identification symbol assigned after the first symbol. The fee for each security identification symbol is being established because many private offerings involve securities that are sold in multiple tranches, each of which is treated as a separate security that is assigned a separate identification symbol, even though they are part of a single private offering.

The NASD believes the imposition of a PORTAL filing fee will assist The Nasdaq Stock Market, Inc. to cover continuing costs associated with the operation of The PORTAL Market, including significant costs associated with the processing of security applications. The processing of security applications for The PORTAL Market requires an immediate review of all applications, as private placements are usually on a very short time schedule. Such review must ensure that the security meets all of the requirements in Part II of The PORTAL Rules, as discussed above. Given the efforts required by The Nasdaq Stock Market, Inc. staff, the NASD believes that the fees as proposed are appropriate.

III. Commission's Findings

The Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Exchange Act,[5] which requires that the rules of the Association provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Association operates or controls. The Commission believes that the proposed rule change equitably applies a filing fee to all applications submitted by PORTAL dealers, PORTAL brokers, and PORTAL qualified investors for the designation of securities in The PORTAL Market. The Commission believes the imposition of a PORTAL filing fee is reasonable in that it should assist The Nasdaq Stock Market, Inc., in covering continuing costs associated with the operation of The PORTAL Market, including significant costs associated with the processing of security applications for the The PORTAL Market.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[6] that the proposed rule change (SR–NASD–94–39) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

[3] Part II, PORTAL Rules, provides that to qualify for initial designation and continued designation in the PORTAL Market, a security shall be either a restricted security, as defined in Rule 144(a)(3) under the Securities Act, or a security that upon issuance and continually thereafter only can be sold pursuant to Regulation S under the Securities Act, Rule 144A, or Rule 144 under the Securities Act, or sold in a transaction exempt from the registration requirements of the Securities Act pursuant to Section 4 and not involving any public offering.

[4] This provision requires that the security meet the "fungibility" and "information delivery requirements" of Rule 144A(d) (3) and (4) under the Securities Act.

[5] 15 U.S.C. § 78o–3 (1988).

[6] 15 U.S.C. § 78s(b)(2) (1988).

[7] 17 CFR 200.30–3(a)(12) (1991).

Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 94–21062 Filed 8–25–94; 8:45 am]
BILLING CODE 8010–01–M

[Release No. 34–34566; File No. SR–NYSE–94–09]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change to Amend Rule 321 to Clarify the Term "Control" and Amend Rules 113, 122 and 321 to Delete the Word "Affiliate" and Insert the Word "Subsidiary"

August 19, 1994.

On March 15, 1994, the New York Stock Exchange, Inc. ("NYSE" 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 clarify the term "control" for the purposes of Rule 321 and to delete the word "affiliate" and insert the word "subsidiary" in Rules 113, 122, and 321.[3]

The proposed rule change was published for comment in Securities Exchange Act Release No. 34301 (July 1, 1994),59 FR 35162 (July 8, 1994). No comments were received on the proposal.

Currently, NYSE Rule 321 requires a member or member organization to obtain Exchange approval for the formation or acquisition of an affiliated company. The term "affiliate" is defined in NYSE Rule 321.10 as "an entity engaged in a securities, or kindred business that is *controlled by* a member or member organization" (emphasis added). The Exchange is amending NYSE Rule 321, as well as Rules 113 and 122 (that refer to an affiliate within the meaning of Rule 321), by substituting the term "subsidiary" for the term "affiliate." The Exchange believes that this non-substantive change will minimize confusion and avoid potential problems which could arise as a result of differing definitions of the term "affiliate" and clarify that the Rules do not apply to parent or sister companies.[4]

In addition, the Exchange is amending the definition of "control" for purposes of NYSE Rule 321.10. Currently, control is presumed if a member or member organization owns 25% or more of the voting securities of an entity or is entitled to receive 25% or more of the net profits. Under NYSE Rule 2, however, control would also be presumed if an associated person is a director, general partner or principal executive officer or another entity.[5] The Exchange believes it is appropriate to include general partner status in the presumption of control for purposes of Rule 321.10.

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, with the requirements of Section 6(b).[6] In particular, the Commission believes the proposal is consistent with the Section 6(b)(5) requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public.

Specifically, the Commission believes substituting the term "subsidiary" for the term "affiliate" is a non-substantive change that will clarify to members which formations or acquisitions require prior Exchange approval under NYSE Rule 321. In addition, the Commission believes that including general partner status in the presumption of control for purposes of NYSE Rule 321 is consistent with other Exchange Rules and will facilitate Exchange oversight of functionally equivalent transactions.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[7] that the proposed rule change (SR–NYSE–94–09) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

[FR Doc. 94–21061 Filed 8–25–94; 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 rule change substitutes the word "subsidiary" for the term "affiliate" in Commentaries .10 through .25 in Rule 321.

[4] For example, the Act defines an "affiliate" as "a person that directly, or indirectly through one or more intermediaries, *controls* or is controlled by, or is under common control with, the person specified" (emphasis added). *See* 17 CFR 240.12b–2 (1993).

[5] Under NYSE Rule 2, a person is presumed to control another person if such person directly or indirectly; (1) has the right to vote 25 percent or more of the voting securities, (2) is entitled to receive 25 percent or more of the net profits, or (3) is a director, general partner or principal executive officer (or persons occupying a similar status or performing similar functions) of the other person.

[6] 15 U.S.C. § 78f(b) (1988).

[7] 15 U.S.C. § 78s(b)(2) (1988).

[8] 17 CFR 200.30–3(a)(12) (1993).

[Release No. 34–34567; File No. SR–PHLX–94–36]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to By-Law Articles IX and X Respecting the Trustees of the Stock Exchange Fund and the Executive Committee

August 19, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on July 9, 1994, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Currently, Section 9–1, "Trustees of Stock Exchange Fund—How Appointed" of Article IX, "Trustees of Stock Exchange Fund" of the Exchange's By-Laws requires that the trustees of the Stock Exchange Fund ("Fund") include the Chairman of the Exchange's Board of Governors, two Vice Chairmen of the Board of Governors and up to five other Exchange members, all of whom are appointed by the Exchange's Board of Governors and serve for three years or until a successor is appointed. The PHLX proposes to amend Section 9–1 to allow two members of the Exchange's Board of Governors, rather than two Vice Chairmen, to serve as trustees of the Fund and to allow qualified non-members to serve as trustees. In addition, the PHLX proposes to amend Section 10–13, "Executive Committee," of By-Law Article X, "Standing Committees," to delete the requirement that the Executive Vice President of the Exchange serve on the Exchange's Executive Committee.

The text of the proposed rule change is available at the Office of the Secretary, PHLX, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of

and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The PHLX states that the proposal to amend By-Law Article IX, Section 9–1 will give the Exchange's Board of Governors more flexibility in choosing trustees of the Fund by eliminating the requirement that all trustees be Exchange members or affiliated with member organizations. Under the proposal, the Board of Governors will be able to choose qualified persons with investment management expertise regardless of their status respecting Exchange membership or affiliation.

The proposed amendment will also eliminate the requirement that the Exchange's Vice Chairmen serve as Fund trustees, to ease the administrative burdens currently imposed upon the Vice Chairmen. The proposal retains the Board of Governors' oversight of the trustees by continuing to require the Chairman of the Board of Governors to be a trustee and by imposing a new requirement that two other members of the Board of Governors be trustees.

The proposed amendment to By-Law Article X, Section 10–13 deletes the Executive Vice President of the PHLX from membership on the Exchange's Executive Committee. The PHLX states that the Exchange's management will continue to be represented on the Executive Committee by the Exchange's President and Chief Executive Officer.

The PHLX believes that the proposal is consistent with section 6 of the Act, in general, and, in particular with Section 6(b)(3), in that it is designed to assure a fair representation of the Exchange's members in the administration of its affairs and to provide that one or more Fund trustees may be representatives not associated with a member of the Exchange.[1]

(B) Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any burden on competition.

[1] Telephone conversation between Murray L. Ross, Secretary, PHLX, and Yvonne Fraticelli, Attorney, Options Branch, Division of Market Regulation, Commission, on July 27, 1994.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

As a proposed By-Law change, the Exchange solicited comment from its membership by Circular 94–79, dated May 19, 1994. Receiving none, the Exchange Board of Governors approved the proposal for submission to the Commission.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reason for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) by order approve such proposed rule change, or

(b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by September 16, 1994.

For the Commission, by the Division of market Regulation, pursuant to delegated authority.[2]

[2] 17 CFR 200.30–3(a)(12) (1993).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–21059 Filed 8–25–94; 8:45 am]

BILLING CODE 8010–01–M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges; Notice and Opportunity for Hearing; Chicago Stock Exchange, Incorporated

August 22, 1994.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to Section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f–1 thereunder for unlisted trading privileges in the following securities:

Atlantis Plastics, Inc.
Class A Common Stock, $.10 Par Value (File No. 7–12863)
Chilgener S.A.
American Depository Shares, each representing 4 shrs of Common Stock, No Par Value (File No. 7–12864)
Health and Retirement Properties Trust
Shares of Beneficial Interest, $.01 Par Value (File No. 7–12865)
NCNB Corporation
Common Stock, $2.50 Par Value (File No. 7–12866)
Exploration Company of Louisiana, Inc.
Common Stock, $.01 Par Value (File No. 7–12867)

These securities are listed and registered on one or more other national securities exchanges and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before September 13, 1994, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such application is consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 94–21064 Filed 8–25–94; 8:45 am]

BILLING CODE 8010–01–M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges; Notice and Opportunity for Hearing; Cincinnati Stock Exchange, Incorporated

August 22, 1994.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to Section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

Voyageur Colorado Insurance Municipal Income
Common Stock, $.01 Par Value (File No. 7-12869)
Kelley Oil & Gas Partners, L.P.
Depositary Units, No Par Value (File No. 7-12870)

These securities are listed and registered on one or more other national securities exchanges and are reported in the consolidated transaction reporting system.

Interesed persons are invited to submit on or before September 13, 1994, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such application are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 94-21063 Filed 8-25-94; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges; Notice and Opportunity for Hearing; Pacific Stock Exchange, Incorporated

August 22, 1994.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to Section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following security:

Consolidated Papers, Inc.
Common Stock, $1.00 Par Value (File No. 7-12868)

This security is listed and registered on one or more other national securities exchanges and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before September 13, 1994, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C. 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 94-21066 Filed 8-6-94; 8:45 am]

BILLING CODE 8010-01-M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges; Notice and Opportunity for Hearing; Philadelphia Stock Exchange, Incorporated

August 22, 1994.

The above name national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to Section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

Chilgener S.A.
American Depository Shares, Representing 4 Shares of Common Stock (File No. 7-12851)
Shandong Huaneng Power Development Co. Ltd.
Common Stock, $.01 Par Value (File No. 7-12852)
TVX Gold, Inc.
Common Shares, No Par Value (File No. 7-12853)
Amax Gold, Inc.
Series B Conv. Pfd. Stock, $1.00 Par Value (File No. 7-12854)
Citicorp
Dep. Shares each representing 1.10th of a share Adj. Rate Cum. Pfd. Stock, No Par Value (File No. 7-12855)
United States Surgical Corporation
$2.20 Dep. Shares (Each Representing 1/50th of a share of Series A Conv. Pfd. Stock) (Dividend Enhanced Conv. Stock-DECS) (File No. 7-12856)
Superior Surgical Manufacturing Co.
Common Shares, $.01 Par Value (File No. 7-12857)
Trigen Energy Corporation
Common Shares, $.01 Par Value (File No. 7-12858)
Consolidated Papers, Inc.
Common Stock Shares, $1.00 Par Value (File No. 7-12859)
Ford Holdings, Inc.
Depository Shares Each Representing 1.400 of a share of Cum. Pfd Stock (File No. 7-12860)
Commonwealth Edison Company
$2.425 Cum. Pfd Stock (File No. 7-12861)
John Hancock Bank and Thrift Opportunity Fund
Common Shares of Beneficial Interest, No Par Value (File No. 7-12862)

These securities are listed and registered on one or more other national securities exchanges and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before September 13, 1994, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 94-21065 Filed 8-25-94; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-26107]

Filing Under the Public Utility Holding Company Act of 1935 ("Act")

August 19, 1994.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s)

and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by September 12, 1994 to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of any attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Consolidated Natural Gas Company, et al. (70–7508)

Consolidated Natural Gas Company ("CNG"), a registered holding company, and its wholly-owned subsidiary company, CNG Financial Services, Inc. ("CNGF"), both located at CNG Tower, 625 Liberty Avenue, Pittsburgh, Pennsylvania 15222–3199, have filed an application-declaration under Sections 6(a), 7, 9(a), 10, 12(b), 12(c), and 13 of the Act and Rules 42, 43, 45 and 87–90 thereunder.

CNG and CNGF request authorization, through December 31, 1998, for CNGF to finance the purchase of certain gas utilizing equipment ("Gas Equipment")[1] by creditworthy customers who purchase or may be expected to purchase gas directly or indirectly from location distribution companies ("LDCs") of the CNG System.[2] In addition, CNG seeks authorization to provide CNGF with up to an aggregate of $25 million in funds, on a revolving basis, through December 31, 1998, to enable CNGF to make Gas Equipment financing loans to such customers. CNGF may obtain funds from GNG through this date by (1) selling CNGF common stock, $10,000 par value, to CNG; and/or (2) obtaining open account advances from CNG; and/or (3) obtaining long-term loans from CNG.

Open account advances made to CNGF will be made by book entry only, not evidenced by short-term notes, and will bear the same interest rate as open account advances made to participants in the CNG System Money Pool, a rate equal to the effective weighted average rate of interest on CNG's commercial paper and/or revolving credit borrowing. All such advances will be payable on demand and may be prepaid at any time without premium or penalty. Long-term loans to CNGF will be evidenced by long-term non-negotiable notes (which may be book entry) of CNGF maturing over a period of time to be determined by the officers of CNG, with the interest predicated on and substantially equal to CNG's cost of funds for comparable borrowings by CNG. In the event that CNG has not had recent comparable borrowings, the rates will be tied to the Solomon Brothers, Inc. Bond Market Roundup, or to a comparable rate index, on the date nearest to the time of takedown. All such loans may be prepaid at any time without premium or penalty.

CNG states that it will obtain the funds it loans to CNGF through internal cash generation, issuance of long-term debt securities as authorized by Commission orders dated April 21, 1993 (HCAR No. 25800) and April 14, 1994 (HCAR No. 26026), borrowings under a credit agreement, as authorized by Commission orders dated March 28, 1991 (HCAR No. 25283) and September 9, 1992 (HCAR No. 25626), or through other authorizations approved or to be approved by the Commission.

Applicants also seek authorization for CNGF, from time to time through December 31, 1998, to purchase, at par from CNG, shares of CNGF's $10,000 par value common stock previously sold to CNG to obtain funds, as described above, to hold such reacquired shares as treasury shares and to resell such shares to CNG at par.

Applicants state that customers receiving loans ("Financing Customers") will come primarily from the commercial and/or industrial sectors and will result mainly from contacts between CNG System LDCs and their end-use customers.[3] CNGF proposes to conduct its Gas Equipment financing activities both within and outside of the four states of Virginia, West Virginia, Pennsylvania and Ohio where the CNG System LDC's are located (collectively, "LDC States"). However, applicants state that during the twelve-month period beginning on the first day of January in the year following the date CNGF commences Gas Equipment financing activities pursuant to a Commission order issued in this matter, and for each subsequent calendar year thereafter, total revenues of CNGF derived from Gas Equipment financing activities in the LDC States will exceed total revenues of CNGF derived from Gas Equipment financing activities in all other states.

CNGF will provide Gas Equipment financing to Financing Customers by (1) making short-term loans to cover the period of installation of the Gas Equipment until permanent financing can be obtained by the customer, or (2) making long-term loans for a period of time not to exceed the lesser of 10 years or the expected useful life of the equipment. The aggregate amount of Gas Equipment financing loans by CNGF outstanding at any one time will not exceed $25,000,000, with an individual customer financing limit of $5,000,000 at any one time.

Loans to Financing Customers may be secured or unsecured and will be made at a spread above the cost of funds from CNG in order to cover CNGF's costs and earn a return on its capital. CNGF does not have any full-time employees, and applicants expect CNGF to obtain accounting, credit, financial, management, marketing, operating, technical and clerical support, at cost, from CNG Service Company ("Service Company") pursuant to a written service agreement.

Northeast Utilities, et al. (70–8048)

Northeast Utilities ("Northeast"), 174 Brush Hill Avenue, West Springfield,

[1] The Gas Equipment to be financed would fall into one or more of the following categories: (1) Standard Gas Appliances—the type of standard gas appliances contemplated by Rule 48, including such gas equipment as ranges, dryers, waterheaters and furnaces; (2) New Technology Equipment—gas equipment marketed to promote new or unfamiliar technology that uses gas as a fuel (which could include equipment using existing technology designed for a new application), such as gas heat pumps, gas air conditioning and gas turbines; (3) Alternate Fuel Equipment—gas equipment that enables an end-user to use natural gas as an alternative to another fuel; such equipment would include both conversion equipment necessary to convert non-gas utilizing equipment to equipment that can use gas as a fuel (e.g., energy connective apparatus enabling a coal-burning boiler to use gas as a fuel) and gas utilizing equipment that is manufactured and sold as a complete indivisible unit (e.g., compact gas generators).

[2] The "CNG System" is comprised of CNG and its 16 wholly-owned subsidiaries. The six local distribution companies of the CNG System are: The East Ohio Gas Company, The Peoples Natural Gas Company, Virginia Natural Gas, Inc., Hope Gas, Inc., West Ohio Gas Company and The River Gas Company.

[3] CNGF will not act as a representative of any gas equipment manufacturer or supplier by may recommend specific manufacturers or types of gas equipment to end-users. For example, a CNG System LDC marketing representative may recommend to a glass manufacturing company that a new type of gas equipment be installed in a furnace to increase production efficiency.

Massachusetts 01809, a registered holding company, and its wholly owned subsidiary companies ("Subsidiaries"), Holyoke Water Power Company ("Holyoke"), Canal Street, Holyoke, Massachusetts 01040, Western Massachusetts Electric Company ("WMECO") and The Quinnehtuk Company ("Quinnehtuk"), both of 174 Brush Hill Avenue, West Springfield, Massachusetts 01809, Public Service Company of New Hampshire ("PSNH") and North Atlantic Energy Corporation ("North Atlantic"), both of 1000 Elm Street, Manchester, New Hampshire 03015, The Connecticut Light & Power company ("CL&P"), Northeast Nuclear Energy Company ("Nuclear") and The Rock River Realty Company ("Rocky River"), each of 107 Selden Street, Berlin, Connecticut 06037, and HEC Inc. ("HEC"), 24 Prime Parkway, Natick, Massachusetts 01760 (all companies collectively, "Applicants"), have filed a post-effective amendment under Sections 6(a), 7, 9(a), 10 and 12(b) of the Act and Rules 43 and 45 thereunder.

By order dated December 16, 1992 (HCAR No. 25710) ("December 1992 Order"): (1) the Applicants (with the exception of HEC, which was not an applicant-declarant) were authorized to make short-term borrowings from time to time after December 31, 1992 and through December 31, 1994, evidenced (a) in the case of Northeast, Holyoke, WMECO, PSNH, North Atlantic, CL&P, Nuclear, and Rocky River, by short-term notes ("Short-Term Notes") issued to banks and non-bank lending institutions through formal and informal credit lines, and (b) in the case of Northeast, WMECO and CL&P, by commercial paper ("Commercial Paper") issued to a dealer or dealers in commercial paper; (2) the Applicants (with the exception of HEC) were authorized to continue to use, through December 31, 1994, of the Northeast Utilities System Money Pool ("Money Pool"), to assist in meeting the Subsidiaries' (except for HEC) respective short-term borrowing needs; (3) Northeast was authorized to make open account advances, through December 31, 1994, to PSNH, Nuclear, North Atlantic, Quinnehtuk and Rocky River; and (4) PSNH was authorized to continue to use, until its termination on May 14, 1994, of a revolving credit facility ("PSNH Facility") entered into before PSNH became subject to Commission jurisdiction.

By order dated June 25, 1993 (HCAR No. 25836) ("June 1993 Order"), the Applicants were authorized to: (1) add HEC as a participant in the Money Pool for borrowings up to $11 million pursuant to the same terms and conditions as authorized by the December 1992 Order, but only insofar as funds borrowed by HEC were contributed to the Money Pool by Northeast; and (2) to increase Rocky River's short-term borrowing authorization from $15 million (which was granted pursuant to the December 1992 Order) to $25 million. In addition, the June 1993 Order reserved jurisdiction over PSNH, North Atlantic and HEC borrowings of Money Pool funds attributable to contributions from WMECO.

The Applicants now propose that the aggregate amount of short-term debt that CL&P may have outstanding at any one time through December 31, 1994 be increased from its presently authorized level of $375 million to $500 million. It is stated that CL&P requests such authorization in order to use short-term debt to repay its Series WW First Mortgage Bonds, which will mature on October 1, 1994.

Central and South West Corporation, et al. 70-8423

Central and South West Corporation ("CSW"), a registered holding company, and CSW Energy, Inc. ("Energy") (collectively, "Applicants"), a wholly owned nonutility subsidiary company of CSW, both located 1616 Woodall Rodgers Freeway, P.O. Box 660164, Dallas, Texas 75202, have filed an application-declaration under Sections 6(a), 7, 9(a), 10, 12(b), 13(b), 32 and 33 of the Act and Rules 43, 45, 51, 53, 83, 86, 87, 90 and 91 thereunder.

Applicants propose to organize and to invest in certain entities for the purpose of engaging in international business activities that may arise from time to time ("Business Activities"). The Business Activities will include forming, acquiring, financing and owning the securities or interests in the business of exempt wholesale generators, as defined in Section 32(e) of the Act ("EWG") and foreign utility companies, as defined in Section 33(a) of the Act ("FUCO") (collectively with EWGs and FUCOs, "Facilities"). The EWGs will develop, construct, own and operate electric generating assets and the FUCOs will develop, construct, own and operate electric generation, transmission and distribution assets ("E/F Activities"). CSW proposes to organize, form, acquire and fund subsidiary companies ("Project Parents") that would engage in E/F Activities, and for Project Parents to issue equity and debt securities to third parties.

The Business Activities will also consist of providing consulting services, including, but not limited to, designing, constructing and engineering services, to foreign electric utility enterprises and Facilities in which CSW has no ownership interest (collectively, with E/F Activities, "Permitted Activities").

CSW proposes to organize and to invest in a direct, wholly owned subsidiary company, which is anticipated to be named CSW International, Inc. ("CSWI"). In addition, Applicants propose for CSWI and Energy to organize and to invest in a subsidiary company, which will be organized and to invest in a subsidiary company, which will be organized under the laws of the United Mexican States and is anticipated to be named CSW de Mexico, S.A. de C.V. ("CSWdM"). Upon formation, CSWI and CSWdM propose to organize and to invest in a subsidiary company, which will be organized under the laws of the United Mexican States and is anticipated to be named CSW de Mexico Servicios, S.A. de C.V. ("CSWdM Servicios").

Applicants propose to organize CSWI, CSWdM and CSWdM Servicios in the following manner: (1) CSWI will be organized under the laws of the State of Delaware with an authorized share capital of 1,000 shares of common stock, par value $.01 per share; (2) CSWdM will be organized under the laws of the United Mexican States with an authorized share capital of up to 10,000 shares of common stock, par value NP$5.00 per share; and (3) CSWdM Servicios will be organized under the laws of the United Mexican States with an authorized share capital of up to 10,000 shares of common stock, par value NP$5.00 per share.

CSW will initially subscribe to 1,000 shares of CSWI's authorized and issued common stock, at a subscription price of $1.00 per share. CSWI will initially subscribe to 9,999 shares of CSWdM common stock at a subscription price of NP$5.00 per share, and Energy will initially subscribe to one share of CSWdM common stock at a subscription price of NP$5.00 per share. CSWI and Energy will thus own all authorized and issued shares of CSWdM. CSWdM will initially subscribe to 9,999 shares of CSWdM Servicios common stock at a subscription price of NP$5.00 per share, and CSWI will initially subscribe to one share of CSWdM Servicios common stock at a subscription price of NP$5.00 per share. CSWI and CSWdM will thus own all authorized and issued shares of CSWdM Servicios. Energy will hold directly one share in CSWdM, and CSWI will hold directly one share in CSWdM Servicios, to comply with the requirement under Mexican law that each of CSWdM and CSWdM Servicios has a minimum of two shareholders. In

the event any company in the CSW System is to acquire an interest in CSWI, CSWdM or CSWdM Servicios (other than as set forth above), appropriate Commission approval will be requested.

The Applicants assert that the purpose of this structure is to: (1) localize management of domestic and foreign office staffs; (2) operate domestic and foreign business activities efficiently; (3) limit liability (domestic and foreign); (4) minimize taxes, both domestic and foreign; and (5) increase flexibility to respond to foreign business opportunities.

CSWI will engage exclusively in Permitted Activities by serving as a holding company for CSWdM, CSWdM Servicios and Project Parents. CSWdM anticipates engaging in Permitted Activities primarily in Mexico. However, CSWdM may also engage in Permitted Activities in other foreign countries through joint ventures with third parties ("Joint Ventures"). The nature of the independent power market in Mexico is such that CSWdM's nonaffiliate Mexican entity partner(s) in a Joint Venture may seek to have such Joint Venture engage in Permitted Activities in a foreign country other than Mexico. It is, therefore, desirable that CSWdM, in order to attract Joint Venture partners, have the authority, directly or indirectly, to engage in Permitted Activities in foreign countries other than Mexico.

CSWdM Servicios will provide services to CSWdM and Project Parents that shall conduct Permitted Activities outside of the United States. Such services shall include management, administrative, employment, tax, accounting, engineering, consulting, utility performance and electronic data processing services and software development and support services in connection therewith. CSWdM Servicios will provide localized management of Mexican employees, increased efficiency from a consolidated foreign office staff and a vehicle to insulate CSW and its affiliates from tax, labor and other liabilities that may apply under Mexican law. CSWdM Servicios will not provide services to any subsidiary company or affiliate of CSW other than CSWdM, CSWI, their subsidiary companies or Project Parents that shall conduct Permitted Activities outside the United States, without prior Commission approval.

Project Parents will engage in E/F Activities and be special purpose domestic corporations, partnerships or limited liability companies or foreign corporations, partnerships or limited liability companies (or the equivalent thereof), and will include Joint Venture(s) engaged in E/F Activities. CSW's experience, in connection with its foreign project development activities to date, including the preparation and submission of bids in connection with foreign government energy privatization programs, is that the organization, formation or acquisition of one or more Project Parents is necessary or desirable to facilitate E/F Activities.

A holding structure of one or more Project Parents may be necessary to minimize foreign and domestic tax liabilities (e.g., by deferring repatriation of foreign source income, or in order to take full advantage of favorable tax treaties among foreign countries). Project Parents may be necessary or desirable for bidding on FUCOs or EWGs through Joint Ventures, since each member of the Joint Venture will typically want to have at least one consolidated subsidiary in the final FUCO or EWG ownership structure for tax and accounting purposes. Project Parents would insulate CSW, CSWI and CSWdM from certain business, tax and labor risks and facilitate subsequent adjustments to or sales of interests among or by the members of such Joint Venture. A Project Parent may also acquire and hold direct or indirect interests in both FUCOs and EWGs.

Any such indirect investment by CSW in any Project Parent would be consummated only if, at the time thereof and after giving effect thereto, CSW's "aggregate investment," determined in accordance with Rule 53(a)(1)(i), in all FUCOs, EWGs and Project Parents would not exceed 50% of CSW's "consolidated retained earnings," as defined in Rule 53(a)(1)(ii).

Investments by CSW, CSWI or CSWdM, directly or indirectly, in any Project Parent may take the form of any combination of acquisition of capital shares, partnership interests, trust certificates or the equivalent of any of the foregoing under the laws of foreign jurisdictions, if applicable. Any investment in the capital shares or other equity securities of a Project Parent that have a stated par value will be in an amount equal to or greater than such par value. Any investment in any particular Project Parent would be limited to an amount no greater than the amount reasonably required in connection with making the underlying investment in any FUCO and/or EWG with respect to which such Project Parent was organized, taking into account development expenditures, working capital needs and cash reserves required to be maintained in accordance with any financing document.

Within 45 days after CSW, CSWI or CSWdM determines that the purpose for owning any Project Parent no longer exists, it shall liquidate, dissolve or sell such Project Parent, unless, within that time-period, CSW, CSWI or CSWdM, as the case may be, determines that such Project Parent may be used in connection with a proposal or plan to develop or acquire an interest in a different FUCO or EWG. The Applicants request authority to liquidate, dissolve or sell any Project Parent under such circumstances.

CSWI, CSWdM and CSWdM Servicios propose to enter into agreements with CSW Services and Energy concerning services to be provided in connection with the Permitted Activities. CSW Services and Energy will initially provide services necessary or desirable for the operation of CSWI, CSWdM and CSWdM Servicios. CSWI, CSWdM and CSWdM Servicios will not provide services to any subsidiary of CSW other than Energy, themselves and their subsidiary companies.

In addition, CSWI, CSWdM and CSWdM Servicios may from time to time require the services of certain employees of the Central Power and Light, Company, Public Service Company of Oklahoma, Southwestern Electric Power Company and West Texas Utilities Company (collectively, "Operating Subsidiaries") in connection with Permitted Activities. Certain employees of the Operating Subsidiaries are fluent in languages other than English or knowledgeable in the operation of Facilities, which may be necessary or desirable skills for CSWI, CSWdM or CSWdM Servicios to demonstrate in connection with the Permitted Activities. However, the necessity or desirability of such skills does not economically justify hiring employees of CSWI, CSWdM and/or CSWdM Servicios with such skills during the commencement of activities at such companies. Accordingly, the Applicants seek authority for the Operating Subsidiaries to provide such services to CSWI, CSWdM and CSWdM Services.

Pursuant to Rule 53(a)(3), no more than 2% of the employees of the Operating Subsidiaries will render services, at any one time, directly or indirectly, to CSWI, CSWdM, CSWdM Servicios or any EWG or FUCO held directly or indirectly by CSW. The accounting by the CSW system of such services will ensure that CSWI, CSWdM or CSWdM Servicios, as the case may be, will be obligated to reimburse the appropriate Operating Subsidiary for such services. In no event will the provision of such services adversely

affect the rate base or the costs to ratepayers of any such Operating Subsidiary.

The cost of services provided by an Operating Subsidiary to CSWI, CSWdM or CSWdM Servicios will include all direct charges based on the wage rates or salaries of assigned employees (including direct labor costs and direct labor benefits; costs of material, vehicle and equipment usage; and meals, lodging and miscellaneous expenses) and indirect or overhead costs including insurance, employment taxes, benefits plans (if applicable) and a portion of the administrative and general expenses of such Operating Subsidiary.

All services rendered by an Operating Subsidiary to CSWI, CSWdM Or CSWdM Servicios will be performed in accordance with a work order which sets forth the services requested and time allocated for such services. No Operating Subsidiary shall be obligated to render services to CSWI, CSWdM or CSWdM Servicios if the personnel and resources needed to fill the work order are not available.

There will be no diversion of CSW system personnel or resources that would adversely affect any operating subsidiary's domestic ratepayers or CSW's shareholders. CSWI will report to the Commission the nature and scope of such services provided by any Operating Subsidiary, CSW Services and Energy to CSWI, CSWdM and CSWdM Servicios, including a quarterly summary of the type and cost of any services furnished by such associates. Such reports will represent that no such associate has subsidized the operations of CSWI, CSWdM or CSWdM Servicios, and, further, that the transfer of any personnel from, and the rendering of services by, such associates in connection with Permitted Activities have not adversely affected the services provided by such associates to their respective customers.

CSW proposes through December 31, 1997, to: (1) finance the activities of the CSWI, CSWdM, CSWdM Servicios and Project Parents in the form of capital contributions, loans or open account advances ("Investments"); and/or (2) issue guarantees in the form of letters of credit, bid bonds or other credit support to secure certain obligations incurred by CSWI, CSWdM, CSWdM Servicios and Project Parents ("Guarantees"), in any combination of Investments and/or Guarantees up to an aggregate principal amount of $400 million ("Aggregate General Authority").

Contributions may be made from CSW to CSWI, CSWdM, CSWdM Servicios and/or Project Parents directly or indirectly. However, the amount of all outstanding Guarantees and/or Investments provided by CSW directly or indirectly to CSWI CSWdM, CSWdM Servicios and/or Project Parents shall not exceed the Aggregate General Authority. Such Investments would bear interest at a rate per annum based on market rates for similar credits, but in any event not in excess of CSW's weighted cost of capital and would have a final maturity not to exceed five years.

Applicants contend that in order to compete in the marketplace and to develop Facilities, CSWI, CSWdM and each Project Parent will require the ability to bid on or otherwise pursue multiple projects on a simultaneous basis and to provide Guarantees at the time of bid or during development. The inability of CSWI, CSWdM and/or the Project Parents to provide such Guarantees on a timely basis will variously prevent, hinder or make more costly their participation in Facilities for which it would otherwise be able to secure contracts.

The terms of, and any fees or interest payable in respect of, Guarantees will be established at arm's length in conformity with market practice; provided that the cost of Guarantees (including interest on outstanding reimbursement obligations in respect of Guarantees) provided by CSW to or for the benefit of CSWI, CSWdM or any Project Parent will not exceed CSW's weighted cost of capital; provided further that the fees with respect to any Guarantee would not exceed 2% per annum of the face amount of such Guarantee, and the interest payable per annum on the unreimbursed drawings under any Guarantee would not exceed the prime rate of the issuer plus six percentage points.

Investments and, if necessary, the payment of the Guarantees shall be funded through third party financing. CSW, CSWI, CSWdM and each Project Parent request authority to finance the Investment in Facilities or, if necessary, to fund the payment of Guarantees through the issuance from time to time of stock, promissory notes, commercial paper or other debt or equity securities to third parties, including, without limitation, banks, insurance companies and other financial institutions. The aggregate of such financing will not, when added to the Investments and Guarantees, exceed the Aggregate General Authority.

Equity securities issued by any Project Parent to any third party may include capital shares, partnership interests, trust certificates or the equivalent of any of the foregoing under applicable foreign law. Debt securities issued to third parties may include secured and unsecured promissory notes, subordinated notes, bonds or other evidence of indebtedness. Securities issued by Project Parents may be denominated in either U.S. dollars or foreign currencies. The amount and type of such securities, and the terms thereof, including (in the case of any indebtedness) interest rate, maturity, prepayment or redemption privileges and the terms of any collateral security granted with respect thereto, would be negotiated in arm's length transactions on a case by case basis, taking into account differences from project to project in optimum debt-equity ratios, projections of earnings and cash flow, depreciation lives and methods and other similar financial and performance characteristics of each project.

Notwithstanding the foregoing, CSW states that no equity security having a stated par value would be issued or sold by a Project Parent for a consideration that is less than such par value. CSW also states that no note, bond or other evidence of indebtedness issued or sold by any Project Parent will mature later than 30 years from the date of issuance thereof, and will bear interest at a rate not in excess of the following: (1) if such note, bond or other indebtedness is U.S. dollar denominated, at a rate not to exceed seven percent over the then applicable prime rate as announced from time to time by Mellon Bank, N.A. ("Applicable Rate"); and (2) if such note, bond or other indebtedness is denominated in the currency of a country other than the United States, at a rate which, when adjusted (i.e., reduced) for the prevailing rate of inflation in such country, as reported in official indices published by such country would be equivalent to a rate on a U.S. dollar denominated borrowing of identical average life that does not exceed 10% over the Applicable Rate.

It is anticipated that fees in the form of placement or commitment fees, or other similar fees, would be paid to lenders, placement agents or other third parties in connection with the issuance of any such non-recourse debt securities. CSW requests authority for any Project Parent to agree to pay placement or commitment fees, and other similar fees, in connection with any borrowing, provided that the effective annual interest charge on any indebtedness evidencing such borrowing is not greater than 115% of the stated interest rate thereon.

In connection with the issuance of debt securities by any Project Parent, it is anticipated that such Project Parent may pledge and/or grant a security interest in its assets. Such pledge or security interest may include, without

limitation, the shares or other equity securities of any FUCO, EWG or Project Parent that it owns, including, without limitation, a security interest in any distributions from any such FUCO, EWG or Project Parent, or a collateral assignment of its rights under and interests in its other property, including, without limitation, any rights under any power purchase agreement, fuel supply agreement or other project agreement to which it is a party.

It is proposed that the aggregate outstanding principal amount of non-recourse debt securities issued by Project Parents to third parties will not exceed $600 million at any one time. Such amount is separate and apart from, and in excess of, the Aggregate General Authority. No more than $200 million principal amount of such non-recourse debt securities at any time outstanding may be denominated in currencies other than U.S. dollars. In any case in which CSW directly or indirectly owns less than all of the equity interests of a Project Parent, only that portion of the non-recourse indebtedness of such Project Parent equal to CSW's equity ownership percentage shall be included for purposes of the foregoing limitations.

CSW, Energy, CSWI, CSWdM, CSWdM Servicios and their affiliates further request that no additional authority be required from the Commission after December 31, 1997 in order to maintain existing Guarantees and/or Investments made prior to such date in accordance with the Act and all applicable rules, regulations and orders of the Commission. If CSW, Energy, CSWI, CSWdM or CSWdM Servicios determine to make any additional investments after December 31, 1997, appropriate authority of the Commission will be sought.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–21005 Filed 8–25–94; 8:45 am]

BILLING CODE 8010–01–M

[Rel. No. IC–20491; 813–130]

The Travelers Inc.; Notice of Application

August 19, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANT: The Travelers, Inc., ("The Travelers").

RELEVANT ACT SECTIONS: Order requested under sections 6(b) and 6(e) granting an exemption from all provisions of the Act except section 9, certain provisions of section 17, sections 36 through 53, and the rules and regulations thereunder.

SUMMARY OF APPLICATION: The Travelers requests an exemptive order on behalf of certain limited partnerships or other entities (the "Partnerships") that it will organize. Each Partnership will be an employees' securities company within the meaning of section 2(a)(13) of the Act.

FILING DATE: The application was filed on March 22, 1994, and amended on July 6, 1994, and August 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 September 13, 1994, and should be accompanied by proof of service on applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, DC 20549. Applicant, 65 East 55th Street, New York, New York 10022.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Staff Attorney, at (202) 942–0574, or Robert A. Robertson, Branch Chief, at (202) 942–0564, or (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. The Travelers is a financial services holding company engaged, through its subsidiaries and certain affiliates, principally in four business segments; investment services, consumer finance services, life insurance services, and property and casualty services. The Travelers and its subsidiaries are referred to as The Travelers Group. One of The Travelers' principal indirect subsidiaries, Smith Barney Inc., which is a subsidiary of Smith Barney Holdings, Inc., is a broker-dealer registered under the Securities Exchange Act of 1934 (the "1934 Act") and an investment adviser registered under the Investment Advisers Act of 1940 (the "Advisers Act").

2. The Travelers proposes to establish the Partnerships to provide investment opportunities for highly compensated key employees of The Travelers Group ("Eligible Employees"). The Partnerships will allow the Eligible Employees to diversify their investments, to pool their investment resources and to receive the benefit of certain investment opportunities that come to the attention of The Travelers Group. Each Partnership will be an "employees' securities company" as that term is defined in section 2(a)(13) of the Act, and will operate as a closed-end, non-diversified, management investment company. Each Partnership will have a general partner, the executive officers and directors of which will be Eligible Employees. The affairs of each Partnership will be governed by a limited partnership agreement to be executed by the general partner and each limited partner who will invest in the Partnership. The Travelers Group will bear all expenses incurred in connection with the organization of the Partnerships. Units will be sold without a sales load.

3. The Eligible Employees, in addition to being employees, officers or directors of The Travelers Group, will be engaged in various aspects of the financial services business. They also will be sophisticated investors who are highly compensated and otherwise able to fend for themselves without benefit of regulatory safeguards, and will be required to meet the standards for "accredited investors" in rule 501(a)(6) of Regulation D under the Securities Act of 1933.

4. Units in the Partnerships will not be transferable by a limited partner except with the express consent of the general partner and then only to parties that fall within the class of persons referred to in section 2(a)(13) of the Act.

5. The Partnerships may provide that the general partner will have the right, but not the obligation, to acquire the units of the limited partners upon the termination of a limited partner's employment with The Travelers Group for any reason or upon his or her bankruptcy. In addition, the Partnerships may provide that in the event of a limited partner's death, total physical disability or adjudication of incompetence, the limited partner or his or her representative may request that the general partner, or its assignee or

designee, terminate his or her participation and purchase the limited partner's interest in the Partnership. The general partner, or its assignee or designee, shall have no obligation to grant such requests. If granted, however, the general partner, or its assignee or designee, shall pay the limited partner an amount equal to what the general partner determines in good faith to be the fair market value of the limited partner's interest as of the semi-annual valuation date preceding the limited partner's termination date.

6. Pending investment, Partnership funds may be invested by the general partner in short-term investments. In compliance with section 12(d)(1)(A)(1) of the Act, no Partnership will purchase or otherwise acquire any security issued by another investment company if the Partnership immediately after such purchase or acquisition will own in the aggregate more than 3 percent of the total outstanding voting stock of any such investment company.

7. Management of each Partnership will be exclusively vested in its general partner, which will be, directly or indirectly, a wholly-owned subsidiary of The Travelers. The general partner will make all investment decisions for the Partnerships and will have all powers and rights necessary to carry out the objectives of each of the Partnerships, except that the general partner may delegate certain of its responsibilities to a manager. No compensation will be paid to the general partner for its services except that it may receive reimbursement of its out-of-pocket expenses. No separate management fee will be charged by the general partner. No compensation will be paid by a Partnership to the directors or officers of the entity controlling the general partner for their services to the general partner other than reimbursement for reasonable and necessary out-of-pocket expenses incurred during the course of conducting the business of the Partnership. However, expenses charged by the general partner to any Partnerships may include expenses charged by an entity affiliated with The Travelers Group for services rendered to the Partnership, but without any additional markup charged to the Partnership.

8. A general partner and/or manager will register as an investment adviser if required under applicable law. The determination as to whether a general partner or manager is required to register under the Advisers Act shall be made by The Travelers Group; no relief in respect to such determination is requested in the application.

9. Each general partner will undertake to contribute capital to the Partnership in an amount equal to at least 1 percent of the aggregate amount of capital contributed by the limited partners. A general partner or another member of The Travelers Group (the "Electing Partner") may undertake to contribute capital to a Partnership in an amount up to ten times the aggregate amount of capital contributed by the limited partners. The limited partnership agreement of a Partnership may provide that the Electing Partner shall not receive its *pro rata* allocation of profits and losses with respect to a specified portion of its capital contribution to the Partnership. With respect to the portion of the general partner's capital contribution for which it will not receive its *pro rata* allocation (the "Non-Allocable Portion"), the Electing Partner will be entitled to a cumulative return, which will not be greater than its "opportunity cost of funds" with respect to such Non-Allocable Portion (the "Return"). The Non-Allocable Portion will be a specified percentage of the amount of cash contributed by the Electing Partner as determined by The Travelers Group and set forth in the limited partnership agreement.

10. The "opportunity cost of funds" will be, at the election of the general partner made at the time the Partnership is organized, either; the applicable interest rate, or a fixed rate of return reflecting the yield in Treasury securities with a term of similar length as the expected average life of the Partnership. The "applicable interest rate" will be, at the election of a general partner made at the time that a Partnership is organized; the prime commercial lending rate as in effect from time to time, the "applicable federal rate" under section 1274(d) of the Internal Revenue code of 1984 (or its successors) as determined in the good faith judgment of the general partner, or The Travelers Group's "effective cost of borrowing" defined as average effective consolidated borrowing costs for commercial paper, bank loan and other short term borrowings, computed on a monthly basis.

11. The Return will be allocable annually out of Partnership profits and will be payable to the general partner when profits are realized by the Partnership or, to the extent not previously paid, upon the liquidation of the Partnership. The rate of the Return may be more favorable to the Partnership than prevailing market rates for comparable types of "borrowing" because a Partnership would receive the benefits of the prime rate or the rate at which the Treasury borrows.

12. The Partnerships' net profits and losses will be allocated to the general partner and the limited partners in the same proportion as the amount of their respective paid-in capital that was employed to make the investments giving rise to such profits or losses, except as previously described with respect to the Non-Allocable Portion, if any, and except that, unless otherwise specifically provided in the limited partnership agreement, the capital accounts of the limited partners will not be reduced below zero and any additional losses will be allocated to the general partner.

13. Each Partnership will send its limited partners annual reports regarding its operations and current valuation of Partnership assets. As soon as practicable after the end of each tax year of a Partnership, a report will be transmitted to each limited partner setting out information with respect to the limited partner's share of income, gains, losses, credits and other items for federal income tax purposes, resulting from the operation of the Partnership during that year.

14. The general partner of a Partnership may purchase units which it may offer to new Eligible Employees joining The Travelers Group after closing of the Partnership. The sale of these units by the general partner will have no dilutive effect on the interest of already existing limited partners because the units will have already been issued and sold at the closing of the Partnership.

Applicant's Legal Analysis

1. On behalf of the Partnerships, The Travelers requests an exemption under section 6(b) and 6(e) of the Act from all provisions of the Act and the rules and regulations thereunder, except section 9, certain provisions of section 17, and sections 36 through 53 of the Act, and the rules and regulations under those sections.

2. The Travelers requests an exemption from section 17(a) to permit a Partnership: (a) to purchase from Smith Barney, or another affiliate of The Travelers, securities or interests in properties previously acquired for the account of Smith Barney or another affiliate of The Travelers; (b) to purchase interests or property in a company or other investment vehicle in which Smith Barney or another affiliate of The Travelers already owns securities; (c) to sell to Smith Barney or other affiliates of The Travelers securities or interests in properties previously acquired by the Partnerships; (d) to invest in investment companies, investment partnerships or other investment vehicles offered,

sponsored or managed by Smith Barney or another affiliate of The Travelers (referred to as "Travelers Sponsored Vehicles"), or to purchase securities from Travelers Sponsored Vehicles, except that The Travelers will not invest more than 15% of the assets of any Partnership in Travelers Sponsored Vehicles; (e) to invest in securities of, or to lend money to, entities with which Smith Barney or another affiliate of The Travelers have performed investment banking or other services and from which they may have received fees; (f) to purchase interests in or lend money to a company or other investment vehicle (i) in which Smith Barney or another affiliate of The Travelers or their respective employees own 5% or more of the voting securities or (ii) that is otherwise affiliated with the Partnership or The Travelers; (g) to purchase securities that are underwritten by Smith Barney or by another affiliate of The Travelers (including a member of a selling group) on terms at least as favorable to the Partnership as those offered to investors other than "affiliated persons" (as defined in the Act) of Smith Barney or another affiliate of The Travelers; and (h) to participate as a selling security-holder in a public offering (i) that is underwritten by Smith Barney or by another affiliate of The Travelers or (ii) in which Smith Barney or another affiliate of The Travelers acts as a member of the selling group.

3. The Travelers also requests an exemption from section 17(d) and rule 17d–1 thereunder, subject to the conditions specified below, to permit a Partnership to make an investment in an entity in which a Partnership, Smith Barney or another affiliate of The Travelers, or any "affiliated persons" (as defined in the Act) of the Partnership or an "affiliated person" of such person also invests or participates or plans concurrently or otherwise directly or indirectly to invest or become a participant.

4. The Travelers requests an exemption from the requirements, contained in rules 17f–1(a) and 17f–1(c), that the custodial agreement between The Travelers Group and a Partnership must be in writing and transmitted to the SEC. Requiring a written contract and transmission to the SEC would unnecessarily burden The Travelers and cause unnecessary expense to The Travelers.

5. The Travelers requests an exemption from the requirements, contained in rule 17g–1(d), (e), and (g), that a majority of the board of directors of the entity controlling the general partner who are not interested persons take certain actions and make certain approvals concerning bonding and request instead that the actions and approvals required by the rule to be taken by the board of directors may and will be taken by officers and directors, regardless of whether they are "interested."

6. The Travelers requests an exemption from rule 17j–1, except rule 17j–1(a). Rule 17j–1 requires that every access person of a registered investment company report to the investment company with respect to transactions in any security in which the access person has any beneficial ownership in the security. Applicant believes that the community of interests among the partners of the Partnerships and the conditions described below provide adequate safeguards. The Travelers does not seek an exemption from, and the Partnerships will comply with, the anti-fraud provisions of paragraph (a) of rule 17j–1.

7. The Travelers believes that the exemptions requested under section 6(b) of the Act are consistent with the protection of investors. The exemptions are being requested because they are considered necessary or relevant to the operations of the Partnerships as an investment program uniquely adapted to the needs of employees of The Travelers Group. The Travelers further believes that the requested relief is consistent with the legislative history relating to employees' securities companies.

8. The Travelers also believes that a substantial community of economic and other interests exists among The Travelers Group and the limited partners which obviates the need for protection of investors under the Act. The Partnerships will be conceived, organized and managed by persons who will be investing in the Partnerships, and will not be promoted by persons seeking to profit from fees or investment advice or from the distribution of securities. The travelers also believes that the terms of the proposed affiliated transactions will be reasonable and fair and free from overreaching, and will be consistent with the policy of each registered investment company concerned.

Applicant's Conditions

Applicant will comply with the following conditions if the requested order is granted:

1. Each proposed transaction involving a Partnership otherwise prohibited by section 17(A) or section 17(D) of the Act and rule 17d–1 thereunder (the "section 17 transactions") will be effected only if the general partner determines that:

a. the terms of the transaction, including the consideration to be paid or received, are fair and reasonable to the partners and do not involve overreaching of the Partnership or its partners on the part of any person concerned; and

b. the transaction is consistent with the interests of the partners, the Partnership's organizational documents and the Partnership's reports to its partners.

In addition, the general partners will record and preserve a description of such affiliated transactions, their findings, the information or materials upon which their findings are based and the basis therefor. All such records will be maintained for the life of the Partnerships and at least two years thereafter, and will be subject to examination by the Commission and its staff.[1]

2. In connection with the section 17 transactions, the general partner will adopt, and periodically review and update, procedures designed to ensure that reasonable inquiry is made, prior to the consummation of any such transaction, with respect to the possible involvement in the transaction of any affiliated person or promoter of or principal underwriter for the Partnerships, or any affiliated person of such a person, promoter, or principal underwriter.

3. The general partner will not invest the funds of any Partnership in any investment in which an Affiliated Co-Investor has or proposes to acquire the same class of securities of the same issuer, where the investment involves a joint enterprise or other joint arrangement within the meaning of rule 17d–1 in which the Partnership and an Affiliated Co-Investor are participants, unless any such Affiliated Co-Investor, prior to disposing of all or part of its investment, (a) gives the general partner sufficient, but not less than one day's, notice of its intent to dispose of its investment, and (b) refrains from disposing of its investment unless the Partnership has the opportunity to dispose of the Partnership's investment prior to or concurrently with, on the same terms as, and *pro rata* with the Affiliated Co-Investor. The term "Affiliated Co-Investor" means any person who is: (1) an "affiliated person" (as such term is defined in the Act) of the Partnership; (2) a member of The

[1] Each Partnership will preserve the accounts, books and other documents required to be maintained in an easily accessible place for the first two years.

Travelers Group; (3) an officer or director of a member of the Travelers Group; (4) a travelers sponsored vehicle; or (5) a company in which an officer or director of the general partner acts as an officer, director, or general partner, or has a similar capacity to control the sale or other disposition of the company's securities. The restrictions contained in this condition, however, shall not be deemed to limit or prevent the disposition of an investment by an Affiliated Co-Investor: (a) to its direct or indirect wholly-owned subsidiary, to any company (a "parent") of which the Affiliated Co-Investor is a direct or indirect wholly-owned subsidiary, or to a direct or indirect wholly-owned subsidiary of its parent; (b) to immediate family members of the Affiliated Co-Investor or a trust established for any Affiliated Co-Investor or any such family member; or (c) when the investment is comprised of securities that are (i) listed on a national securities exchange registered under section 6 of the 1934 Act, (ii) national market system securities pursuant to section 11A(1)(2) of the 1934 Act and rule 11A(a)(2)–1 thereunder, or (iii) government securities as defined in section 2(a)(16) of the Act.

4. Each Partnership and its general partner will maintain and preserve, for the life of each such Partnership and at least two years thereafter, such accounts, books, and other documents as constitute the record forming the basis for the audited financial statements that are to be provided to the partners, and each annual report of such Partnership required by the terms of the applicable partnership agreement to be sent to the partners, and agree that all such records will be subject to examination by the Commission and its staff.[2]

5. The general partner will send to each limited partner who had an interest in the Partnership, at any time during the fiscal year then ended, Partnership financial statements audited by the Partnership's independent accountants. At the end of each fiscal year, the general partner will make a valuation or have a valuation made of all of the assets of the Partnership as of such fiscal year end. In addition, within 90 days after the end of each fiscal year of each of the Partnerships or as soon as practicable thereafter, the general partner shall send a report to each person who was a limited partner at any time during the fiscal year then ended, setting forth such tax information as shall be necessary for the preparation by the limited partner of his or her federal and state income tax returns and a report of the investment activities of the Partnership during such year.

6. In any case where purchases or sales are made from or to an entity affiliated with a Partnership by reason of a 5% or more investment in such entity by a Travelers Group director, officer or employee, such individual will not participate in the general partner's determination of whether or not to effect such purchase or sale.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–21004 Filed 8–24–94; 8:45 am]

BILLING CODE 8010–01–M

[2] Each Partnership will preserve the accounts, books, and other documents required to be maintained in an easily accessible place for the first two years.

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

ACTION: Notice of Reporting Requirements Submitted for Review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Comments should be submitted within 30 days of this publication in the **Federal Register**. If you intend to comment but cannot prepare comments promptly, please advise the OBM Reviewer and the Agency Clearance Officer before the deadline.

COPIES: Request for clearance (S.F. 83), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer. Submit comments to the Agency Clearance Officer and the OMB Reviewer.

FOR FURTHER INFORMATION CONTACT: Agency Clearance Officer: Cleo Verbillis, Small Business Administration, 409 3RD Street, SW., 5th Floor, Washington, D.C. 20416, Telephone: (202) 205–6629.

OMB Reviewer: Donald Arbuckle, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, D.C. 20503.

Title: Application for Business Loans.

Form No.: SBA Form s 4, 4–I, 4Schedule A, 4–L, 4–EX, 4Short.

Frequency: On Occasion.

Description of Respondents: Applicants for an SBA Business Loan.

Annual Responses: 33,150.

Annual Burden: 656,038.

Dated: August 19, 1994.

Cleo Verbillis,

Chief, Administrative Information Branch.

[FR Doc. 94–21069 Filed 8–25–94; 8:45 am]

BILLING CODE 8025–01–M

[Application No. 99000132]

Mercury Capital, L.P.; Filing of an Application for a License To Operate as a Small Business Investment Company

Notice is hereby given of the filing of an application with the Small Business Administration (SBA) pursuant to Section 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1994)) by Mercury Capital, L.P., 650 Madison Avenue, New York, New York 10022 for a license to operate as a small business investment company (SBIC) under the Small Business Investment Act of 1958, as amended, (15 U.S.C. et seq.), and the Rules and Regulations promulgated thereunder. Mercury Capital, L.P. is a limited partnership formed under Delaware law.

Mercury Capital, L.P. will be managed by the General Partner, Mercury Capital Investment Corp., and by Mercury Management Company, Inc. Both entities are located at the address provided above for the Applicant. The following limited partner will own 10 percent or more of the proposed SBIC:

Name	Percentage of ownership
Rosenkranz & Company and Subsidiaries, 650 Madison Avenue, New York, New 10022	96.9%

The Applicant will begin operations with an initial capitalization of approximately $15.5 million. The Applicant intends to principally make equity investments in basic manufacturing, distribution and service businesses. The investments are expected to be in small concerns located in the midwest United States, however, the Applicant will also consider other attractive investment opportunities throughout the U.S., as appropriate.

Matters involved in SBA's consideration of the application include the general business reputation and character of the proposed owners and management, and the probability of

successful operations of the new SBIC under their management, including profitability and financial soundness in accordance with the Act and Regulations.

Notice is hereby given that any person may, not later than 30 days from the date of publication of this Notice, submit written comments on the proposed SBIC to the Associate Administrator for Investment, Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

A copy of this Notice will be published in a newspaper of general circulation in New York, New York.

(Catalog of Federal Domestic Assistance Programs No. 59.011, Small Business Investment Companies).

Dated: August 19, 1994.

Robert D. Stillman,

Associate Administrator for Investment.

[FR Doc. 94–21057 Filed 8–25–94; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF STATE

Bureau of Political-Military Affairs

[Public Notice 2059]

Determination Under the Arms Export Control Act

Pursuant to Section 654(c) of the Foreign Assistance Act of 1961, as amended, notice is hereby given that the Under Secretary of State for Arms Control and International Security Affairs has made a determination pursuant to Section 81 of the Arms Export Control Act and has concluded that publication of the determination would be harmful to the national security of the United States.

Dated: August 22, 1994.

Thomas E. McNamara,

Acting Assistant Secretary of State for Political-Military Affairs.

[FR Doc. 94–21155 Filed 8–25–94; 8:45 am]

BILLING CODE 4710–25–M

Bureau of Politico-Military Affairs

[Public Notice 2060]

Determination Under the Arms Export Control Act

Pursuant to Section 654(c) of the Foreign Assistance Act of 1961, as amended, notice is hereby given that the Under Secretary of State for Arms Control and International Security Affairs has made a determination pursuant to Section 81 of the Arms Export Control Act and has concluded that publication of the determination would be harmful to the national security of the United States.

Dated: August 22, 1994.

Thomas E. McNamara,

Acting, Assistant Secretary of State for Political-Military Affairs.

[FR Doc. 94–21154 Filed 8–25–94; 8:45 am]

BILLING CODE 4710–25–M

Bureau of Political-Military Affairs

[Public Notice 2061]

Imposition of Chemical and Biological Weapons Proliferation Sanctions Against a Foreign Person

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: The United States Government has determined that an Italian national has engaged in chemical weapons proliferation activity that requires the imposition of sanctions pursuant to the Arms Export Control Act and the Export Administration Act of 1979, as amended by the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991.

EFFECTIVE DATE: August 19, 1994.

FOR FURTHER INFORMATION CONTACT: Vann H. Van Diepen, Director, Office of Chemical, Biological and Missile Nonproliferation, Bureau of Political-Military Affairs, Department of State (202-647-1142).

SUPPLEMENTARY INFORMATION: Pursuant to Sections 81(a) and 81(b) of the Arms Export Control Act (22 U.S.C. 2798(a), 2798(b)), Sections 11C(a) and 11C(b) of the Export Administration Act of 1979 (50 U.S.C. app. 2410c(a), 2410c(b)), Section 305 of the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (P.L. 102–182), and Executive Order 12851 of June 11, 1993, the United States Government determined that Alberto Di Salle, an Italian national, has engaged in chemical weapons proliferation activity that requires the imposition of the sanctions described in Section 81(c) of the Arms Export Control Act (22 U.S.C. 2798(c)) and Section 11C(c) of the Export Administration Act of 1979 (50 U.S.C. app. 2410c(c)).

Accordingly, the following sanctions are being imposed:

(A) Procurement Sanction: The United States Government shall not procure, or enter into any contract for the procurement of, any goods or services from the sanctioned person; and

(B) Import Sanctions: The importation into the United States of products produced by any sanctioned person shall be prohibited.

Sanctions on the individual described above may apply to firms or other entities with which he is associated. Questions as to whether a particular transaction is affected by the sanctions should be referred to the information number listed above. The sanctions shall commence on August 19, 1994. They will remain in place for at least one year and until further notice.

These measures shall be implemented by the responsible agencies as provided in Executive Order 12851 of June 11, 1993.

Dated: August 22, 1994.

Thomas E. McNamara,

Acting Assistant Secretary of State for Political-Military Affairs.

[FR Doc. 94–21153 Filed 8–25–94; 8:45 am]

BILLING CODE 4710–25–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee Meeting on Air Traffic Issues; Cancellation of Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meeting cancellation.

SUMMARY: The FAA is issuing this notice to advise the public that the September 8, 1994, meeting on Aviation Rulemaking Advisory Committee on Air Traffic issues is cancelled.

FOR FURTHER INFORMATION CONTACT: Mr. Reginald C. Matthews, Air Traffic Rules and Procedures Service, Federal Aviation Administration, telephone: 202–267–8783.

Issued in Washington, DC., on August 18, 1994.

Reginald C. Matthews,

Assistant Executive Director, Aviation Rulemaking Advisory Committee on Air Traffic Issues.

[FR Doc. 94–21134 Filed 8–25–94; 8:45 am]

BILLING CODE 4910–13–M

Intent To Rule on Application To Use the Revenue From a Passenger Facility Charge (PFC) at Houghton County Memorial Airport, Hancock, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to use the revenue from a

PFC at Houghton County Memorial Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before September 26, 1994.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address:

Federal Aviation Administration, Detroit Airports District Office, Willow Run Airport, East, 8820 Beck Road Belleville, Michigan 4811.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. John M. Kelly, Airport Manager, of the County of Houghton, Michigan, at the following address: Houghton County Memorial Airport, Route 1, Box 94, Calumet, Michigan 49913.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the County of Houghton under § 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Dean C. Nitz, Manager, Detroit Airports District Office, Willow Run Airport, East, 8820 Beck Road, Belleville, Michigan 48111 (313) 487–7300. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to use the revenue from a PFC at Houghton County Memorial Airport under the provisions of the Aviation Safety and Capacity act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On August 5, 1994, the FAA determined that the application to use the revenue from a PFC submitted by the County of Houghton was substantially complete within the requirements of § 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than November 11, 1994.

The following is a brief overview of the application.

Level of the PFC: $3.00

Actual charge effective date: July 1, 1993

Estimated charge expiration date: January 1, 1996

Total approved PFC revenue: $162,986.00

Brief description of proposed project(s): Relocate Very High Frequency Omnirange (TVOR); Relocate glide slope facility (Runway 13/31 ILS).

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Not applicable.

Any persons may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the County of Houghton, Michigan.

Issued in Des Plaines, Illinois, on August 17, 1994.

Benito DeLeon,

Manager, Planning/Programming Branch, Airports Division, Great Lakes Region.

[FR Doc. 94–21133 Filed 8–25–94; 8:45 am]

BILLING CODE 4910–13–M

Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Naples Municipal Airport, Naples, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Naples Municipal Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before September 26, 1994.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Orlando Airports District Office, 9677 Tradeport Drive, Suite 130, Orlando, Florida 32827–5397.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Ted Soliday, Executive Director of the City of Naples Airport Authority at the following address: City of Naples Airport Authority, 160 Aviation Drive North, Naples, Florida 33942.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the City of Naples Airport Authority under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Ms. Pegy Jones, Airport Plans and Programs Manager, 9677 Tradeport Drive, Orlando, Florida 32827–5397, (407) 648–6583. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use a PFC at the Naples Municipal Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation regulations (14 CFR Part 158).

On August 18, 1994, the FAA determined that the application to impose and use a PFC submitted by the City of Naples Airport Authority was substantially complete within the requirements of § 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than November 26, 1994.

The following is a brief overview of the application.

Level of the proposed PFC: $3.00

Proposed charge effective date: February 1, 1995

Proposed charge expiration date: February 1, 1998

Total estimated PFC revenue: $470,000

Brief description of proposed projects:

Project 001 Commercial Terminal Apron

Project 002 Acquire Passenger Access Lift

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Non-scheduled air carrier and charter flights using aircraft with less than ten (10) seats.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT.**

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the City of Naples Airport Authority.

Issued in Orlando, Florida, on August 18, 1994.

John W. Reynolds, Jr.,

Assistant Manager, Orlando Airports District Office Southern Region.

[FR Doc. 94–21132 Filed 8–25–94; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review.

August 18, 1994.

The Department of Treasury has submitted the following public information collection requirement(s) to

OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

U.S. Customs Service (CUS)

OMB Number: 1515–0182.
Form Number: None.
Type of Review: Extension.
Title: Card Survey on Global Trade Talk Magazines.
Description: This information collection is a survey of readers of the Global Trade Talk for their opinions on ways to improve the publication of topics they would like to see covered.
Respondents: Businesses or other for-profit, Federal agencies or employees, small businesses or organizations.
Estimated Number of Recordkeepers: 10,000.
Estimated Burden Hours Per Recordkeeper: 15 minutes.
Frequency of Response: Annually.
Estimated Total Recordkeeping Burden: 2,500 hours.
Clearance Officer: Laverne Williams (202) 927–0229. U.S. Customs Service, Paperwork Management Branch, Room 6316, 1301 Constitution Avenue, NW., Washington, DC 20229.
OMB Reviewer: Milo Sunderhauf (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503

Lois K. Holland,
Departmental Reports Management Officer.
[FR Doc. 94–21114 Filed 8–25–94; 8:45 am]
BILLING CODE 4820–02–P

Public Information Collection Requirements Submitted to OMB for Review

August 19, 1994.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

U.S. Customs Service (CUS)

OMB Number: 1515–0053.
Form Number: CF 3299.
Type of Review: Extension.
Title: Declaration For Free Entry of Unaccompanied Articles
Description: This form serves as a declaration for residents, non-residents, and military personnel who are attempting to enter their personal and household goods free of duty. This form is also applicable for tools of trade and professional books.
Respondents: Businesses or other for-profit, small businesses or organizations.
Estimated Number of Respondents/Recordkeepers: 10,000.
Estimated Burden Hours Per Respondent/Recordkeeper: 10 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting/Recordkeeping Burden: 25,799 hours.
Clearance Officer: Laverne Williams (202) 927–0229, U.S. Customs Service, Paperwork Management Branch, Room 6316, 1301 Constitution Avenue, N.W., Washington, DC 20229.
OMB Reviewer: Milo Sunderhauf (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports Management Officer.
[FR Doc. 94–21115 Filed 8–25–94; 8:45 am]
BILLING CODE 4820–02–P

Public Information Collection Requirements Submitted to OMB for Review

August 15, 1994.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545–0052.
Form Number: IRS Forms 990–PF and 4720.
Type of Review: Revision.
Title: Return of Private Foundation or Section 4947(a)(1) Charitable Trust Treated as a Private Foundation (Form 990–PF); Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the Internal Revenue Code (Form 4720).
Description: Internal Revenue Code (IRC) 6033 requires all private foundations, including section 4947(a)(1) trusts treated as private foundations, to file an annual information return. Section 53.4940–1(a) of the Income Tax Regulations requires that the tax on net investment income be reported on the return filed under section 6011 requires a report of taxes under Chapter 42 of the Code for prohibited acts by private foundations and certain related parties. Section 4947(a)(1) trusts may file Form 990–PF in lieu of Form 1041 under the provisions of sections 6033 and 6012.
Respondents: Non-profit institutions.
Estimated Number of Respondents/Recordkeepers: 48,170.
Estimated Burden Hours Per Respondent/Recordkeeper: Recordkeeping—140 hr., 52 min.; Learning about the law or the form—27 hr., 11 min.; Preparing the form—31 hr., 37 min.; Copying, assembling, and sending the form to the IRS—16 min.
Frequency of Response: Annually.
Estimated Total Reporting/Recordkeeping Burden: 9,521,323 hours.
Clearance Officer: Garrick Shear (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, N.W., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports, Management Officer.
[FR Doc. 94–21116 Filed 8–25–94; 8:45 am]
BILLING CODE 4830–01–P

Public Information Collection Requirements Submitted to OMB for Review

August 19, 1994.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545–0991.
Form Number: IRS Form 8633.
Type of Review: Revision.
Title: Application to Participate in the Electronic Filing Program.
Description: Form 8633 will be used by tax preparers, electronic return collectors, software firms, and electronic transmitters, as an application to participate in the electronic filing program covering individual income tax returns.
Respondents: Businesses, non-profit institutions.
Estimated Number of Respondents: 70,000.
Estimated Burden Hours Per Respondent: 1 hour.
Frequency of Response: Annually.
Estimated Total Reporting Burden: 70,000 hours.
Clearance Officer: Garrick Shear (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, N.W., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf, (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports Management Officer.
[FR Doc. 94–21117 Filed 8–25–94; 8:45 am]
BILLING CODE 4830–01–P

Public Information Collection Requirements Submitted to OMB for Review

August 19, 1994.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Internal Revenue Service (IRS)

OMB Number: 1545–0215.
Form Number: IRS Forms 5712 and 5712–A.
Type of Review: Revision.
Title: Election To Be Treated as a Possessions Corporation Under Section 936 (Form 5712); Election and Verification of the Cost Sharing or Profit Split Method Under Section 936(h)(5) (Form 5712–A).
Description: Domestic corporations may elect to be treated as possessions corporations on Form 5712. This election allows the corporation to take a tax credit. Possession corporations may elect on Form 5712–A to share their taxable income with their affiliates under section 936(h)(5). These forms are used by the IRS to ascertain if corporations are entitled to the credit and if they may share their taxable income with their affiliates.
Respondents: Businesses or other for-profit.
Estimated Number of Respondents/Recordkeepers: 2,600.
Estimated Burden Hours Per Respondent/Recordkeeper: Recordkeeping—5 hr., 30 min.; Learning about the law or the form—42 min.; Preparing and sending the form to the IRS—49 min.
Frequency of Response: Annually.
Estimated Total Reporting/Recordkeeping Burden: 18,138 hours.
OMB Number: 1545–0717.
Form Number: IRS Form W–4S.
Type of Review: Extension.
Title: Request for Federal Income Tax Withholding From Sick Pay.
Description: Section 3402(o) of the Internal Revenue Code extends income tax withholding to sick pay payments made by third parties upon request of the payee. The information is used to determine the amount to be withheld from the third-party sick pay payments.
Respondents: Individuals or households.
Estimated Number of Respondents/Recordkeepers: 500,000.
Estimated Burden Hours Per Respondent/Recordkeeper: Recordkeeping—40 min.; Learning about the law or the form—6 min.; Preparing the form—25 min.; Copying, assembling, and sending the form to the IRS—11 min.
Frequency of Response: On occasion.
Estimated Total Reporting/Recordkeeping Burden: 685,000 hours.
OMB Number: 1545–1099.
Form Number: IRS Form 8811.
Type of Review: Extension.
Title: Information Return for Real Estate Mortgage Investment Conduits (REMICs) and Issuers of Collateralized Debt Obligations.
Description: Form 8811 will be used to collect the name, address, and phone number of a representative of a REMIC who can provide brokers with the correct income amounts that the broker's clients must report on their income tax returns. It is estimated that there are some 1,000 REMICs currently in existence.
Respondents: Businesses or other for-profit.
Estimated Number of Respondents/Recordkeepers: 1,000.
Estimated Burden Hours Per Respondent/Recordkeeper: Recordkeeping—2 hr., 38 min.; Learning about the law or the form—24 min.; Preparing, copying, assembling, and sending the form to the IRS—27 min.
Frequency of Response: Other (Taxpayer must only file once for each obligation issued.).
Estimated Total Reporting/Recordkeeping Burden: 3,490 hours.
Clearance Officer: Garrick Shear, (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, N.W., Washington, DC 20224.
OMB Reviewer: Milo Sunderhauf (202) 395–7340, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,
Departmental Reports Management Officer.
[FR Doc. 94–21118 Filed 8–25–94; 8:45 am]
BILLING CODE 4830–01–P

UNITED STATES INFORMATION AGENCY

College and University Development Program in Business Management for Croatia and Macedonia

ACTION: Notice—Request for Proposals.

SUMMARY: The Office of Academic Programs of the United States Information Agency's Bureau of Educational and Cultural Affairs announces an open competition for an assistance award program. Accredited post-secondary U.S. educational institutions and U.S. scholarly/professional organizations are invited to submit proposals to conduct exchange programs with post-secondary educational institutions in Croatia and Macedonia. The purpose of the exchange programs is to develop curricula and teaching methodologies for foreign faculties in the field of business management. USIA anticipates awarding one grant not to exceed $300,000 for a project in Macedonia, and one grant not to exceed $200,000 for a project in Croatia. Public or private non-profit organizations applying under this program must meet the provisions described in IRS regulation 501(c)(3).

Grant Activities

Grant activities should begin no later than February 1, 1995. Programs must be a minimum of 18 months and a maximum of two years in duration. Activities must include placement of U.S. faculty at Croatian or Macedonian institutions for in-country training of

foreign faculty and for development of sustainable programs to educate future foreign business management teachers and business people. Targeted program activities may include: Faculty development and enrichment; curriculum design; modernization of the administrative structures within the foreign institution; outreach to the private sector; and direct teaching. U.S. and foreign participants may include post-graduate students on a "faculty track" who are currently involved in teaching at participating institutions (not to exceed 25% of all participants). Development of linkages with the private sector and development of appropriate materials are encouraged. Orientation, seminar, workshop and semester-long course formats will be acceptable. Visits to partner institutions by staff or consultants to plan joint projects may be funded under this program but should be a relatively small part of the overall exchange. Applicants are strongly encouraged to maintain an in-country presence at the foreign partner institution(s) for the duration of the program. This presence should include project director(s) at the partner institution(s) for periods of at least one continuous academic semester.

Courses developed may include, but are not limited to: Marketing, production management, economics, industrial relations, finance, accounting, international business and business communications. Proposals must provide for a two-way exchange. Exchange activities should include establishment of electronic communications between partner institutions and other organizations.

Funding Authority

Funding for this program is provided under the Support for East European Democracies (SEED) Act. Under the auspices of the SEED Act, USIA is offering this program to help foster greater expertise in business management in selected countries of the region. Projects must conform with Agency requirements and guidelines outlined in this announcement and the Application Package. USIA projects and programs are subject to the availability of funds.

ANNOUNCEMENT NAME AND NUMBER: All communications with USIA concerning this announcement should refer to the above title and reference number E/ASU–95–03.

DATES: Deadline for proposals: The original and 14 complete copies of the proposal must be received at the U.S. Information Agency by 5 p.m. Washington, D.C. time on Tuesday, October 11, 1994. Faxed documents will not be accepted, nor will documents postmarked on October 11 but received at a later date. It is the responsibility of each applicant to ensure that proposals are received by the above deadline.

FOR FURTHER INFORMATION CONTACT: Office of Academic Programs, Specialized Programs Unit—E/ASU, Room 349, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547, (202) 619–5289 (phone), (202) 401–1433 (fax), to request an Application Package, which includes detailed award criteria; all application forms; and guidelines for preparing proposals, including specific criteria for preparation of the proposal budget. Please specify USIA Program Officer Robin Kline or Mary Ann Garlic on all inquiries and correspondence. Interested applicants should read the complete **Federal Register** announcement before addressing inquiries to the Specialized Programs Unit or submitting proposals. Once the RFP deadline has passed, Specialized Programs Unit program officers may not discuss this competition in any way with applicants until the Bureau proposal review process has been completed.

ADDRESSES: Applicants must follow all instructions given in this announcement and the Application Package and send only complete applications to: U.S. Information Agency, Ref.: E/ASU–95–03, Office of Grants Management, E/XE, Room 336, 301 4th Street, SW., Washington, DC 20547.

SUPPLEMENTARY INFORMATION: Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. Programs must also maintain their scholarly integrity and meet the highest standard of academic excellence or artistic achievement. "Diversity" should be interpreted in the broadest sense and encompass differences including but not limited to race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle.

Overview

The specific purpose of this program is to assist Central and East European countries in their transformation to free market economies through the development of business management training capabilities in academic institutions. An important goal of the program is to create enduring linkages between designated foreign and U.S. institutions. Proposals that are extensions or enhancements of past or current relationships with a partner institution will be accepted.

Guidelines

A. Programs must comply with J–1 visa regulations; program participants must carry the requisite level of health and accident insurance. U.S. project directors must ensure that all participants are covered by a comprehensive health insurance plan, and the proposal must reflect insurance coverage.

B. *Institutional Eligibility:* In the U.S., participation in the program is open to accredited two- and four-year colleges and universities, graduate schools, and non-profit scholarly/professional organizations. Consortia of institutions are also eligible. Proposals from consortia must be submitted by a single member institution with authority to represent the consortium. Overseas, participation is limited to recognized degree-granting institutions of higher education and internationally recognized and highly regarded independent research institutes. Special note: USIA encourages proposals from eligible Historically Black Colleges and Universities, community colleges, and other institutions in the U.S. with significant minority student enrollment.

C. *Participant Eligibility:* Each participant representing a U.S. institution, whose travel costs are covered under this program's funding, must be a U.S. citizen. Each participant representing a foreign institution must be a citizen, national, or permanent resident of the eligible foreign country in which the foreign partner institution is located.

D. *Ineligibility:* A proposal will be deemed technically ineligible if:

(1) It does not fully adhere to the guidelines established herein and in the Application Package, including budgetary requirements.

(2) The applicant is not an accredited two- or four-year institution, or a non-profit organization.

(3) The project does not constitute a direct partnership with a post-secondary business management program in Croatia or Macedonia.

(4) The project involves partnerships in more than one country.

(5) The project does not seek to address the faculty, curriculum, and administrative aspects entailed in developing the business management program identified.

(6) The project does not provide for in-country presence of U.S. faculty.

(7) The proposal requests USIA support for indirect costs.

(8) The project includes profits or fees.

E. *Institutional Commitment:* In making award decisions, USIA will focus especially on evidence of an ongoing commitment by the U.S. partner to internationalizing its educational programs as well as a commitment by both partner institutions to the success of the particular exchange program. Each proposal must include documentation of institutional support for the proposed program in the form of signed letters of endorsement from the president, chancellor, or director of the U.S. and foreign institution(s) involved. The documentation may also be submitted in the form of a signed agreement by the same persons. Each agreement or letter of endorsement must describe the institution's commitment to an on-going partnership and make specific reference to the proposed program and how it will fit into and be supported by the institution's current activities in internationalizing its educational programs. Proposals must discuss on how the partnership will be continued beyond the period of the grant award. If not submitted with original proposal, documentation of support from foreign institutions must be received by 5 p.m. Washington, D.C. time on October 24, 1994, addressed to Robin Kline or Mary Ann Garlic, E/ASU, Room 349, U.S. Information Agency, 301 4th Street SW., Washington, DC 20547. Applicant institutions are required to make their own arrangements with the appropriate foreign institutions regarding institutional commitment and visas, and the proposal must make reference to this requirement.

Proposed Budget: USIA anticipates awarding one grant not to exceed $300,000 for a project in Macedonia, and one grant not to exceed $200,000 for a project in Croatia. Institutions must submit a comprehensive line item budget, including a budget summary page, based on the specific guidance in the Application Package. USIA will not pay for indirect costs under this program; however, indirect costs may be included as part of an institution's cost sharing. Requesting USIA support for indirect costs will result in technical ineligibility. Proposals must demonstrate substantial cost-sharing (dollar and in-kind) in both program and administrative categories, including overseas partner contributions. Cost-sharing may be in the form of allowable direct or indirect costs. The recipient must maintain written records to support all allowable costs which are claimed as being its contribution to cost participation, as well as cost to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A110, Attachment E. Cost-sharing and matching should be described in the proposal. In the event the recipient does not provide the minimum amount of cost sharing as stipulated in the recipient's budget, the USIA contribution will be reduced in proportion to the recipient's contribution.

The recipient's proposal shall include the cost of an audit that:

1. Complies with the requirements of OMB Circular No. A–133, Audits of Institutions of Higher Education and Other Nonprofit Institutions;

2. Complies with the requirements of American Institute of Certified Public Accountants (AICPA) Statement of Position (SOP) No. 92–9; and

3. Includes review by the recipient's independent auditor of a recipient-prepared supplemental schedule of indirect cost rate computation, if such a rate is being proposed.

The audit costs shall be identified separately for:

1. Preparation of basic financial statements and other accounting services; and

2. Preparation of the supplemental reports and schedules required by OMB Circular A–133, AICPA SOP 92–9, and the review of the supplemental schedule of indirect cost rate computation.

USIA reserves the right to reduce, increase or otherwise modify proposal budgets in accordance with the needs of the program. For organizations with less than four years of experience in international exchange activities, grants will be limited to a maximum of $60,000. Administrative costs cannot exceed 20 percent of the requested budget, including administrative expenses for orientation.

Allowable costs for the program include the following (see Application Package for further details):

A. Program Costs

(1) International travel (via U.S. flag carriers);

(2) Domestic travel;

(3) Maintenance (lodging/meals/incidental expenses);

(4) Educational materials, not to exceed 35 percent of total budget;

(5) Honoraria or compensation for in-country work, not to exceed $100/day per person;

(6) Visa fees for foreign participants;

(7) Medical insurance for foreign participants during U.S. visits;

(8) Salaries/benefits of U.S. participant(s) in residence at foreign partner institution for one academic year or more. Total costs for the participant(s) in residence must not exceed 30 percent of the total budget.

B. Administrative Costs (Not to exceed 20% of Total Budget)

(1) Salaries and benefits;

(2) Communications (fax, phone, postage, etc.);

(3) Office supplies;

(4) Other direct costs.

Please refer to the Application Package for complete budget guidelines.

Review Process

USIA will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Application Package. Eligible proposals will be forwarded to panels of USIA officers for advisory review. All eligible proposals will also be reviewed by the budget and contracts offices, as well as the USIA Office of East European and NIS Affairs and USIA posts overseas. Proposals may also be reviewed by the Office of the General Counsel or by other Agency elements. Funding decisions are at the discretion of the USIA Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with the USIA contracts officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the following criteria:

(A) Quality of program plan—including academic rigor, thorough conception of project (including a timeline of activities and identification of participants), understanding of the needs of the partner institution, potential to address partner needs, and proposed follow-up.

(B) Feasibility of the program plan and the capacity of the organization to conduct the exchange; e.g., qualifications of program staff and participants, commitment of the institution's administration to internationalize its faculty outlook and curricula. Each proposal should clearly demonstrate how the institution will meet the program objectives and execute the program plan.

(C) Track record—relevant Agency and outside assessments of the organization's experience with international exchanges; for organizations that have not worked with USIA, the demonstrated potential to achieve program goals will be evaluated.

(D) Multiplier effect/impact—the impact of the exchange activity on the wider community and on the establishment of continuing ties, as well as the contribution of the proposed activity in promoting mutual understanding.

(E) Value to U.S.-partner country relations—the assessment by USIA's geographic area office and posts of the potential impact and significance of the project with the partner country.

(F) Cost effectiveness—greatest return on each grant dollar; degree of cost-sharing exhibited.

(G) Adherence of proposed activities to the criteria and conditions described above.

(H) Institutional commitment as demonstrated by financial and in-kind support of the program.

(I) Follow-on Activities—each proposal must provide a plan for follow-on activity (without USIA support) which ensures that the USIA-supported program is not an isolated event. Each proposal must clearly demonstrate long-term commitment from all partners.

(J) Support of Diversity—proposals should demonstrate the recipient's commitment to promoting the awareness and understanding of diversity throughout the program. This can be accomplished through documentation (such as a written statement or account) summarizing past and/or on-going activities and efforts that further the principle of diversity within both the organization and the program activities.

(K) Evaluation plan—proposals must provide a plan for evaluation by the grantee institution.

Notice

The terms and conditions published in this RFP are binding and may not be modified by any USIA representative.

Notification

All applicants will be notified of the results of the review process on or about Monday, January 2, 1994. Awards made will be subject to periodic reporting and evaluation requirements.

Dated: August 23, 1994.

Dell Pendergrast,

Deputy Associate Director, Educational and Cultural Affairs.

[FR Doc. 94-21124 Filed 8-25-94; 8:45 am]

BILLING CODE 8230-01-M

Sunshine Act Meetings

Federal Register
Vol. 59, No. 165
Friday, August 26, 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).

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, August 31, 1994.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: August 24, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-21205 Filed 8-24-94; 10:35 am]

BILLING CODE 6210-01-P

SECURITIES AND EXCHANGE COMMISSION

Agency Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of August 29, 1994.

An open meeting will be held on Wednesday, August 31, 1994, at 10:00 a.m., in Room 1C30. A closed meeting will be held on Wednesday, August 31, 1994, following the open meeting.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Roberts, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the open meeting scheduled for Wednesday, August 31, 1994, at 10:00 a.m., will be:

1. The Commission will consider a concept release soliciting comment on a number of questions concerning the use of the term "nationally recognized statistical rating organization" ("NRSRO") in the Commission's rules. This concept release examines the process employed by the Commission to designate rating agencies as NRSROs and the nature of the Commission's oversight role with respect to NRSROs. For further information, please contact Elizabeth K. King at (202) 942–0140.

2. The Commission will consider whether to propose amendments to Item 202 of Regulation S–K and Item 202 of Regulation S–B under the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"), Securities Act Rule 436(g), and Exchange Act Form 8–K. These proposals address the disclosure of assigned security ratings in prospectuses and periodic reports. For further information, please contact Brian P. Miller at (202) 942–1997.

The subject matter of the closed meeting scheduled for Wednesday, August 31, 1994, following the open meeting will be:

Institution of injunctive actions.
Institution of administrative proceedings of an enforcement nature.
Settlement of administrative proceedings of an enforcement nature.
Opinions.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary (202) 942–7070.

Dated: August 24, 1994.

Jonathan G. Katz,

Secretary.

[FR Doc. 94–21300 Filed 8–24–94; 3:43 pm]

BILLING CODE 8010-01-M

Corrections

Federal Register
Vol. 59, No. 165
Friday, August 26, 1994

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 172

[Docket No. HM-206; Notice No. 94-8]
RIN 2137-AB75

Improvements to Hazardous Materials Identification Systems

Correction

In proposed rule document 94-19490 beginning on page 41848 in the issue of Monday, August 15, 1994, make the following corrections:

§ 172.416 [Corrected]

1. On page 41864, in the third column, § 172.416(a) should read as follows:

§ 172.416 POISON GAS label.

(a) Except for size and color, the POISON GAS label must be as follows:

* * * * *

§ 172.429 [Corrected]

2. On page 41865, in the first column, § 172.429(a) should read as follows:

§ 172.429 POISON INHALATION HAZARD label.

(a) Except for size and color, the POISON INHALATION HAZARD label as follows:

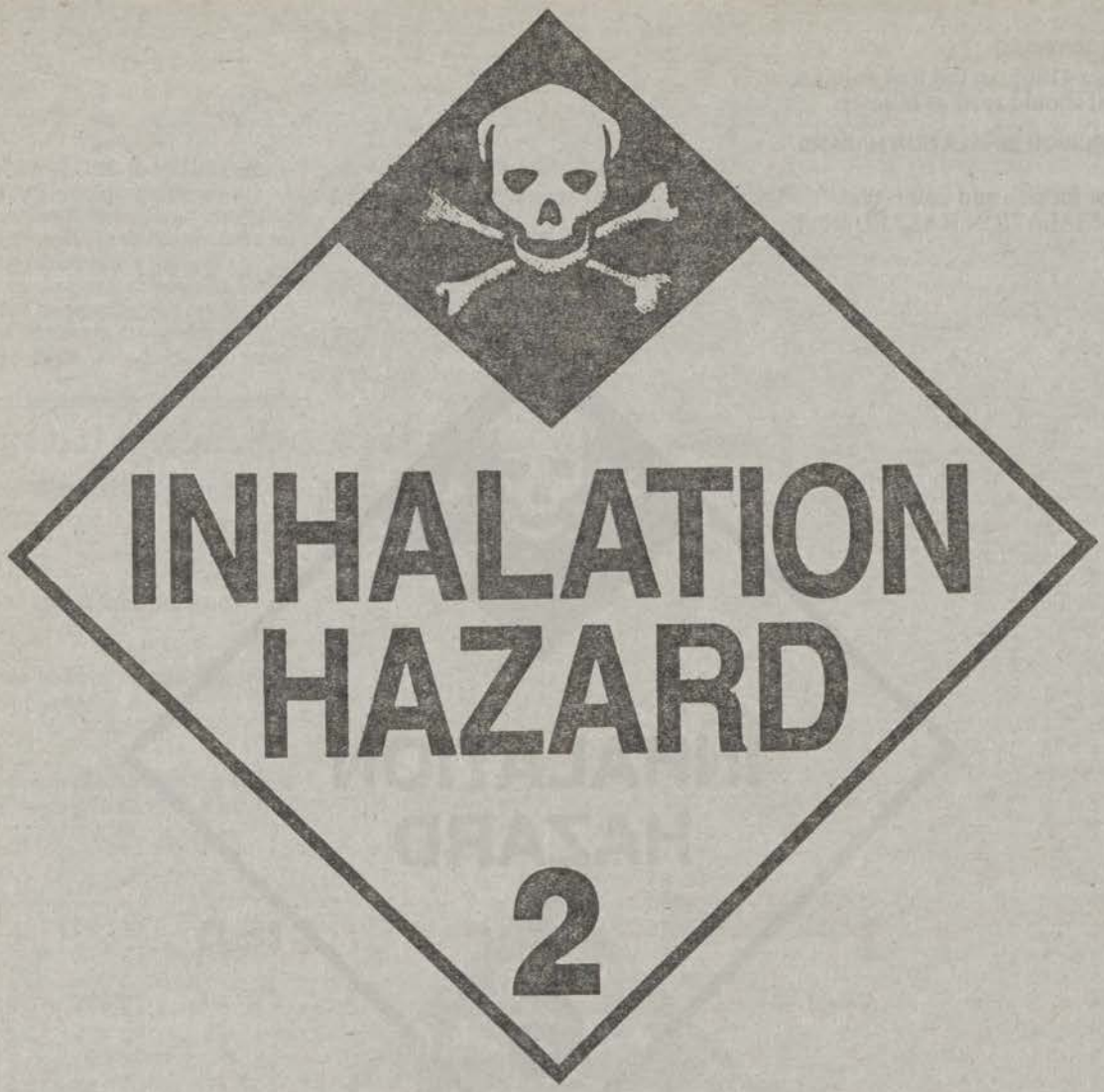
* * * * *

§ 172.540 [Corrected]

3. On page 41866, in the third column, § 172.540(a) should read as follows:

§ 172.540 POISON GAS placard.

(a) Except for size and color, the POISON GAS placard must be as follows:



* * * * *

§ 172.504 [Corrected]

4. On page 41866, in the first column, in § 172.504(e), the heading above the table was omitted and should read "Table 1".

BILLING CODE 1505-01-D

federal register

Friday
August 26, 1994

Part II

Environmental Protection Agency

40 CFR Ch. I

Effluent Guidelines Plan; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Ch. I

[FRL–5050–3]

RIN 2040–AC90

Effluent Guidelines Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Effluent Guidelines Plan.

SUMMARY: Today's notice announces the Agency's plans for developing new and revised effluent guidelines, which regulate industrial discharges to surface waters and to publicly owned treatment works. Section 304(m) of the Clean Water Act requires EPA to publish a biennial Effluent Guidelines Plan.

ADDRESSES: The public record for this notice is available for review in the EPA Water Docket, 401 M Street, SW., Washington, DC. For access to Docket materials, call (202) 260–3027 between 9 a.m. and 3 p.m. for an appointment. The EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying. Preliminary Data Summaries referred to in this notice may be obtained from the distributors listed in Appendix B.

FOR FURTHER INFORMATION CONTACT: Eric Strassler, Engineering and Analysis Division (4303), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; telephone 202–260–7150.

SUPPLEMENTARY INFORMATION:

I. Legal Authority
II. Introduction
A. Purpose of Today's Notice
B. Overview of Today's Notice
III. 1994 Proposed Effluent Guidelines Plan
IV. 1994 Effluent Guidelines Plan
A. Regulations
1. Ongoing Rulemakings
2. Future Regulations
a. Metal Products and Machinery Phase 2
b. Two Additional Rulemaking Projects: 1996 Start
B. Preliminary Studies
C. Summary of Changes from Proposed Plan
V. Public Comments
VI. Economic Impact Assessment
VII. Executive Order 12866
Appendix A—Effluent Guidelines Rulemaking Projects and Preliminary Studies
Appendix B—Completed Preliminary Studies

I. Legal Authority

Today's notice is published under the authority of section 304(m) of the Clean Water Act, 33 U.S.C. 1314(m).

II. Introduction

A. Purpose of Today's Notice

Today's notice announces the Agency's third biennial plan for developing new and revised effluent guidelines pursuant to sec. 304(m) of the Clean Water Act.

EPA published a proposed Effluent Guidelines Plan (the "Proposed Plan") on May 18, 1994 (59 FR 25859). The Agency invited comment on the notice until June 17, 1994. Today's notice summarizes and addresses the major comments the Agency received.

B. Overview of Today's Notice

The Agency intends to develop effluent limitation guidelines and standards ("effluent guidelines") as follows:

1. Continue development of nine rules listed in the Proposed Plan. The categories are: Pulp, Paper and Paperboard; Pesticide Chemicals (Formulating, Packaging and Repackaging); Coastal Oil and Gas Extraction; Centralized Waste Treatment; Pharmaceutical Manufacturing; Metal Products and Machinery, Phase 1; Landfills and Incinerators; Industrial Laundries; and Transportation Equipment Cleaning.

2. Begin development of effluent guidelines for the Metal Products and Machinery category, Phase 2.

3. Continue to initiate approximately two preliminary studies per year to assist in determining whether new or revised rules should be developed for particular categories. Each preliminary study will generally take approximately two years to complete.

4. Plan for development of eight additional effluent guidelines, either new or revised, between 1996 and 2003. The point source categories to be covered by these guidelines will be identified in future **Federal Register** notices. EPA intends to begin development of two rules each year from 1996 to 1999, with proposed rules published between 1998 and 2001, and final action taken between 2000 and 2003 respectively.

These actions are identical to those described in the Proposed Plan.

III. 1994 Proposed Effluent Guidelines Plan

In the Proposed Plan, EPA described its intent to continue development of nine ongoing rulemakings, develop eight additional rules between 1996 and 2003, and conduct preliminary studies. The Proposed Plan set forth EPA's rationale for the selection of particular industries as candidates for new or revised effluent guidelines. The Proposed Plan also described the relevant statutory framework, the components and process for development of an effluent guidelines regulation, and other background information. The principal elements of the Proposed Plan were designed to implement sec. 304(m) and a consent decree in *Natural Resources Defense Council et al.* v. *Reilly* (D.D.C. 89–2980, January 31, 1992) (the "Consent Decree"). See 59 FR 25860–25865.

IV. 1994 Effluent Guidelines Plan

EPA's 1994 Effluent Guidelines Plan is set forth below. Today's Plan is substantively identical to the Proposed Plan. As noted above, the basis for selection of the industries identified in today's Plan is described in the Proposed Plan.

A. Regulations

1. Ongoing Rulemakings

The Agency is currently in the process of developing new or revised effluent guidelines for nine categories. (These categories were listed in the Proposed Plan.) The categories and actual or projected dates for proposal and final action are set forth in Table 1.

TABLE 1.—EFFLUENT GUIDELINES CURRENTLY UNDER DEVELOPMENT

Category	Proposal	Final action
Pulp, paper and paperboard.[1]	12/17/93	9/95
Pesticide formulating, packaging, and repackaging	4/14/94	8/95
Metal products and machinery, phase.[1]	11/94	5/96
Centralized waste treatment	[2] 12/94	[2] 9/96
Coastal oil and gas extraction	1/95	7/96
Pharmaceutical manufacturing	[2] 2/95	[2] 8/96
Industrial laundries	12/96	12/98
Transportation equipment cleaning	12/96	12/98
Landfills and incinerators	[2] 3/97	[2] 3/99

[1] The Pulp, Paper and Paperboard rulemaking is not covered by the NRDC consent decree. Deadlines are subject to a consent decree in *EDF et al* v. *Thomas* (D.D.C. No. 85–0973).

[2] These dates reflect pending unopposed motions to extend consent decree deadlines.

EPA will include any updates to these schedules in the semi-annual Regulatory Agenda published in the **Federal Register**.

2. Future Regulations

a. Metal Products and Machinery Phase 2. The 1992 consent decree

requires that EPA begin rulemaking for the Metal Product and Machinery Phase 2 (MP&M 2) category in 1995. As announced in the 1992 Effluent Guidelines Plan (57 FR 41000, September 8, 1992), EPA intends to propose the MP&M 2 rule in 1997 and take final action in 1999.

b. Two Additional Rulemaking Projects: 1996 Start. EPA will start work on two more rules in 1996. EPA has not yet selected the specific industrial categories for 1996. However, based on the discussion of data sources in the Proposed Plan (59 FR 25863), the Agency may choose the next categories from the following list:

- Petroleum Refining
- Metal Finishing
- Textile Mills
- Inorganic Chemicals
- Steam Electric Power Generating
- Iron and Steel Manufacturing
- a portion of the Pulp, Paper and Paperboard category (proposed subcategories for which EPA did not propose toxic and nonconventional pollutant limits in the proposed rule published December 17, 1993: G. Mechanical Pulp; H. Non-Wood Chemical Pulp; I. Secondary Fiber Deink; J. Secondary Fiber Non-Deink; K. Fine and Lightweight Papers from Purchased Pulp; and L. Tissue, Filter, Non-Woven, and Paper from Purchased Pulp).

EPA intends to announce its rulemaking selections in the **Federal Register** within the next year.

B. Preliminary Studies

In the Proposed Plan EPA described six preliminary studies either completed or underway, and announced that it intended to begin two preliminary studies in 1995, and three additional studies in 1996 (59 FR 25864–5). The studies assist the Agency in selecting industries to be subject to future effluent guidelines rulemaking.

The Agency is proceeding as proposed with studies for the Textile Mills category (40 CFR part 410) and the Inorganic Chemicals category (40 CFR part 415), both of which will be completed by December 1994. Studies of the Steam Electric Power Generating category (40 CFR part 423) and Iron and Steel Manufacturing category (40 CFR part 420) were started earlier this year will be complete in late 1995. Studies on the Petroleum Refining category (40 CFR part 419) and the Metal Finishing category (40 CFR part 433) were recently completed.

Three additional existing effluent guidelines categories are listed in the consent decree for preliminary studies: Leather Tanning and Finishing (40 CFR part 425); Coal Mining (40 CFR part 434); and Onshore/Stripper Oil and Gas Extraction (40 CFR part 435). EPA may study these categories or other categories, based on public comments received and other available information.

EPA has not yet selected the categories to be studied in 1995 or 1996.

C. Summary of Changes from Proposed Plan

Today's Effluent Guidelines Plan is substantively identical to the Proposed Plan. However, some clarifications are provided below in response to several comments the Agency received on the proposal.

V. Public Comments

The public comment period for the Proposed Plan closed on June 17, 1994. The Agency received comments that covered approximately 18 topics from 6 commenters, including industries and an environmental group. The summary in this section highlights the more significant comments submitted. The administrative record for today's notice includes a complete text of the comments and the Agency's responses.

A. Scope of Specific Effluent Guidelines Rules

Several comments addressed the scope of coverage and other issues pertaining to specific effluent guidelines rules which EPA recently proposed or will propose in the next few years.

EPA will forward these comments to the dockets for the appropriate rules. The Agency has not made final decisions about the scope and applicability of these guidelines.

B. Effluent Guidelines Planning Process

One comment questioned the Agency's commitment to planning for the Effluent Guidelines Program, and stated that EPA should demonstrate that it has actually engaged in planning for future development of Effluent Guidelines, rather than using the 304(m) plan as a status report and vehicle to request further information from outside sources.

EPA has devoted substantial resources to planning for Effluent Guidelines. Most significantly, the Agency has supported the Effluent Guidelines Task Force, an advisory committee, that has investigated ways to improve the planning process, expedite the promulgation of effluent guidelines, and better promote pollution prevention practices. The Task Force recently submitted its Report and Recommendations on "Selection Criteria for Preliminary Industry Studies" to the EPA Administrator The Task Force agreed with EPA on the limitations of various data sources, although it encouraged the Agency to take greater advantage of the information and experience available from state and local governments in dealing with industrial dischargers. EPA looks forward to working more closely with state and local governments on preliminary studies and effluent guidelines planning in general.

While the Agency does invite submissions of data from outside sources to assist in Effluent Guidelines planning, it also conducts preliminary industry studies. EPA believes that conducting preliminary studies is the most effective manner in which to learn about industries discharging toxic and nonconventional pollutants. Two studies have been completed, and additional studies are underway, pursuant to the Consent Decree. Consistent with the previous Plans, the 1994 Proposed Plan states that the "total priority pollutants discharged" factor has been "among the most useful indicators for selecting categories for effluent guidelines" (59 FR 25863). The preliminary studies provide this kind of information, but most of the other data sources the Agency consults do not support calculating national estimates of discharges by category.

VI. Economic Impact Assessment

Today's notice proposes a plan for the review and revision of existing effluent guidelines and for the selection of priority industries for new regulations. This notice does not establish any requirements; therefore, no economic impact assessment has been prepared. EPA will provide economic impact analyses or regulatory impact analyses, as appropriate, for all of the future effluent guideline rulemakings developed by the Agency.

VII. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, 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 of recipients thereof; or

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

It has been determined that this plan is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

Dated: August 18, 1994.

Carol M. Browner,

Administrator.

Appendix A—Effluent Guidelines Rulemaking Projects and Preliminary Studies

EFFLUENT GUIDELINES CURRENT AND FUTURE RULEMAKING PROJECTS

Category	40 CFR part	Proposed	Final
Pulp, paper and paperboard	430	12/17/93	9/95
Pesticide formulating, packaging and repackaging	455	4/14/94	8/95
Metal products and machinery, Phase 1	438	11/94	5/96
Centralized waste treatment [1]	437	[3] 12/94	[3] 9/96
Coastal oil and gas extraction	435	1/95	7/96
Pharmaceutical manufacturing	439	[3] 2/95	[3] 8/96
Industrial laundries	441	12/96	12/98
Transportation equipment cleaning	442	12/96	12/98
Landfills and incinerators [2]	437	[3] 3/97	[3] 3/99
Metal products and machinery, Phase 2	438	12/97	12/99
2 categories—rulemaking projects start 1996	.....	12/98	12/00
2 categories—rulemaking projects start 1997	.....	12/99	12/01
2 categories—rulemaking projects start 1998	.....	12/00	12/02
2 categories—rulemaking projects start 1999	.....	12/01	12/03

[1] Formerly called Waste Treatment, Phase 1.

[2] Formerly called Waste Treatment, Phase 2.

[3] Dates reflect pending unopposed motions to extend consent decree deadlines.

CURRENT AND FUTURE PRELIMINARY STUDIES

Category	40 CFR part	Start	Complete
Inorganic chemicals	415	1993	1994
Textile mills	410	1993	1994
Steam electric power generating	423	1994	1995
Iron and steel manufacturing	420	1994	1995
2 categories	.....	1995	1996
3 categories	.....	1996	1997

Appendix B—Completed Preliminary Studies

Recent Studies

Recently-completed preliminary studies will be available from the EPA National Center for Environmental Publications and Information (NCEPI), 11029 Kenwood Road, Building 5, Cincinnati, OH 45242; telephone (513) 891–6561, fax (513) 891–6685. Please specify the EPA Document Number when ordering.

Publication title	40 CFR part	Publication date	EPA document No.
Preliminary data summary for the petroleum refining category	419	October 1994	EPA–821–R–94–005
Preliminary data summary for the metal finishing category	433	October 1994	EPA–821–R–94–006

1989 Studies

The following studies were published as Preliminary Data Summaries by EPA in 1989. Copies may be purchased from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161; telephone (703) 487–4650. Please specify the NTIS Accession Number(s) when ordering.

Publication title	Current category name (if different from publication title)	NTIS accession No.
Preliminary data summary for the drum reconditioning industry	.....	PB90–126491
Preliminary data summary for the hazardous waste treatment industry	Centralized waste treatment; landfills and incinerators.	PB90–126517
Preliminary data summary for the hospitals point source category	.....	PB90–126459
Preliminary data summary for industrial laundries	.....	PB90–126541
Preliminary data summary for the machinery manufacturing and rebuilding industry.	Metal products and machinery	PB90–126525
Preliminary data summary for the paint formulating point source category.	.....	PB90–126475
Preliminary data summary for the pharmaceutical manufacturing point source category.	.....	PB90–126533

Publication title	Current category name (if different from publication title)	NTIS accession No.
Preliminary data summary for the solvent recycling industry		PB90–126467
Preliminary data summary for the transportation equipment cleaning industry.		PB90–126483
Preliminary data summary for the used oil reclamation and re-refining industry.		PB90–126509

[FR Doc. 94–20954 Filed 8–25–94; 8:45 am]

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federal register

Friday
August 26, 1994

Part III

Environmental Protection Agency

40 CFR Part 82

Protection of Stratospheric Ozone; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL-5057-3]

Protection of Stratospheric Ozone

AGENCY: Environmental Protection Agency.

ACTION: Notice of Acceptability.

SUMMARY: This notice expands the list of acceptable substitutes for ozone depleting substances (ODSs) under the U.S Environmental Protection Agency's (EPA) Significant New Alternatives Policy (SNAP) program. SNAP implements section 612 of the amended Clean Air Act of 1990 whereby EPA is required to evaluate substitutes for the ODSs, and regulate the use of substitutes where other alternatives exist that reduce overall risk to human health and the environment. Through these evaluations, SNAP generates lists of acceptable and unacceptable substitutes for each of the major industrial use sectors.

On March 18, 1994, EPA promulgated its plan for administering the SNAP program, and issued decisions on the acceptability and unacceptability of a number of substitutes (59 FR 13044). In today's Notice, EPA is issuing decisions on the acceptability of certain substitutes not previously reviewed by the Agency. The intended effect of this action is to expedite movement away from ozone depleting compounds. To arrive at determinations on the acceptability of substitutes, the Agency completed a cross-media sector end-use screening assessment of risks to human health and the environment.

EFFECTIVE DATE: August 26, 1994.

ADDRESSES: Information relevant to this notice is contained in Air Docket A-91-42, Central Docket Section, South Conference Room 4, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Telephone: (202) 260-7549. The docket may be inspected between 8 a.m. and 4 p.m. weekdays. As provided in 40 CFR part 2, a reasonable fee may be charged for photocopying.

FOR FURTHER INFORMATION CONTACT: Sally Rand at (202) 233-9739 or fax (202) 233-9577, USEPA, Stratospheric Protection Division, 401 M Street SW., 6205-J, Washington, DC 20460.

SUPPLEMENTARY INFORMATION:

I. Overview of This Action

This action is divided into six sections, including this overview:

I. Overview of This Notice

II. Section 612 Program

A. Statutory Requirements
B. Regulatory History

III. Listing of Acceptable Substitutes

IV. Listing of Substitutes Pending Review

V. Additional Information

Appendix A Summary of Acceptable and Pending Decisions

II. Section 612 Program

A. Statutory Requirements

Section 612 of the Clean Air Act authorizes EPA to develop a program for evaluating alternatives to ozone-depleting substances. EPA is referring to this program as the Significant New Alternatives Policy (SNAP) program. The major provisions of section 612 are:

• *Rulemaking*—Section 612(c) requires EPA to promulgate rules making it unlawful to replace any class I (chlorofluorocarbon, halon, carbon tetrachloride, methyl chloroform, methyl bromide, and hydrobromofluorocarbon) or class II (hydrochlorofluorocarbon) substance with any substitute that the Administrator determines may present adverse effects to human health or the environment where the Administrator has identified an alternative that: (1) Reduces the overall risk to human health and the environment, and (2) is currently or potentially available.

• *Listing of Unacceptable/Acceptable Substitutes*—Section 612(c) also requires EPA to publish a list of the substitutes unacceptable for specific uses. EPA must publish a corresponding list of acceptable alternatives for specific uses.

• *Petition Process*—Section 612(d) grants the right to any person to petition EPA to add a substance to or delete a substance from the lists published in accordance with section 612(c). The Agency has 90 days to grant or deny a petition. Where the Agency grants the petition, EPA must publish the revised lists within an additional 6 months.

• *90-day Notification*—Section 612(e) requires EPA to require any person who produces a chemical substitute for a class I substance to notify the Agency not less than 90 days before new or *existing* chemicals are introduced into interstate commerce for significant new uses as substitutes for a class I substance. The producer must also provide the Agency with the producer's unpublished health and safety studies on such substitutes.

• *Outreach*—Section 612(b)(1) states that the Administrator shall seek to maximize the use of federal research facilities and resources to assist users of class I and II substances in identifying and developing alternatives to the use of such substances in key commercial applications.

• *Clearinghouse*—Section 612(b)(4) requires the Agency to set up a public clearinghouse of alternative chemicals, product substitutes, and alternative manufacturing processes that are available for products and manufacturing processes which use class I and II substances.

B. Regulatory History

On March 18, 1994, EPA published the Final Rulemaking (FRM) (59 FR 13044) which described the process for administering the SNAP program and issued EPA's first acceptability lists for substitutes in the major industrial use sectors. These sectors include: Refrigeration and air conditioning; foam blowing; solvent cleaning; fire suppression and explosion protection; sterilants; aerosols; adhesives, coatings and inks; and tobacco expansion. These sectors compose the principal industrial sectors that historically consume the largest volumes of ozone-depleting compounds.

As described in the final rule for the SNAP program (59 FR 13044), EPA does not believe that rulemaking procedures are required to list alternatives as acceptable with no limitations. Such listings do not impose any sanction, nor do they remove any prior license to use a substance. Consequently, EPA is adding substances to the list of acceptable alternatives without first requesting comment on new listings.

EPA does, however, believe that notice-and-comment rulemaking is required to place any substance on the list of prohibited substitutes, to list a substance as acceptable only under certain conditions, to list substances as acceptable only for certain uses, or to remove a substance from either the list of prohibited or acceptable substitutes. Updates to these lists are published as separate notices of rulemaking in the **Federal Register.**

The Agency defines a "substitute" as any chemical, product substitute, or alternative manufacturing process, whether existing or new, that could replace a class I or class II substance. Anyone who produces a substitute must provide the Agency with health and safety studies on the substitute at least 90 days before introducing it into interstate commerce for significant new use as an alternative. This requirement applies to substitute manufacturers, but may include importers, formulators or end-users, when they are responsible for introducing a substitute into commerce.

III. Listing of Acceptable Substitutes

This section presents EPA's most recent acceptable listing decisions for class I substitutes in the following industrial sectors: refrigerants and air conditioning, foam blowing, solvent cleaning, fire suppression and explosion protection; sterilants; aerosols; adhesives, coatings and inks. These decisions represent substitutes not previously reviewed in the final rulemaking for SNAP (59 FR 13044; March 18, 1994) and, consequently, add to the lists of acceptable substitutes under SNAP. For copies of the full list, contact the EPA Stratospheric Protection Hotline at the number listed in Section V of this notice.

Parts A through H below present a detailed discussion of the substitute listing determinations by major use sector. Tables summarizing listing decisions in this notice are in Appendix A. The comments contained in Appendix A provide additional information on a substitute, but like the listings themselves, are not regulatory in nature, and thus they are not mandatory for use of a substitute. Nor should the comments be considered comprehensive with respect to other legal obligations pertaining to the use of the substitute. However, EPA encourages users of acceptable substitutes to apply all comments to their use of these substitutes. In many instances, the comments simply allude to sound operating practices that have already been identified in existing industry and/or building-code standards. Thus, many of the comments, if adopted, would not require significant changes in existing operating practices for the affected industry.

As described in the final rule for the SNAP program, EPA does not believe that rulemaking procedures are required to list alternatives as acceptable with no limitations. Such listings do not impose any sanction, nor do they remove any prior license to use a substitute. Consequently, EPA is adding substances to the list of acceptable alternatives without first requesting comment on new listings.

EPA, however, does believe that notice-and-comment rulemaking is required to place any alternative on the list of prohibited substitutes, to list a substitute as acceptable only under use restrictions, or to remove a substitute from either the list of prohibited or acceptable substitutes. Updates to these lists are published as separate notices of rulemaking in the **Federal Register.**

D. Refrigeration and Air Conditioning

1. Overview

The refrigeration and air conditioning sector includes all uses of class I and class II substances to produce cooling, including mechanical and non-mechanical refrigeration, air conditioning, and heat transfer. Please refer to the final SNAP rule (59 FR 13044) for a more detailed description of this sector.

The refrigeration and air conditioning sector is divided into the following end-uses:

- Commercial comfort air conditioning;
- Industrial process refrigeration systems;
- Industrial process air conditioning;
- Ice skating rinks;
- Uranium isotope separation processing;
- Cole storage warehouses;
- Refrigerated transport;
- Retail food refrigeration;
- Vending machines;
- Water coolers;
- Commercial ice machines;
- Household refrigerators;
- Household freezers;
- Residential dehumidifiers;
- Motor vehicle air conditioning;
- Residential air conditioning and heat pumps;
- Non-mechanical heat transfer; and
- Very low temperature refrigeration.

In addition, each end-use is divided into retrofit and new equipment applications. EPA has not necessarily reviewed substitutes in every end-use for this Notice.

EPA has modified the list of end-uses for this sector for this SNAP update. First, EPA has changed the name of the heat transfer end-use to non-mechanical heat transfer. This change is intended to avoid confusion between systems that move heat from a cool area to a warm one (mechanical refrigeration) and systems that simply aid the movement of heat away from warm areas (non-mechanical heat transfer). The second change is that EPA added a new end-use, very low temperature refrigeration. Substitutes for this end-use have been reviewed since the final rule, and therefore have been added for this SNAP update. Finally, EPA has also reviewed substitutes for CFC–13, R–13B1, and R–503 industrial process refrigeration. Please refer to the final SNAP rule (59 FR 13044) for a detailed description of end-uses other than these three. EPA may continue to add other end-uses in future SNAP updates.

a. Non-mechanical Heat Transfer. As discussed above, this end-use includes all cooling systems that rely on a fluid to remove heat from a heat source to a cooler area, rather than relying on mechanical refrigeration to move heat from a cool area to a warm one. Generally, there are two types of systems: systems with fluid pumps, referred to as recirculating coolers, and those that rely on natural convection currents, known as thermosyphons.

b. Very Low Temperature Refrigeration. Medical freezers, freeze-dryers, and other small appliances require extremely reliable refrigeration cycles. These systems must meet stringent technical standards that do not normally apply to refrigeration systems. They usually have very small charges. Because they operate at very high vapor pressures, and because performance is critically affected by any charge loss, standard maintenance for these systems tends to reduce leakage to a level considerably below that for other types of refrigeration and air conditioning equipment.

c. CFC–13, R–13B1, and R–503 Industrial Process Refrigeration. This end-use differs from other types of industrial refrigeration only in the extremely low temperature regimes that are required. Although some substitutes may work in both these extremely low temperatures and in systems designed to use R–502, they are acceptable only for this end-use because of global warming and atmospheric lifetime concerns. These concerns are discussed more fully below.

2. Corrections from the March 18, 1994 FRM

In the FRM, the components of two refrigerants, R–404A and R–507, were inadvertently reversed. R–507 consists of HFC–125 and HFC–143a and R–404A consists of HFC–125, HFC–143a, and HFC–134a. These blends were listed as acceptable for the same end-uses, so the reversal had no effect on the acceptable status of either refrigerant.

Also in the FRM, EPA listed HFC–134a as acceptable in several CFC–12 end-uses. In the descriptive text, EPA wrote "while HFC–134a is compatible with most existing refrigeration and air conditioning equipment parts, it is not compatible with mineral oils currently used in such systems. An ester-based lubricant should be used rather than mineral oils." EPA's intention was to alert users to the need to use lubricants other than current mineral oils, rather than to recommend a particular type of new oil. While it remains true that mineral oils are incompatible with HFC–134a, it is not true that polyol ester oils are the only replacement. Polyalkylene glycol oils are also available, and are in fact the

predominant choice of the automobile manufacturers. Therefore, the portion of each listing for HFC–1234a should have read "An appropriate ester-based, polyalkylene glycol-based, or other type of lubricant should be used." In addition, specifically in the Motor Vehicle Air Conditioning end-use the listing for HFC–134a should have included the recommendation to consult the original equipment manufacturer or the retrofit kit manufacturer for further information. For clarity, these changes have been incorporated into the listing for HFC–134a in Motor Vehicle Air Conditioning in the NPRM.

3. Substitutes for Refrigerants

Substitutes fall into eight broad categories. Seven of these categories are chemical substitutes used in the same vapor compression cycle as the ozone-depleting substances being replaced. They include hydrochlorofluorocarbons (HCFCs), hydrofluorocarbons (HFCs), hydrocarbons, refrigerant blends, ammonia, perfluorocarbons (PFCs), and chlorine systems. The eighth category includes alternative technologies that generally do not rely on vapor compression cycles. Please refer to the final SNAP rule (59 *FR* 13044) for more discussion of these broad categories.

4. Listing Decisions

a. Acceptable Substitutes. These determinations are based on data submitted to EPA and on the risk screen described in the draft background document entitled "Risk Screen on the Use of Substitutes for Class I Ozone-Depleting Substances: Refrigerants". In accordance with the guiding principles for SNAP, substitutes were compared both to the substance they replace and to each other.

EPA believes the use of all acceptable substitutes presents lower overall risk than the continued use of an ozone-depleting substance. Not all substitutes will necessarily be appropriate choices for all systems within an end-use. Engineering decisions must take into account factors such as operating temperatures and pressures, ambient conditions, and age of equipment, especially during retrofits. For example, substitutes listed under industrial process refrigeration may be listed as acceptable for retrofits for both CFC–12 and R–502 systems. However, these substances exhibit significantly different thermodynamic characteristics, and a substitute for one may not be appropriate for use as a substitute for the other. EPA believes such decisions are most appropriately made by the equipment owner, manager, or contractor.

Users of HCFCs should be aware that an acceptability determination shall not be construed to release any user from compliance with all other regulations pertaining to class II substances. These include: (a) The prohibition against venting during servicing under section 608, which was effective July 1, 1992; (b) recycling requirements under section 608, which were effective July 13, 1993; (c) section 609 regulations regarding MVACS which were effective August 13, 1992; and (d) the revised production phaseout of class II substances under section 606, which was published on December 10, 1993. In addition, users of refrigerants that do not contain chlorine should be aware that an acceptability determination shall not be construed to release any user from compliance with the venting prohibition under section 608(c)(2), which takes effect November 15, 1995, at the latest.

Substitutes are listed as acceptable by end-use. These substitutes have only been found acceptable for use in the specific end-uses for which they have been reviewed, as described in this section. Users of blends should be aware that EPA has evaluated and found acceptable in each case only the specific percentage composition submitted for review; no others have been evaluated. EPA strongly recommends that users of alternative refrigerants adhere to the provisions of *ASHRAE Standard 15—Safety Code for Mechanical Refrigeration* when applicable. *ASHRAE Standard 34—Number Designation and Safety Classification of Refrigerants* is a useful reference on refrigerant numerical designations. Users are also strongly encouraged to contain, recycle, and reclaim all refrigerants.

(1) R–500 Centrifugal Chillers, Retrofit

(a) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for R–500 in retrofitted centrifugal chillers. Because HCFC–22 and HCFC–142b contribute to ozone depletion, this blend is considered a transitional alternative. Regulations regarding recycling and reclamation issued under section 608 of the Clean Air Act apply this blend. HCFC–142b has one of the highest ODPs among the HCFCs. The GWPs of HCFC–22 and HCFC–142b are somewhat high. Although HCFC–142b is flammable, the blend is not. After significant leakage, however, this blend may become weakly flammable.

(2) CFC–11, CFC–12, and R–502 Industrial Process Refrigeration, Retrofit

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) HCFC–123.—HCFC–123 is acceptable as a substitutes for CFC–11, CFC–12, and R–502 in retrofitted industrial process refrigeration. Because HCFC–123 contributes to ozone depletion, it is considered a transitional alternative. Since it poses much lower ozone-depleting risk than continued use of CFCs, EPA has determined that its use is acceptable for certain end-uses. In addition, HCFC–123's GWP and atmospheric lifetime are significantly lower than almost all other alternatives. HCFC–123 is not flammable. EPA strongly recommends that users of HCFC–123 adhere to any requirements provided in ASHRAE Standards 15 and 34. Worker-monitoring studies conducted by EPA demonstrate that in office building equipment rooms, HCFC–123's 8-hour time-weighted average concentration can be maintained at or under 1 ppm (less than the industry-established AEL of 30 ppm), provided that such standards are followed. HCFC–123 is acceptable for use in commercial building chillers and should pose no hazard in industrial uses.

(b) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–11, CFC–12, and R–502 in retrofitted industrial process refrigeration. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(c) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–11, CFC–12, and R–502 in retrofitted industrial process refrigeration. None of the components contribute to ozone depletion. However, HFC–125 has a very high GWP and HFC–134a has a moderate GWP. EPA strongly encourages recycling and reclamation of this blend in order to reduce its direct global warming impact. Although HFC–143a is flammable, the blend is not. Leak testing has demonstrated that its composition never becomes flammable.

(d) HCFC Blend Epsilon.—HCFC Blend Epsilon, which consists of HCFC–22, HFC–143a, and HFC–125, is acceptable as a substitute for CFC–11, CFC–12, and R–502 in retrofitted industrial process refrigeration. Because HCFC–22 contributes to ozone depletion, this blend is considered a transitional alternative. Regulations regarding recycling and reclamation

issued under section 608 of the Clean Air Act apply to this blend. HFC–125 and HFC–143a have very high GWPs, and the GWP of HFC–22 is somewhat high. Although HFC–143a is flammable, the blend is not. Leak testing has demonstrated that its composition never becomes flammable.

(3) CFC–11, CFC–12, and R–502 Industrial Process Refrigeration, New

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) HCFC–123.—HCFC–123 is acceptable as a substitute for CFC–11, CFC–12, and R–502 in new industrial process refrigeration. Because HCFC–123 contributes to ozone depletion, it is considered a transitional alternative. Since it poses much lower ozone-depleting risk than continued use of CFCs, EPA has determined that its use is acceptable for certain end-uses. In addition, HCFC–123's GWP and atmospheric lifetime are significantly lower than almost all other alternatives. HCFC–123 is not flammable. EPA strongly recommends that users of HCFC–123 adhere to any requirements provided in ASHRAE Standards 15 and 34. Worker-monitoring studies conducted by EPA demonstrate that in office building equipment rooms, HCFC–123's 8-hour time-weighted average concentration can be maintained at or under 1 ppm (less than the industry-established AEL of 30 ppm), provided that such standards are followed. HCFC–123 is acceptable for use in commercial building chillers and should pose no hazard in industrial uses.

(b) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–11, CFC–12, and R–502 in new industrial process refrigeration. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(4) CFC–13, R–13B1, and R–503 Industrial Process Refrigeration, Retrofit and New

This type of refrigeration requires temperatures well below those achieved with R–502 or HCFC–22. A limited number of substitutes have been identified that are capable of meeting technical requirements. These substitutes all contain components with extremely high GWPS, and EPA is concerned about their potential contribution to global warming. However, under SNAP, EPA intends to only find those substitutes unacceptable that clearly present greater overall risk. Given this framework, EPA finds these high-GWP substitutes acceptable. At the same time, EPA strongly urges industry to develop new alternatives for this end-use that do not contain substances with such high GWPs and long lifetimes.

(a) HFC–23.—HFC–23 is acceptable as a substitute for CFC–13, R–13B1, and R–503 in retrofitted and new industrial process refrigeration. HFC–23 has an extremely high 100-year GWP of 9000 relative to CO_2 and a lifetime of 280 years. Its GWP is the highest among the HFCs, and its lifetime is exceeded only by the PFCs. EPA believes HFC–23 could contribute significantly to global warming. In addition, the long lifetime of HFC–23 means any global warming or other effects would be essentially irreversible. While the current rule issued under section 608 of the CAA does not require recycling and recovery of HFC–23, or leak repair for systems using HFC–23, EPA strongly encourages users to anticipate future rulemakings with voluntary compliance. In particular, EPA urges users to reduce leakage and recover and recycle HFC–23 during equipment servicing and upon the retirement of equipment. HFC–23 is nonflammable and does not deplete stratospheric ozone.

(b) R–403B.—R–403B, which consists of HCFC–22, R–218, and propane, is acceptable as a substitute for CFC–13, R–13B1, and R–503 in retrofitted and new industrial process refrigeration. Because HCFC–22 contributes to ozone depletion, this blend is considered a transitional alternative. Regulations regarding recycling and reclamation issued under section 608 of the Clean Air Act apply to this blend. R–218, or perfluoropropane, is an extremely long-lived substance with an extremely high GWP. EPA believes this blend could contribute significantly to global warming. In addition, the long lifetime of R–218 means any global warming or other effects would be essentially irreversible. R–403B is only acceptable as a substitute for this end-use. The GWP of HCFC–22 is also somewhat high. Although propane is flammable, the blend is not. Leak testing has demonstrated that the blend's composition never becomes flammable. In a proposed rulemaking soon to be issued, EPA intends to propose R–403B unacceptable as a substitute for R–502 in all end-uses because other substitutes have been identified which do not exhibit such extreme GWPs or lifetimes.

(c) PFC Blend Alpha.—PFC Blend Alpha, which contains HFC–23 and R–116, is acceptable as a substitute for CFC–13, R–13B1, and R–503 in retrofitted and new industrial process refrigeration. Both components of this blend exhibit extremely high GWPs and long lifetimes. HFC–23 has a GWP of 9,000 and a lifetime of 280 years, and R–116, perfluoroethane, has a GWP of 9,000 and a lifetime of 10,000 years. EPA believes this blend could significantly contribute to global warming if allowed to escape refrigeration systems. In addition, the long lifetimes of R–116 and HFC–23 mean any global warming or other effects would be essentially irreversible. While the current rule issued under section 608 of the CAA does not require recycling and recovery of this blend, or leak repair for systems using it, EPA strongly encourages users to anticipate future rulemakings with voluntary compliance. In particular, EPA urges users to reduce leakage and recover and recycle this blend during equipment servicing and upon the retirement of equipment. This blend is nonflammable and does not deplete ozone.

(5) CFC–12 and R–502 Ice Skating Rinks, Retrofit and New

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–12 and R–502 in new and retrofitted ice rinks. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(6) CFC–12 and R–502 Cold Storage Warehouses, Retrofit

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–12 and R–502 in retrofitted cold storage warehouses. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(b) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–12 and R–502 in retrofitted cold storage warehouses. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(c) HCFC Blend Epsilon.—HCFC Blend Epsilon, which consists of HCFC–22, HFC–143a, and HFC–125, is acceptable as a substitute for CFC–12 and R–502 in retrofitted cold storage warehouses. See the discussion on HCFC Blend Epsilon under retrofitted industrial process refrigeration.

(7) CFC–12 and R–502 Cold Storage Warehouses, New

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–12 and R–502 in new cold storage warehouses. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(8) CFC–12, R–500, and R–502 Refrigerated Transport, Retrofit

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–12, R–500, and R–502 in retrofitted refrigerated transport. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(b) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–12, R–500, and R–502 is retrofitted refrigerated transport. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(c) HCFC Blend Gamma.—HCFC Blend Gamma, which consists of HCFC–22, HCFC–142b, and HCFC–124, is acceptable as a substitute for CFC–12, R–500, and R–502 in retrofitted refrigerated transport. Because HCFC–22, HCFC–142b, and HCFC–124 contribute to ozone depletion, this blend is considered a transitional alternative. Regulations regarding recycling and reclamation issued under section 608 of the Clean Air Act apply to this blend. HCFC–142b has one of the highest ODPs among the HCFCs, while HCFC–124 has one of the lowest. The GWPs of HCFC–22 and HCFC–142b are somewhat high. Although HCFC–142b is flammable, the blend is not. Leak testing has demonstrated that its composition never becomes flammable.

(d) HCFC Blend Epsilon.—HCFC Blend Epsilon, which consists of HCFC–22, HFC–143a, and HFC–125, is acceptable as a substitute for CFC–12 R–500, and R–502 in retrofitted refrigerated transport. See the discussion on HCFC Blend Epsilon under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(9) CFC–12, R–500, and R–502 Refrigerated Transport, New

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–12, R–500, and R–502 in new refrigerated transport. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(10) CFC–12 and R–502 Retail Food Refrigeration, Retrofit

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–12 and R–502 in retrofitted retail food refrigeration. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(b) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–12 and R–502 in retrofitted retail food refrigeration. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(c) HCFC Blend Gamma.—HCFC Blend Gamma, which consists of HCFC–22, HCFC–142b, and HCFC–124, is acceptable as a substitute for CFC–12 and R–502 in retrofitted retail food refrigeration. See the discussion on HCFC Blend Gamma under retrofitted CFC–12, R–500, and CFC–502 refrigerated transport.

(d) HCFC Blend Epsilon.—HCFC Blend Epsilon, which consists of HCFC–22, HFC–143a, and HFC–125, is acceptable as a substitute for CFC–12 and R–502 in retrofitted retail food refrigeration. See the discussion on HCFC Blend Epsilon under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(11) CFC–12 and R–502 Retail Food Refrigeration, New

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–12 and R–502 in new retail food refrigeration. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(12) CFC–12 and R–502 Commercial Ice Machines, Retrofit

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–12 and R–502 in retrofitted commercial ice machines. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(b) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–12 and R–502 in retrofitted commercial ice machines. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(c) HCFC Blend Gamma.—HCFC Blend Gamma, which consists of HCFC–22, HCFC–142b, and HCFC–124, is acceptable as a substitute for CFC–12 and R–502 in retrofitted commercial ice machines. See the discussion on HCFC Blend Gamma under retrofitted CFC–12, R–500, and CFC–502 refrigerated transport.

(d) HCFC Blend Epsilon.—HCFC Blend Epsilon, which consists of HCFC–22, HFC–143a, and HFC–125, is acceptable as a substitute for CFC–12 and R–502 in retrofitted commercial ice machines. See the discussion on HCFC Blend Epsilon under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(13) CFC–12 and R–502 Commercial Ice Machines, New

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–407A and R–407B.—R–407A and R–407B, which consist of HFC–134a, HFC–32, and HFC–125, are acceptable as substitutes for CFC–12 and R–502 in new commercial ice machines. See the discussion on these blends under retrofitted CFC–11, CFC–12, and R–502 industrial process refrigeration.

(14) CFC–12 and R–502 Vending Machines, Retrofit

(a) R–404A.—R–404A, which consists of HFC–125, HFC–143a, and HFC–134a, is acceptable as a substitute for CFC–12 and R–502 in retrofitted vending machines. None of this blend's constituents contains chlorine, and thus this blend poses no threat to stratospheric ozone. However, HFC–125 and HFC–143a have very high GWPs, and the GWP of HFC–134a is somewhat high. EPA strongly encourages recycling

and reclamation of this blend to reduce its direct global warming impact. Although HFC–134a is flammable, the blend is not. Leak testing has demonstrated that its composition never becomes flammable.

(b) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–12 and R–502 in retrofitted vending machines. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(c) R–507.—R–507, which consists of HFC–125 and HFC–143a, is acceptable as a substitute for CFC–12 and R–502 in retrofitted vending machines. None of this blend's constituents contains chlorine, and thus this blend poses no threat to stratospheric ozone. However, HFC–125 and HFC–143a have very high GWPs. EPA strongly encourages recycling and reclamation of this blend in order to reduce its direct global warming impact. Although HFC–143a is flammable, the blend is not. It is an azeotrope, so it will not fractionate during operation. Leak testing has demonstrated that its composition never becomes flammable.

(d) HCFC Blend Gamma.—HCFC Blend Gamma, which consists of HCFC–22, HCFC–142b, and HCFC–124, is acceptable as a substitute for CFC–12 and R–502 in retrofitted vending machines. See the discussion on HCFC Blend Gamma under retrofitted CFC–12, R–500, and CFC–502 refrigerated transport.

(15) CFC–12 Vending Machines, New

(a) R–404A.—R–404A, which consists of HFC–125, HC–143a, and HFC–134a, is acceptable as a substitute for CFC–12 and R–502 in new vending machines. See the discussion on this blend under retrofitted CFC–12 and R–502 vending machines.

(b) R–507.—R–507, which consists of HFC–125 and HFC–143a, is acceptable as a substitute for CFC–12 and R–502 in new vending machines. See the discussion on this blend under retrofitted CFC–12 and R–502 vending machines.

(16) CFC–12 Water Coolers, Retrofit

(a) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–12 in retrofitted water coolers. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(b) HCFC Blend Gamma.—HCFC Blend Gamma, which consists of HCFC–22, HCFC–142b, and HCFC–124, is acceptable as a substitute for CFC–12 in retrofitted water coolers. See the discussion on HCFC Blend Gamma under retrofitted CFC–12, R–500, and CFC–502 refrigerated transport.

(17) CFC–12 Household Refrigerators, Retrofit

(a) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–12 in retrofitted household refrigerators. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(b) HCFC Blend Gamma.—HCFC Blend Gamma, which consists of HCFC–22, HCFC–142b, and HCFC–124, is acceptable as a substitute for CFC–12 in retrofitted household refrigerators. See the discussion on HCFC Blend Gamma under retrofitted CFC–12, R–500, and CFC–502 refrigerated transport.

(18) CFC–12 and R–502 Household Freezers, Retrofit

(a) R–402A and R–402B.—R–402A and R–402B, which consist of HCFC–22, propane, and HFC–125, are acceptable as substitutes for CFC–11, CFC–12, and R–502 in retrofitted household freezers. HCFC–22 contributes to ozone depletion, and will be phased out according to the accelerated schedule (published 12/10/93, 58 FR 65018), although it has a lower ODP than CFC–12. The GWP of HFC–125 is very high and that of HCFC–22 is somewhat high. Although these blends contain one flammable constituent, propane, the blends themselves are not flammable. In addition, while testing demonstrated that the vapor and liquid compositions changed during leaks, neither phase became flammable.

(b) R404A.—R–404A, which consists of HFC–125, HFC–143a, and HFC–134a, is acceptable as a substitute for CFC–12 and R–502 in retrofitted household freezers. See the discussion on this blend under retrofitted CFC–12 and R–502 vending machines.

(c) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–12 in retrofitted household freezers. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(d) R–507.—R–507, which consists of HFC–125 and HFC–143a, is acceptable as a substitute for CFC–12 and R–502 in retrofitted household freezers. See the discussion on this blend under retrofitted CFC–12 and R–502 vending machines.

(e) HCFC Blend Gamma.—HCFC Blend Gamma, which consists of HCFC–22, HFC–142b, and HCFC–124, is acceptable as a substitute for CFC–12 in retrofitted household freezers. See the discussion on HCFC Blend Gamma under retrofitted CFC–12, R–500, and CFC–502 refrigerated transport.

(19) CFC–12 and R–502 Household Freezers, New

(a) R–402A and R–402B.—R–402A and R–402B, which consist of HCFC–22, propane, and HFC–125, are acceptable as substitutes for CFC–11, CFC–12, and R–502 in retrofitted household freezers. See the discussion on R–402A and R–402B under retrofitted household freezers.

(b) R–404A.—R–404A, which consists of HFC–125, HFC–143a, and HFC–134a, is acceptable as a substitute for CFC–12 and R–502 in new household freezers. See the discussion on this blend under retrofitted CFC–12 and R–502 vending machines.

(c) R–507.—R–507, which consists of HFC–125 and HFC–143a, is acceptable as a substitute for CFC–12 and R–502 in new household freezers. See the discussion on this blend under retrofitted CFC–12 and R–502 vending machines.

(20) CFC–12 and R–500 Residential Dehumidifiers, Retrofit

Please note that different temperature regimes may affect the applicability of substitutes within this end-use.

(a) R–406A.—R–406A, which consists of HCFC–22, HCFC–142b, and isobutane, is acceptable as a substitute for CFC–12 and R–500 in retrofitted residential dehumidifiers. See the discussion on R–406A under retrofitted R–500 centrifugal chillers.

(b) HCFC Blend Gamma.—HCFC Blend Gamma, which consists of HCFC–22, HCFC–142b, and HCFC–124, is acceptable as a substitute for CFC–12 and R–500 in retrofitted residential dehumidifiers. See the discussion on HCFC Blend Gamma under retrofitted CFC–12, R–500, and CFC–502 refrigerated transport.

(21) CFC–12 Automobile Air Conditioners, Retrofit and New

A smooth transition to the use of substitutes strongly depends on the continued purity of the recycled CFC–12 supply. The existence of several substitutes in this end-use may increase the likelihood of significant cross-contamination. To address this increased risk, EPA is proposing several use conditions on the use of all motor vehicle air conditioning refrigerants. Please refer to the notice of proposed rulemaking, soon to be issued, for more information.

(22) CFC–12 Non-Automobile Motor Vehicle Air Conditioners, Retrofit and New

(a) HCFC–22.—HCFC–22 is acceptable as a substitute for CFC–12 in retrofitted and new CFC–12 Non-Automobile Motor Vehicle Air Conditioners. In some situations, HCFC–22 may be used as a retrofit refrigerant in bus and rail car air conditioning systems originally designed to use CFC–12. In addition, while HCFC–22 is the primary refrigerant in these uses, EPA is listing it as an acceptable substitute for CFC–12 in new systems in order to remove confusion about its usefulness. Please note that HCFC–22 is only acceptable in motor vehicles other than automobiles. Design differences render HCFC–22 ineffective in cars. In fact, HCFC–22 may damage automobile air conditioners. HCFC–22 does contribute to ozone depletion and will therefore be phased out according to the accelerated schedule (published 12/10/93, 58 FR 65018). It is therefore covered by regulations issued under section 608 of the CAA. HCFC–22 is nonflammable.

(23) Non-mechanical Heat Transfer, Retrofit and New

EPA did not review substitutes for this end-use as part of the SNAP FRM, nor did it propose to include this end-use in the refrigeration and air conditioning sector in the NPRM (58 FR 28094). However, the Agency has developed a better understanding of the volumes likely to be used as coolants, and this new information has led EPA to reconsider its earlier position that heat transfer systems constitute small uses. Therefore, EPA has included this end-use within the refrigeration and air conditioning sector. In a subsequent proposal, EPA plans to propose narrowed use limits for several substitutes in this end-use.

(24) CFC–13, R–13B1, and R–503 Very Low Temperature Refrigeration, Retrofit and New

This type of refrigeration requires temperatures well below those achieved with R–502 or HCFC–22. Because these systems are used for purposes such as freezing blood or for simulating extreme conditions for testing, extremely low leakage rakes are essential. A limited number of substitutes have been identified that are capable of meeting technical requirements. These substitutes all contain components with extremely high GWPS, and EPA is concerned about their potential contribution to global warming. However, under SNAP, EPA intends to only find those substitutes unacceptable that clearly present greater overall risk. Given this framework, EPA finds these high-GWP substitutes acceptable. At the same time, EPA strongly urges industry to develop new alternatives for this end-use that do not contain substances with such high GWPs and long lifetimes.

(a) HFC–23.—HFC–23 is acceptable as a substitute for CFC–13, R–13B1, and R–503 in retrofitted and new very low temperature refrigeration. HFC–23 has an extremely high GWP of 9000 and a lifetime of 280 years. Its GWP is the highest among the HFCs, and its lifetime is exceeded only by the PFCs. EPA believes it could contribute significantly to global warming. In addition, the long lifetime of HFC–23 means any global warming or other effects would be essentially irreversible. While the current rule issued under section 608 of the CAA does not require recycling and recovery of HFC–23, or leak repair for systems using HFC–23, EPA strongly encourages users to anticipate future rulemakings with voluntary compliance. In particular, EPA urges users to reduce leakage and recover and recycle HFC–23 during equipment servicing and upon the retirement of equipment. HFC–23 is nonflammable and does not deplete ozone.

(b) R–403B.—R–403B, which consists of HCFC–22, R–218, and propane, is acceptable as a substitute for CFC–13, R–13B1, and R–503 in retrofitted and new very low temperature refrigeration. Because HCFC–22 contributes to ozone depletion, this blend is considered a transitional alternative. Regulations regarding recycling and reclamation issued under section 608 of the Clean Air Act apply to this blend. R–218, or perfluoropropane, is an extremely long-lived substance with an extremely high GWP. EPA believes this blend could significantly contribute to global warming. In addition, the long lifetimes of R–218 means global warming and other effects would be essentially irreversible. R–403B is only acceptable as a substitute for the refrigerants listed above. The GWP of HCFC–22 and HCFC–142b are also somewhat high. Although propane is flammable, the blend is not. Leak testing has demonstrated that the blend's composition never becomes flammable. In a proposed rulemaking soon to be issued, EPA intends to propose R–403B unacceptable as a substitute for R–502 in all end-uses because other substitutes have been identified which do not exhibit such extreme GEPs or lifetimes.

(c) PFC Blend Alpha.—PFC Blend Alpha, which contains HFC–23 and R–116, is acceptable as a substitute for CFC–13, R–13B1, and R–503 in retrofitted and new very low temperature refrigeration. Both components of this blend exhibit extremely high GWPs and long lifetimes. HFC–23 has a GWP of 9,000 and a lifetime of 280 years, and R–116, perfluoroethane, has a GWP of 9,000 and a lifetime of 10,000 years. EPA believes this blend could significantly contribute to global warming if allowed to escape refrigeration systems. In addition, the long lifetimes of R–116 and HFC–23 mean any global warming or other effects would be essentially irreversible. While the current rule issued under section 608 of the CAA does not require recycling and recovery of this blend, or leak repair for systems using it, EPA strongly encourages users to anticipate future rulemakings with voluntary compliance. In particular, EPA urges users to reduce leakage and recover and recycle HFC–23 during equipment servicing and upon the retirement of equipment. This blend is nonflammable and does not deplete ozone.

B. Foams

1. Clarification from March 18, 1994 Final Rulemaking

In Section IX.E. Foams, under the listing decisions for rigid polyurethane and polyisocyanurate laminate boardstock (59 FR 13085), the narrative under substitute (e) HCFC–22/HCFC–141b incorrectly reads as follows: "The *HCFC–22/HCFC–142b* blend is acceptable as a substitute for CFC–11 in rigid polyurethane and polyisocyanurate laminate boardstock foams." This sentence should read *HCFC–22/HCFC–141b.* The Agency regrets any confusion this error may have caused.

Further, the end-use titled "Phenolic Insulation Board" requires clarification. In this end-use the Agency includes foam products manufactured from both the discontinuous block (or bun) process and the continuous lamination process. Henceforth, this end-use will be referred to as "Phenolic Insulation Boardstock and Bunstock Foam."

2. New Listing Decisions

a. Acceptable Substitutes

(1) Rigid Polyurethane and Polyisocyanurate Laminated Boardstock

(a) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. This proprietary manufacturing process, developed by the U.S. Navy, transforms organic casting resins into electrosettable foaming compounds. These compounds are made electrically

semiconductive with the addition of electrically polarizable particles, and if necessary, an electrically conductive fluid. This process enables foam manufacturers to electrically accelerate the speed at which they set (i.e., harden) and cure (i.e. solidify). Other characteristics such as density, compressibility, adhesion, and shear strength can also be electrically controlled.

Potential health and environmental risks for this technology are considered similar to or less than those of other acceptable substitutes for this end-use. Risk is expected to vary based on the quantity of electrically polarizable particles added in the polymer and whether other electrically conductive fluids are added to the formulation. Of the six potential electrically foaming agents reviewed by the Agency, none represented a significant risk under the SNAP criteria for evaluation. Adequate workplace precautions such as workplace ventilation were presumed. For additional detail see, "SNAP Evaluation for Electroset Technology."

(2) Rigid Polyurethane Appliance

(a) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. See discussion above.

(3) Rigid Polyurethane Spray and Commercial Refrigeration, and Sandwich Panels

(a) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. See discussion above.

(4) Rigid Polyurethane Slabstock and other Foams

(a) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. See discussion above.

(5) Polystyrene Extruded Boardstock and Billet

(a) HFC–143a.—HFC–143a is acceptable as an alternative to CFC–12 in polystyrene boardstock and billet foams. HFC–143a has a higher global warming potential (GWP) than other acceptable substitutes for this end-use.

(b) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. See discussion above.

(6) Phenolic Insulation Boardstock and Bunstock Foam

(a) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. See discussion above.

(7) Polyurethane Flexible

(a) Saturated Light Hydrocarbons C3–C6.—Saturated light hydrocarbons C3–C6 (and blends thereof) are acceptable as substitutes for CFC–11 and methyl chloroform in polyurethane flexible foam. Saturated light hydrocarbons C3–C6 offer the potential of a non-ozone-depleting flexible foam. Saturated light hydrocarbons C3–C6 offer the potential of a non-ozone-depleting alternative to the use of CFC–11 blowing agents in polyurethane flexible foams. Plant modifications, however, may be necessary to accommodate the flammability of hydrocarbons. Saturated light hydrocarbons C3–C6 are VOCs and are subject to control as such under Title I of the Clean Air Act.

(b) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. See discussion above.

(8) Polyurethane Integral Skin

(a) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. See discussion above.

(9) Polystyrene Extruded Sheet

(a) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. See discussion above.

(10) Polyolefin Foam

(a) Methylene Chloride.—Methylene chloride is acceptable as a substitute for CFC–11, CFC–12 and CFC–14 in polyolefin foams. Methylene chloride is a non-ozone-depleting and non-global warming alternative blowing agent. Nevertheless, it does pose potential health and safety concerns. In addition to occupational and worker safety standards, some local and regional restrictions apply to the use of methylene chloride. To assess risks in the Polyolefin foam sector, EPA used data collected by the Occupational Safety and Health Administration (OSHA) for the proposed revision of the permissible exposure level (PEL) for methylene chloride. The Agency's estimate for total population risk for methylene chloride was based on average plant emissions derived from OSHA's analysis, and while not negligible, was within the range of existing Agency decisions on acceptable risk. For further detail, refer to the SNAP background document entitled, "Risk Screen on the Use of Methylene Chloride in Polyolefin Foams for Class I Ozone-Depleting Substances: Foams, June, 1994." Users of this substitute should note that methylene chloride will be subject to future controls for hazardous air pollutants under Title III section 112 of the Clean Air Act.

(b) Polyolefin Chemical Blend A.—Polyolefin Chemical Blend A is an acceptable substitute for CFC–11, CFC–12 and CFC–114 in polyolefin foams. Polyolefin Chemical Blend A is a proprietary combination of blowing agents submitted by a polyolefin foam manufacturer.

(c) HFC–152a/Saturated Light Hydrocarbons C3–C6 Blends.—HFC–152a/Saturated Light Hydrocarbons C3–C6 blends are acceptable substitutes for CFC–11, CFC–12 and CFC–114 in polyolefin foams. Both HFC–152a and saturated light hydrocarbons C3–C6 are flammable. Plant modifications may be necessary to accommodate this characteristic. Saturated light hydrocarbons C3–C6 are volatile organic compounds (VOCs) and are subject to control as such under Title I of the Clean Air Act.

(d) Electroset Technology.—The Electroset Manufacturing Technology is an acceptable substitute for CFC–11 blown rigid polyurethane and polyisocyanurate laminated boardstock foams. See discussion above.

C. Solvent Cleaning

1. New Listing Decisions

a. Acceptable Substitutes

(1) Metals Cleaning

(a) Trans-1,2-dichloroethlyene.—Trans-1,2-dichloroethylene is acceptable as an alternative to MCF and CFC–113 in metals cleaning.

(b) Volatile Methyl Siloxanes.—Octamethylcyclotetrasiloxanes and decamethylcyclopentasiloxanes are acceptable alternatives to MCF and CFC–113 in metal cleaning. Evaluation of other VMS's is ongoing.

(2) Electronics Cleaning

(a) Trans-1,2-dichloroethlyene.-Trans-1,2-dichloroethylene is acceptable is acceptable as an alternate

to MCF and CFC–113 in electronics cold cleaning.

(b) Volatile Methyl Siloxanes.—Octamethylcyclotetrasiloxanes and decamthylcyclopentasiloxanes are acceptable alternatives to MCF and CFC–113 in electronics cleaning. Evaluation of other VMS's is ongoing.

(3) Precision Cleaning

(a) Trans-1,2-dichloroethlyene.—Trans-1,2-dichloroethylene is acceptable as an alternative to MCF and CFC–113 in precision cleaning.

(b) HCFC–123.—HCFC–123 is an acceptable substitute for CFC–113 and MCF in precision cleaning. New toxicity data has led to an upward revision of the company set workplace exposure limit (AEL) of 30 ppm. The Agency believes that under normal conditions of use this limit is attainable.

(c) Volatile Methyl Siloxanes.—Octamethylcyclotetrasiloxanes and decamethylcyclo pentasiloxanes are acceptable alternatives to MCF and CFC–113 in precision cleaning. Evaluation of other VMS's is ongoing.

D. Fire Suppression and Explosion Protection

1. Weight and Volume Equivalence of Halon Substitutes

In the SNAP Rulemaking published March 18, 1994 (59 FR 13043), EPA included weight and volume equivalence data in the discussion of halon substitutes. This data was derived from either of two sources. EPA used manufacturer data when available, otherwise the data was taken from the background document entitled "Characterization of Risk from the Use of Substitutes for Class I Ozone-Depleting Substances: Fire Extinguishing and Explosion Protection (Halon Substitutes)." While this data was presented in the Rulemaking for informational purposes only to establish a relative concept, the variability of methodologies for calculating these values has generated some confusion in the regulated and user community. Therefore, at EPA's request, the Technical Committee of the Halon Alternatives Research Corporation has developed an agreed upon set of data for determining weight and volume equivalence of halon substitutes.

The following table presents weight and volume equivalents for certain halon substitutes when compared to Halon 1301. The equivalents were calculated using a single, fuel-specific design concentration (heptane); therefore, they do not represent the exact weight or volume of the agent needed to protect any specific space against any specific hazard. The information used to calculate the equivalents was obtained from agent manufacturers and NFPA 2001, "Standard on Clean Agent Fire Extinguishing Systems." Equivalents are included for general comparison and informational purposes only.

Fire suppression agents must be evaluated in the context of the fire extinguishing system equipment with which they are used. Design concentration, and weight and volume equivalents are only meaningful when evaluated in specific system hardware configurations. This is especially important when comparing storage volume where storage container fill density varies with the equipment used. Agent fire suppression performance will vary with the system used and the detailed design of the system. Therefore, fire suppression agent manufacturers do not generally recommend design concentration as these are also a function of the system hardware in which they are used. Hence, these data are provided for general guidance only and do not reflect a recommendation for system design or a basis for rigorous quantitative comparison.

1	2	3	4	5	6	7
Agent	Design Concentration (% Vol.)	lb/1000 ft^3 @ 70°F per NFPA 2001 [5]	lb agent lb Halon 1301 [6]	ft^3/agent ft^3/1301 [7]	Maximum fill density (lb/ft^3) [8]	Storage pressure [9] (psi)
Halon 1301	[4] 5	20.6	1.0	1.0	70	360
HFC–23	[1] 16	34.8	1.7	2.2	54	609
HFC–125	[1] 10.9	38.7	1.9	2.3	58	166
HCFC–124	[1,2] 8.5	33.8	1.6	1.6	71	195
IG–541	[1,2] 37.5	42.0	2.0	[10] 10.5	[9] N/A	2175
FC–3–1–10	[1,2] 6	39.3	1.9	1.7	80	360
HCFC Blend A	[3] 8.6	22.6	1.1	1.4	56	360
HFC–227ea	[1,2] 7	34.1	1.7	1.6	72	360

Notes:
[1] Based on 120 percent of cup burner value for n-heptane.
[2] Based on 120 percent of cup burner verified by listing/approval tests.
[3] Based on listing/approval tests, cup burner value approx. 10 percent.
[4] Minimum design concentration per NFPA 12A, cup burner value approx. 3 percent.
[5] Design concentration per NFPA 2001.
[6] Ratio of value in Column 3 to value in Column 3 for Halon 1301 (weight equivalents).
[7] Based on ratio in Column 4 to ratio of maximum fill density relative to Halon 1301 (storage volume equivalents).
[8] Per NFPA 2001, NFPA 12A (for Halon 1301).
[9] Approx. storage density of 13.3 lb/ft^3 @2175 psi.
[10] Based on approx. storage density of IG–541 @2175 psi.

Weight and volume equivalencies based on cup burner data are much less meaningful for streaming agents than for total flood agents. One needs to consider performance of the agents and equipment in larger-scale standardized tests.

2. Use of CFCs and HCFCs in Portable Extinguishers

In this notice, EPA is clarifying the relationship between CAAA section 610 and section 612 regulations. Under section 610(b) (58 FR 4768; January 15, 1993), CFCs are banned from sale or distribution in all portable fire extinguishers. Under section 610(d) (58 FR 69637, December 30, 1993), HCFCs in pressurized dispensers are banned from sale or distribution. However, section 619(d) excludes HCFCs which are part of an installed 'system,' and therefore exempted total flooding systems and those streaming

applications which incorporate fixed, automatic systems (58 FR 69646). Further, section 610(d) only allows the sale of a portable fire extinguisher containing HCFCs where other agents are not suitable for the intended applications. Suitability includes the commercial availability of the agent and the ability of the agent to suppress a fire in progress without damaging the equipment requiring protection (58 FR 69648). Because alternatives are available for residential consumer uses, section 610(d) banned the sale and use of HCFCs in portable fire extinguishers for residential consumer applications. However, in commercial (including industrial and military) settings, the variety of hazards are too broad to make a standard rulemaking, and therefore under section 610(d) EPA has established industry-based mechanisms for controlling the sale of HCFCs to commercial users and owners of watercraft and aircraft. Because section 610(d) already bans CFCs in portable fire extinguishers and HCFCs in residential applications, it is not necessary for them to be listed as unacceptable under SNAP.

The HCFCs and HCFC Blends that are listed as acceptable under SNAP, but that are not acceptable under section 610(d) in residential streaming applications are: HCFC–123, HCFC–124, [HCFC Blend] B, [HCFC Blend] C, and [HCFC Blend] D.

3. New Listing Decisions

a. Acceptable Substitutes

(1) Streaming Agents

(a) HCFC–124.—HCFC–124 is acceptable as a Halon 1211 substitute. HCFC–124 has an ODP of 0.02, a 100-year GWP of 440 and an atmospheric lifetime of 7 years. Its extinguishment concentration, based on cup burner tests, is 7.0 per cent, while its cardiotoxic level (LOAEL) is 2.5 per cent in the dog, with no effect (NOAEL) apparent at 1.0 per cent.

Actual exposures were assessed using personal monitoring devices, and the Agency concludes that likely exposure levels from its use as a streaming agent do not exceed safe levels when used in a well ventilated area. The manufacturer of portable extinguishers using these agents should include cautionary language on the label indicating the need for ventilation.

This agent is subject to regulations under section 610(d) of the CAA, which stipulates that HCFCs may only be used in portable fire extinguishers where other commercially available agents are not as effective for the fire hazard. Under section 610(d), HCFCs may not be used in residential extinguishers.

(b) [HCFC Blend] C.—[HCFC Blend] C is acceptable as a Halon 1211 substitute. This agent is a proprietary blend of HCFC–123, HCFC–124, HCFC–134a, and an additive. The cardiotoxic LOAEL and NOAEL for HCFC–123 is, respectively, 2.0 per cent and 1.0 per cent; the LOAEL and NOAEL for HCFC–124 is 2.5 per cent and 1.0 per cent; and the LOAEL and NOAEL for HCFC–134a is 8.0 per cent and 4.0 per cent respectively. While the manufacturer may, in the future, conduct personal monitoring studies of actual exposure levels of this agent, previous studies conducted for pure HCFC–123 and for pure HCFC–124 have shown that exposure in the breathing zone does not exceed cardiotoxicity values.

The ODP of both HCFC–123 and HCFC–124 is 0.02 while HCFC–134a has no ODP since it contains no chlorine. The respective GWP values for HCFC–123, HCFC–124, and HCFC–134a are 90, 440, and 1200, relative to CO_2, while their respective atmospheric lifetimes are 2 years, 7 years and 16 years.

This agent is subject to regulations under section 610(d) of the CAA, which stipulates that HCFCs may only be used in portable fire extinguishers where other commercially available agents are not as effective for the fire hazard. Under section 610(d), HCFCs may not be used in residential extinguishers.

(c) [HCFC Blend] D.—[HCFC Blend] D is acceptable as a Halon 1211 substitute. This blend is comprised of HCFC–123 plus a proprietary additive, and is intended for large outdoor uses such as wheeled extinguishers, HCFC–123 is currently listed as acceptable for use in non-residential streaming applications. This agent is subject to regulations under section 610(d) of the CAA, which stipulates that HCFCs may only be used in portable fire extinguishers where other commercially available agents are not as effective for the fire hazard. Under section 610(d), HCFCs may not be used in residential extinguishers.

(d) Gelled Halocarbon/Dry Chemical Suspension (formerly Powdered Aerosol B).—Gelled Halocarbon/Dry Chemical Suspension is acceptable as a Halon 1211 substitute. This class of agents is comprised of a variety of blends developed for particular markets. Each blend contains one or more halocarbons, a dry chemical, and a gel which keeps the powder and gas uniform. Both the halocarbon and the dry chemical act on the fire, while the gel is consumed by the fire.

EPA's acceptability listing is extended to any blend comprised of a halocarbon with a cardiotoxic LOAEL of at least 2.0 per cent, in combination with a dry chemical or multipurpose dry chemical that is currently widely used, including monoammonium phosphate (ABC powder), potassium bicarbonate (Purple K powder), and sodium bicarbonate. This listing decision also includes ammonium polyphosphate.

The manufacturer of this technology proposes using several different halocarbons singly and in blends, in combination with one of several dry chemicals or multipurpose dry chemical powders. The halocarbons included in the SNAP submission include HFC–227ea, HFC–125, HFC–134a, and HFC–125 blended with HFC–134a. The cardiotoxic LOAEL and NOAEL of HFC–227ea is, respectively, 10.5 per cent of 9.0 per cent; the LOAEL and NOAEL of HFC–125 is 10.0 per cent and 7.5 per cent; and the LOAEL and NOAEL of HFC–134a is 8.0 per cent and 4.0 per cent respectively. Previous personal monitoring tests of streaming agents using pure HCFC–123 (LOAEL 2.0 per cent; NOAEL 1.0 per cent) and HCFC–124 (LOAEL 2.5 per cent; NOAEL 1.0 per cent) indicate that actual exposure to the breathing zone does not exceed these values. Such tests with agents which pose greater risk of cardiosensitization indicate that HFC–227ea, HFC–125 and HFC–134a can also be used safely in well-ventilated areas. In addition, the quantity of the halocarbons in this technology is approximately half of what a pure halocarbon extinguisher would contain and thus there is a built-in margin of safety as it relates to cardiotoxicity.

While all of the proposed halocarbons have no ODP, the GWP and atmospheric lifetime of HFC–227ea is 2050 and 31 years; of HCF–125 is 3400 and 41 years; and of HCF–134a is 1200 and 16 years.

The dry chemical powders proposed by the manufacturer include ammonium polyphosphate, monoammonium phosphate (MAP), potassium bicarbonate, and sodium bicarbonate. Sodium bicarbonate was among the original dry chemical extinguishers, followed by potassium bicarbonate and monoammonium phosphate which were developed in the 1960s. Thus, these dry chemical agents have been in use for decades. These powders have been considered generally nontoxic, although if not used according to manufacturers directions they can cause temporary breathing difficulty during and immediately after discharge. Discharge in large quantities may decrease visibility. These powders typically have particle sizes of less than 10 microns up to 75 microns, with most being optimized at 20 to 25 microns.

Ammonium polyphosphate has previously been used as a fire retardant additive to products and coatings, and the manufacturer is introducing it for use as a streaming agent.

Monoammonium phosphate, commonly known as ABC powder, is a general purpose agent which can be used for class A, B and C fires. However, it is corrosive on hard surfaces. Potassium bicarbonate (Purple K) and sodium bicarbonate cannot be used on class A fires, but are used for specific class B and C applications, generally in the commercial sector. Ammonium polyphosphate is most suitable for military uses, because it is not corrosive.

An initial assessment of inhalation toxicology of fine particulates indicates that some risk is posed when the particles are below a certain size compared to the mass per cubic meter in air. Particle sizes less than 10 to 15 microns and a mass above the ACGIH nuisance dust levels raise concerns which need to be further studied should these agents be used in a total flooding application. However, in a streaming application, it is unlikely that the exposure level will exceed ACGIH dust levels.[1]

The particle size distribution for these powders was analyzed with a Micromeretics Sedigraph using Sedisperse A–11 as the settling medium. Mesh of various sizes ranging from 40 mesh (420 microns) to 325 mesh (45 microns) is used to filter the powders into a pan, thus leaving a 'pan fraction' of powder particles which are smaller than 45 microns. A sample of the sediment in the pan is mixed in the Sedisperse medium, which is a heavy, high viscosity fluid. An X-ray beam shines through the sample and counts the particles as they drift down.

Using this method, 50 to 75 per cent of the monoammonium phosphate is smaller than 45 microns. Of that portion which is smaller than 45 microns, the median particle size is 20 microns, with 19.5 per cent of the particles being smaller than 10 microns, and 3.0 per cent being smaller than five microns. Thus, up to 15 per cent (.75×.195) of the entire MAP product is smaller than 10 microns.

Seventy-four to 88 per cent of the potassium bicarbonate is smaller than 45 microns, with a median size of the pan fraction being 17.4 microns. With 28.4 per cent of the pan fraction being ten microns in size, then up to 25 per cent (.284×88) of the total potassium bicarbonate product is under ten microns. 11.3 per cent of the pan fraction is under five microns.

Seventy-five to ninety per cent of the sodium bicarbonate is retained in the pan, and therefore is smaller than 45 microns. The median particle size of the pan fraction is 15.0 microns. With 12.2 per cent of the pan fraction being smaller than ten microns, then 11 per cent of the total product is smaller than ten microns. One per cent of the pan fraction is smaller than five microns.

The manufacturer's data indicate that there are two mixtures of ammonium polyphosphate. The P40 mixture has a particle size distribution with 50% of the particles less than 10 microns. The intended market for this agent is military applications. The P30 mixture has a distribution with 20% of particles less than 10 microns and 50% less than 30 microns. The intended market for this agent is for use in domestic and industrial kitchens.

E. Sterilants

1. EtO/CO_2 Systems

In the March 18, 1994 Final Rulemaking, EPA described ethylene oxide/carbon dioxide (EtO)/CO_2) substitutes for use in medical sterilization. Recently, the Agency has become aware of more information concerning the design and use of EtO/CO_2 systems, which is described in this Notice.

EtO/CO_2 is stored in tanks as a liquified compressed gas mixture. A tube in the tank draws the liquid mixture from the bottom for use as a sterilant. By Department of Transportation (DOT) regulations, the tank can be filled with liquid to only 60 per cent of its capacity. The remaining 40 per cent capacity above the liquid is called the "headspace."

Liquified compressed gases will vaporize into the headspace of a tank until equilibrium is reached. Each gas in a mixture vaporizes at its own specific rate. In EtO/CO_2 systems, the CO_2 vaporizes much more readily than does the EtO. The CO_2 vaporizes to fill the headspace, and virtually all the EtO remains in the liquid mixture.

The starting liquid/compressed gas mixture is 8.5 per cent EtO and 91.5 per cent CO_2. When a tank is filled, some CO_2 vaporizes to fill the headspace. Because the liquid mixture loses some CO_2 to form this vapor, the percentage of EtO in the mixture is now greater than 8.5 per cent. As liquid leaves the tank, the headspace increases. More CO_2 continues to vaporize into the headspace and the percentage of EtO in the remaining liquid mixture continues to increase. This results in a liquid mixture that grows increasingly EtO-rich until the liquid is fully depleted. At a certain point during depletion, the percentage of EtO in the liquid mixture increases to a point where the mixture may become flammable.

Once the liquid mixture is fully depleted, only the CO_2-rich vapor phase remains in the tank. If the depletion is not noted, the sterilizer could attempt a sterilization cycle using the CO_2-rich vapor. Under these conditions, the vapor will not sterilize effectively.

Two methods of supply control effectively address these problems. The first uses one-tank-per-cycle "unit dose" tanks. The second uses larger, multiple-cycle tanks and a weight-sensing system.

Unit dose tanks hold only enough EtO/CO_2 for a single sterilization cycle. Unit dose tanks are available for several sizes of sterilizer chambers. After a cycle, the depleted tank is replaced with a fresh one. Using all of the gas in one discharge avoids the risks of flammability and ineffective sterilization which occur in multiple-cycle tanks. However, replacing the tank after each cycle is inconvenient. It also increases the risk of accidental exposure.

A weight-sensing system uses the tank for more than one sterilization cycle. To be safe, such a system must sense when a tank is depleted, before either the liquid mixture becomes flammable or when only ineffective vapors remain in the tank headspace.

For many gas mixtures, a pressure gauge can indicate the amount of gas in a tank. But for EtO/CO_2 systems, tank pressure does not change appreciably during tank depletion. As the liquid is depleted, more CO_2 fills the headspace and keeps the pressure almost constant. But as a tank of EtO/CO_2 is depleted, the weight of the liquid mixture decreases steadily.

A weight-sensing system monitors the weight of a tank as it is depleted. Before the increasingly EtO-rich liquid in the tank becomes flammable, the system switches to a fresh tank. The depleted tank can then be replaced.

Such systems are designed with numerous safety features to prevent accidental exposure. One drawback is that, when depleted, a tank still contains a portion of the original EtO/CO_2 charge. If more EtO/CO_2 were removed, the liquid mixture would approach the point of flammability.

[1] Documentation of the Threshold Limit Values and Biological Exposure Indices, Fifth Edition, 1986. American Conference of Governmental Industrial Hygienists Inc., Cincinnati, Ohio.

2. New Listing Decisions

a. Acceptable

(1) [HCFC Blend] A

[HCFC] Blend A is acceptable as a medical sterilant substitute for 12/88 CFC–12/EtO. This is the second agent listed under SNAP that can serve as a virtual drop-in replacement for 12/88, enabling users to transition away from CFC–12 without replacing their existing equipment.

Under Title III of the Clean Air Act Amendments of 1990, the Agency is required to regulate any of the 189 hazardous air pollutants (HAPs). Ethylene oxide is a HAP, and the user is alerted to follow all upcoming regulations concerning the use of ethylene oxide, whether used alone or in a blend. Manufacturers and users are alerted to the fact that the Agency has issued a Proposed Rulemaking which includes EtO used in all sterilizers except hospital systems (59 FR 10591, March 7, 1994).

This agent has been registered under FIFRA.

F. Aerosols

1. New Listing Decisions

A. Acceptable Substitutes

(1) Aerosol Solvent

a. Trans-1,2-dichloroethylene.—Trans-1,2-dichloroethylene is acceptable as a solvent substitute for CFC–113 and MCF in aerosols.

IV. Substitutes Pending Review

The Agency describes submissions as pending if data are incomplete or for which the 90-day review period is underway and EPA has not yet reached a final decision. For submissions that are incomplete, the Agency will contact the submitter to determine a schedule for providing the missing information if the Agency needs to extend the 90-day review period. EPA will use its authority under section 114 of the Clean Air Act to gather this information, if necessary. Any delay of the review period does not affect a date of publication. This notice can also be retrieved electronically from EPA's Technology Transfer Network (TTN), Clean Air Act Amendment Bulletin Board. If you have a 1200 or 2400 bps modem, dial (919) 541–5742. If you have a 9600 bps modem, dial (919) 541–1447. For assistance in accessing this service, call (919) 541–5384.

List of Subjects in 40 CFR Part 82

Environmental protection,, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

Dated: August 9, 1994.

Mary D. Nichols,

Assistant Administrator.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix A: Summary of Acceptable and Pending Decisions

REFRIGERANTS.—ACCEPTABLE SUBSTITUTES

End-use	Substitute	Decision	Comments
R–500 Centrifugal Chillers (Retrofit).	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
R–500 Centrifugal Chillers (New Equipment/NIKs).	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–11, CFC–12, R–502 Industrial Process Refrigeration (Retrofit).	HCFC–123	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	HCFC Blend Epsilon	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–11, CFC–12, R–502, Industrial process Refrigeration (New Equipment/NIKs).	HCFC–123	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
CFC–13, R–13B1, R–503 Industrial Process Refrigeration (Retrofit and New Equipment/NIKs.	HFC–23	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–403B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	PFC Blend Alpha	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
CFC–12, R–502 Ice Skating Rinks (Retrofit and New).	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
CFC–12, R–502 Cold Storage Warehouses (Retrofit).	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	HCFC Blend Epsilon	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.

REFRIGERANTS.—ACCEPTABLE SUBSTITUTES—Continued

End-use	Substitute	Decision	Comments
CFC–12, R–502 Cold Storage Warehouses (New Equipment/NIKs).	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
CFC–12, R–500, R–502 Refrigerated Transport (Retrofit).	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	HCFC Blend Gamma	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	HCFC Blend Epsilon	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–12, R–500 Refrigerated Transport (New Equipment/NIKs).	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
CFC–12, R–502 Retail Food Refrigeration (Retrofit).	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	HCFC Blend Gamma	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	HCFC Blend Epsilon	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–12, R–502 Retail Food Refrigeration (New Equipment/NIKs).	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
CFC–12, R–502 Commercial Ice Machines (Retrofit).	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	HCFC Blend Gamma	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	HCFC Blend Epsilon	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–12, R–502 Commercial Ice Machines (New Equipment/NIKs).	R–407A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–407B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
CFC–12 Vending Machines (Retrofit).	R–404A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–507	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	HCFC Blend Gamma	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–12 Vending Machines (New Equipment/NIKs).	R–404A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–507	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
CFC–12 Water Coolers (Retrofit)	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	HCFC Blend Gamma	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–12 Household Refrigerators (Retrofit).	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	HCFC Blend Gamma	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–12, R–502 Household Freezers (Retrofit).	R–402A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.

REFRIGERANTS.—ACCEPTABLE SUBSTITUTES—Continued

End-use	Substitute	Decision	Comments
	R–402B	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–404A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–507	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	HCFC Blend Gamma	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–12, R–502 Household Freezers (New Equipment/ NIKs).	R–402A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–402B	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	R–404A	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–507	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
CFC–12, R–500 Residential Dehumidifiers (Retrofit).	R–406A	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
	HCFC Blend Gamma	Acceptable	This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–12 Non-Automobile Motor Vehicle Air Conditioners (Retrofit and New).	HCFC–22	Acceptable	HCFC–22 may damage automobile air conditioning systems, which is why it is only acceptable for non-automotive use. This substitute is subject to containment and recovery regulations covering HCFCs.
CFC–13, R–13B1, and R–503 Very Low Temperature Refrigeration (Retrofit and New Equipment/NIKs.	HFC–23	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	R–403B	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.
	PFC Blend Alpha	Acceptable	EPA strongly recommends the containment and reclamation of this substitute.

REFRIGERANTS.—PENDING DECISIONS

Application	Substitute	Comments
CFC–12 Motor Vehicle Air Conditioning	HCFC Blend Delta	EPA has requested additional data.
HCFC–22 Heat Pumps	HFC–134a	EPA has not yet evaluated Class II substitutes.
	HFC–152a	EPA has not yet evaluated Class II substitutes.
	HFC–32	EPA has not yet evaluated Class II substitutes.
	R–407A/R–407B	EPA has not yet evaluated Class II substitutes.
HCFC–22 Conventional (Household) Air Conditioning.	HFC–125/HFC–134a/HFC–32	EPA has not yet evaluated Class II substitutes.

FOAM SECTOR.—ACCEPTABLE SUBSTITUTES

End-use	Substitute	Decision	Comments
CFC–11 Rigid Polyurethane and Polyisocyanurate Laminated Boardstock.	Electroset Technology	Acceptable	Proprietary technology.
CFC–11 Polyurethane, Rigid Appliance.	Electroset Technology	Acceptable	Proprietary technology.
CFC–11 Polyurethane, Rigid Commercial.	Electroset Technology	Acceptable	Proprietary technology.
CFC–11 Polyurethane, Rigid Slabstock and Other.	Electroset Technology	Acceptable	Proprietary technology.
CFC–12 Polystyrene, Extruded Boardstock and Billet.	HFC–143a	Acceptable	HFC–143a has the highest GWP of those substitutes acceptable for this end-use.
	Electroset Technology	Acceptable	Proprietary technology.
CFC–11 CFC–113 Phenolic, Insulation Board.	Electroset Technology	Acceptable	Proprietary technology.

FOAM SECTOR.—ACCEPTABLE SUBSTITUTES—Continued

End-use	Substitute	Decision	Comments
CFC–11 Polyurethane, Flexible ...	Electroset Technology .	Acceptable .	Proprietary technology.
	Saturated Light Hydrocarbons C3–C6.	Acceptable .	Flammability may be an issue for the manufacture and transport of products. Hydrocarbons are VOCs and are subject to control under Title I of the Clean Air Act.
CFC–11 Polyurethane, Integral Skin.	Electroset Technology .	Acceptable .	Proprietary technology.
CFC–12 Polystyrene, Extruded Sheet.	Saturated Light Hydrocarbons C3–C6.	Acceptable .	Flammability may be an issue for the manufacture and transport of products. Hydrocarbons are VOCs and are subject to control under Title I of the Clean Air Act.
	Electroset Technology .	Acceptable .	Proprietary technology.
CFC–12, CFC–114, CFC–11 Polyolefin.	Methylene Chloride	Acceptable .	Revised OSHA PELs have been proposed at 25 ppm (TWA) for methylene chloride (11/7/91). Subject to meeting all future ambient air controls for hazardous air pollutants under Title III section 112, of the 1990 CAA Amendments. RCRA standards must be met.
	HFC–152a/Saturated Light Hydrocarbons.	Acceptable .	Flammability may be an issue for the manufacture and transport of products. Major sources of VOC emissions are subject to the New Source Review (NSR) program.
	Chemical Blend A	Acceptable .	Proprietary blend.
	Electroset Technology .	Acceptable .	Proprietary technology.

SOLVENTS.—ACCEPTABLE SUBSTITUTES

End-use	Substitute	Decision	Comments
Metals Cleaning With CFC–113, MCF.	Trans-1,2-dichloroethylene.	Acceptable.	
	Volatile Methyl Siloxanes.	Acceptable .	Octamethylcyclotetrasiloxanes and decamethylcyclopentasiloxanes are acceptable alternatives. Evaluation of other VMS's is ongoing.
Electronics Cleaning With CFC–113, MCF.	Trans-1,2-dichloroethylene.	Acceptable.	
	Volatile Methyl Siloxanes.	Acceptable .	Octamethyl cyclotetras iloxanes and decamethy lcyclopentas iloxanes are acceptable alternatives. Evaluation of other VMS's is ongoing.
Precision Cleaning With CFC–113, MCF.	Trans-1,2-dichloroethylene.	Acceptable.	
	HCFC–123	Acceptable .	New toxicity data has led to an upward revision of the company set workplace exposure limit (AEL) of 30 ppm. The Agency believes that under normal conditions of use, this limit is acceptable.
	Volatile Methyl Siloxanes.	Acceptable .	Octamethylcyclotetrasiloxanes and decamethylcyclopentasiloxanes are acceptable alternatives. Evaluation of other VMS's is ongoing.

FOAMS.—PENDING SUBSTITUTES

End-use	Substitute	Comments
CFC–11, CFC–113 Rigid Polyurethane, Applicance Foams.	Vacuum panels	Agency has not completed review of data.
Polyurethane, Rigid	HFC–356	Insufficient data. Also need information on proposed end-use(s).

SOLVENT CLEANING.—PENDING SUBSTITUTES

End-use	Substitute	Comments
Precision Cleaning w/CFR–113, MCF	Chlorobromomethane	Agency has not completed review of data.

FIRE SUPPRESSION AND EXPLOSION PROTECTION.—ACCEPTABLE SUBSTITUTES: STREAMING AGENTS

Application	Substitute	Decision	Comments
Halon 1211 Streaming Agents	HCFC–124	Acceptable .	This agent is banned in residential applications per section 610(d) of the CAAA.
	[HCFC Blend] C	Acceptable .	This agent is banned in residential applications per section 610(d) of the CAAA.

FIRE SUPPRESSION AND EXPLOSION PROTECTION.—ACCEPTABLE SUBSTITUTES: STREAMING AGENTS—Continued

Application	Substitute	Decision	Comments
	[HCFC Blend] D	Acceptable	The intended market for this agent is Large, outdoor applications. This agent is banned in residential applications per section 610(d) of the CAAA.
	Gelled Halocarbon/Dry Chemical Suspension.	Acceptable	This agent was formerly indentified as Powdered Aerosol B.

FIRE SUPPRESSION AND EXPLOSION PROTECTION.—PENDING SUBSTITUTES

End-use	Substitute	Comments
Halon 1211 Streaming agents	HFC–227ea	Complete SNAP submission and personal monitoring data required.

End-use	Substitute	Comments
Halon 1301	[HFC Blend] A	Agency analysis of this agent is not yet complete.
Total flooding agents	[Inert Gas Blend] B	Pending receipt of medical assessment by peer review panel.
	[Inert Gas Blend] C	Pending receipt of medical assessment by peer review panel.
	[Powdered Aerosol] A	For use in occupied areas, pending medical assessment by peer review panel.
	[Water Mist System] A	Pending receipt of medical assessment by peer review panel.
	[Water Mist System] B	Pending receipt of medical assessment by peer review panel.

STERILANTS.—ACCEPTABLE

End-use	Substitute	Decision	Conditions	Comments
12/88 Blend of EtO/CFC–12 Sterilant.	[HCFC Blend] A	Acceptable	This agent has received FIFRA registration.	

STERILANTS.—PENDING

End-use	Substitute	Comments
12/88 Blend of EtO/CFC–12	HFC–125	Pending FIFRA registration and completion of Agency review.
Sterilant	HFC–227ea	Pending FIFRA registration and receipt of complete SNAP submission.

AEROSOLS.—ACCEPTABLE SUBSTITUTES

End-use	Substitute	Comments
CFC–11, CFC–113, MCF, HCFC–141b as aerosol solvents.	Trans-1,2-dichloroethylene.	

AEROSOLS.—PENDING

End-use	Substitute	Comments
CFC–11, CFC–113, MCF, HCFC–141b as aerosol solvents.	Monochlorotoluene/benzotrifluorides	Agency has not completed review. Data submission pending.
CFC–12 as aerosol propellant	HFC–4310mee	Agency has not completed review of this data. Premanufacture Notice review under the Toxic Substances Control Act not yet completed.
	Perfluorocarbons (C6F14) and Perfluoropolyethers.	Agency has not completed review. Data submission pending.
	HFC–227	FDA approval still required in metered dose inhalers.

ADHESIVES, COATINGS AND INKS.—PENDING SUBSTITUTES

End-use	Substitute	Comments
Metals cleaning w/CFC–113, MCF	Monochloro-toluene/benzo-trifluorides	Agency has not completed review of data. Evaluation of exposure and toxicity data still ongoing.

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Friday
August 26, 1994

Part IV

Department of Housing and Urban Development

Office of the Secretary
Office of Assistant Secretary

24 CFR Parts 58 and 92

HOME Investment Partnerships Program and Amendment to NOFA for FY 1994 for Indian Applicants Under the HOME Program; Interim Rule and Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Parts 58 and 92

[Docket No. R-94-1735; FR-3716-I-01]

RIN 2501-AB77

HOME Investment Partnerships Program

AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule amends the existing interim rule for the HOME Investment Partnerships Program by making it conform with program changes enacted in the Multifamily Housing Property Disposition Reform Act of 1994 and by making a number of additional clarifying changes.

DATES: Effective date: September 26, 1994, except amendments to part 92 effective October 26, 1994 through June 30, 1995.

Comments due date: Comments on this interim rule must be submitted on or before October 25, 1994.

ADDRESSES: Interested persons are invited to submit comments regarding this interim rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address. FAXED comments will not be accepted.

FOR FURTHER INFORMATION CONTACT: Mary Kolesar, Director, Program Policy Division, Office of Affordable Housing Programs, 451 Seventh Street, S.W., Washington, D.C. 20410, telephone (202) 708-2470, TDD (202) 708-2565. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act Statement

The information collection requirements for the HOME Investment Partnerships Program have been approved by the Office of Management and Budget, under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520), and assigned OMB control number 2501-0013. This interim rule does not contain additional information collection requirements.

II. Background

The HOME Investment Partnerships Program (HOME) was enacted under title II (42 U.S.C. 12701-12839) of the Cranston-Gonzalez National Affordable Housing Act (NAHA) (Pub. L. 101-625, approved November 28, 1990). Implementing regulations for the HOME Program are at 24 CFR part 92.

The Housing and Community Development Act of 1992 (HCDA 1992) (Pub. L. 102-550, approved October 28, 1992) included a substantial number of amendments to the HOME program. These amendments were implemented in rules published on December 22, 1992 (57 FR 60960), June 23, 1993 (58 FR 34130), and April 19, 1994 (59 FR 18626).

The Multifamily Housing Property Disposition Reform Act of 1994 (MHPDRA) (Pub. L. 102-233, approved April 11, 1994) included an additional number of amendments to the HOME Program. The following discussion, arranged according to the sequence of the MHPDRA sections, summarizes the changes made to the HOME program regulation in this interim rule.

Section 201 of MHPDRA amends section 104(2) of NAHA to allow governors to designate State agencies or instrumentalities of the State (e.g., housing finance agencies or housing authorities) to administer HOME Program funds. Prior to this change, a subrecipient agreement was required between the State and its instrumentality to administer the HOME funds. This amendment provides greater flexibility to designate such an organization to run the program and the definition of State in § 92.2 is amended accordingly.

Section 202 of MHPDRA amends section 214(1) of NAHA which required that at least 90 percent of the HOME funds invested in rental housing be for units occupied by families below 60 percent of median income. This amendment changes the requirement to say that at least 90 percent of the units assisted, and in the case of tenant-based rental assistance, the families assisted be below 60 percent of median income. This amendment, as implemented through § 92.216, will simplify the targeting requirement since it is easier to count units than funds invested.

Section 203 of MHPDRA amends section 215(b) of NAHA in two ways. The first change is the elimination of the "first-time" designation for homebuyers. The HCDA 1992 amendment broadened the eligibility of "first-time" homebuyers to include almost all low-income homebuyers. By eliminating the designation, participating jurisdictions will not have to document the statutory category under which income-eligible homebuyers qualify. The change will also conform the HOME Program to the CDBG Program, which does not restrict homebuyer assistance to first-time homebuyers.

The second change would permit participating jurisdictions to use funds recaptured from the sale of homebuyer units for any eligible HOME cost. The provision formerly limited the use of the recaptured funds to assistance for additional first-time homebuyers. This change will effect the use of current and future recaptured funds. Conforming changes have been made to §§ 92.2, 92.61(b)(4), 92.150(b)(4), 92.205(a)(1), 92.206(b), 92.214(a)(7), 92.254(a), and 92.354 to implement the new homebuyer requirements.

Section 204 of MHPDRA amends section 220(a) of NAHA to effect a flat 25 percent match on all funds drawn down for HOME projects or tenant-based rental assistance. This provision eliminates the 30 percent match of funds drawn down for new construction. This new, lower match rate will be applied to all Fiscal Year 1993 funds currently expended or future year funds drawn down for eligible HOME activities, and § 92.218 has been changed accordingly.

The new environmental provisions make three amendments to section 288 of NAHA which are implemented for the HOME Program by § 92.352, for Subpart M—HOME Funds for Indian Tribes at § 92.633, and also by revisions to HUD regulations in 24 CFR part 58, which govern the assumption of environmental responsibilities by recipients under the HOME program and other programs with similar statutory authority for recipient environmental reviews. The first amendment provides for assumption of HUD's environmental review responsibilities by all jurisdictions receiving assistance under the HOME Program, not just participating jurisdictions, as well as Indian tribes and insular areas.

The second amendment to Section 288 makes HOME environmental review procedures consistent with the procedures under the Community Development Block Grant and McKinney Act homeless assistance programs with regard to States' responsibilities. Where a State makes funds available to a unit of general local government, the State would perform the release of funds function otherwise performed by HUD, and local governments would assume the responsibility for performing environmental reviews. To the extent that the State would be using the HOME funds directly, HUD would approve the request for release of funds.

Third, a new paragraph, § 58.77(d), is added to part 58, which adds the new statutory provisions for monitoring, training, and termination or suspension of assumption of review responsibilities.

The amendments to 24 CFR part 58 in this interim rule contain changes consistent with the above changes in part 92. In addition, Section 305 of MHPDRA amends Section 1011 of the HCDA 1992 to provide that for purposes of environmental review, decisionmaking and action, certain grants for lead-based paint hazard reduction and abatement shall be treated as assistance under the HOME Investment Partnership Act and shall be subject to HUD's regulations implementing section 288 of that Act. In other words, recipients of these lead-based paint grants will assume environmental responsibilities to the same extent as recipients under the HOME program and will be subject to 24 CFR part 58. The grants covered by this provision are lead-based paint hazard reduction grants under section 1011, as well as grants to States and units of general local government for abatement of lead-based paint and lead dust hazards pursuant to title II of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992 (approved October 28, 1991, Pub. L. 102–139), (92 App. Act). Accordingly, § 58.1(c) is amended to reflect the applicability of part 58 to these lead-based paint grants.

Section 208 of MHPDRA creates a new section 290 of NAHA which permits the Secretary to waive certain statutory provisions for PJs that are in federally-declared disaster areas under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act and that will be using HOME funds to address damage. However, the Secretary may not waive requirements related to public notice of funding availability, nondiscrimination, fair housing, labor standards, environmental standards and low-income housing affordability. With regard to low-income housing affordability, projects must meet the occupancy rent and periods of affordability provisions outlined in §§ 92.252 and 92.254. It is the Department's intent to provide waivers on other HOME requirements based on the circumstances of a particular disaster, tailoring the waivers to the needs of the participating jurisdiction.

The Department is making a technical correction to § 92.211(a)(2) to reflect the 1992 amendments to the Section 6(c)(4)(A) of the Housing Act of 1937. Selection policies and criteria for a tenant-based rental assistance program funded by HOME are considered reasonably related to the Federal preference rules if, at least, 50% of the families would meet the Federal preferences. The change reduces the proportion of families required to meet the Federal preferences from 70% to 50%.

The Department is amending § 92.254(a) to include the requirement that homeownership under a lease-purchase agreement, in conjunction with a homebuyer program, must occur within 36 months. This addition serves to integrate policy guidance enunciated previously to the field into the rule. The Department believes that 36 months should be ample time for a homebuyer to resolve any outstanding credit problems, to complete homeowner education courses, or build up sufficient equity for homeownership (especially since HOME funds can be used for down-payment assistance). Lease-purchase arrangements in connection with homebuyer programs are not subject to the same occupancy and rental restrictions as are HOME rental projects and, therefore, the Department is concerned that any longer lease period would be contrary to the statutory requirements governing HOME rental projects. The Department would appreciate any comment regarding this regulatory amendment, whether the 36 month period is too long or not long enough or whether the time period should be determined by the PJ.

The HOME Program regulations published April 19, 1994 made a change to § 92.252(a)(2) designed to prevent "Low HOME Rents," as calculated, to be higher than "High HOME Rents" as a result of fair market rents in some regions. The change was made to correct this problem by indicating that if the low HOME rents were higher than the high HOME rents that the figure for the lower rent would be used for all HOME units. That change, however, has been interpreted as limiting the method for calculation of low HOME rents, which was not intended. Revisions have been made to § 92.252(a)(2)(iii) to clarify this point.

This interim rule also makes clarifying changes to three cross-cutting program provisions in the HOME rule. First, this interim rule amends § 92.257, "Religious organizations," to remove a reference relating to control of wholly secular entities established by "primarily religious organizations" to rehabilitate or construct housing which will therefore not be owned by such primarily religious organizations. The Department recognizes the important role served by religious groups in providing lower income housing. This change conforms the rule to the same principles and tests applied in the Community Development Block Grant regulations at § 570.200(j) and in the section 202 program for elderly housing assistance. This clarification is intended to indicate the availability of no lesser role in the HOME program for entities established by a "primarily religious organization," a term equivalent to what the United States Supreme Court describes as a "pervasively sectarian institution," one in which "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973).

Second, this interim rule revises § 92.353(e) to set out the requirement that HOME participating jurisdictions must comply with the requirements of a Residential Antidisplacement and Relocation Assistance Plan (Plan). The change reflects a statutory amendment to the Comprehensive Housing Affordability Strategy made by Section 220(b) of the Housing and Community Development Act of 1992. A participating jurisdiction with a Community Development Block Grant (CDBG) must follow a Plan identical to its CDBG Plan. A participating jurisdiction that is not a CDBG grantee must follow a Plan that meets the requirements of the applicable CDBG regulation (24 CFR 570.606(c) for a local jurisdiction and § 570.488(c) for States). A certification requirement related to this provision is also added to § 92.10(c)(4). On July 1, 1994, HUD published a proposed rule at 24 CFR part 43 (59 FR 34300) describing proposed changes to Plan requirements. The deadline for public comments was August 1, 1994.

Finally, this interim rule also amends § 92.354(a)(2), regarding Davis-Bacon Act applicability. The change is intended to make clear that construction contracts covering 12 or more units, disregarding the number of projects involved, are subject to Davis-Bacon requirements. Also, dividing a single project into multiple construction contracts for purposes of avoiding Davis-Bacon requirements is not permitted.

III. Findings and Certifications

Justification for Interim Rulemaking

The Department has determined that this interim rule should be adopted without the delay occasioned by requiring prior notice and comment. This interim rule simply constitutes the implementation of statutory language with the exercise of little or no discretion on the part of the Department

and makes a number of clarifying changes to existing provisons. As such, prior notice and comment are unnecessary under 24 CFR Part 10. This rule is being published as an interim rule and not as a final rule because the HOME program regulation at 24 CFR part 92 has not yet been issued as a final rule.

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk.

Regulatory Planning and Review

This interim rule has been reviewed and approved in accordance with Executive Order 12866, issued by the President on September 30, 1993 (58 FR 51735, October 4, 1993). Any changes to the interim rule resulting from this review are available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk.

Impact on Small Entities

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the undersigned hereby certifies that this interim rule does not have a significant economic impact on a substantial number of small entities, because jurisdictions that are statutorily eligible to receive formula allocations are relatively larger cities, counties or States.

Regulatory Agenda

This interim rule was not listed in the Department's Semiannual Agenda of Regulations published on April 25, 1994 (59 FR 20424) under Executive Order 12866 and the Regulatory Flexibility Act.

Federalism Impact

The General Counsel has determined, as the Designated Official for HUD under section 6(a) of Executive Order 12612, *Federalism*, that this interim rule does not have federalism implications concerning the division of local, State, and federal responsibilities. While the HOME Program interim rule amended by this interim rule was determined to be a rule with federalism implications and the Department submitted a Federalism Assessment concerning the interim rule to OMB, this amending rule only makes limited adjustments to the interim rule and does not significantly affect any of the factors considered in the Federalism Assessment for the interim rule.

Impact on the Family

The General Counsel, as the designated official under Executive Order 12606, *The Family*, has determined that this interim rule would not have significant impact on family formation, maintenance, and general well-being. Assistance provided under this interim rule can be expected to support family values, by helping families achieve security and independence; by enabling them to live in decent, safe, and sanitary housing; and by giving them the means to live independently in mainstream American society. This interim rule would not, however, affect the *institution* of the family, which is requisite to coverage by the Order. Even if this interim rule had the necessary family impact, it would not be subject to further review under the Order, since the provision of assistance under this interim rule is required by statute, and is not subject to agency discretion.

The Catalog of Federal Domestic Assistance Number for the HOME Program is 14.239.

List of Subjects

24 CFR Part 58

Environmental protection, Community development block grants, Environmental impact statements, Grant programs—housing and community development, Reporting and recordkeeping requirements.

24 CFR Part 92

Administrative practice and procedure, Grant programs—housing and community development, Grant programs—Indians, Indians, Low and moderate income housing, Manufactured homes, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, the Department amends parts 58 and 92 of title 24 of the Code of Federal Regulations as follows:

PART 58—ENVIRONMENTAL REVIEW PROCEDURES FOR RECIPIENTS ASSUMING HUD RESPONSIBILITIES

1. The authority citation for part 58 is revised to read as follows:

Authority: 42 U.S.C. 1437o(i)(1) and (2), 3535(d), 4332, 4852, 5304(g), 11402, and 12838.

2. Section 58.1 is amended by:

a. Revising the second sentence in the introductory text of paragraph (c);

b. Removing the word "and" at the end of paragraph (c)(3);

c. Removing the period at the end of paragraph (c)(4) and adding "; and"; and

d. Adding a new paragraph (c)(5), to read as follows:

§ 58.1 Purpose, scope and applicability.

* * * * *

(c) *Applicability.* * * * Programs and activities subject to this part include:

* * * * *

(5) Grants to States and units of general local government for abatement of lead-based paint and lead dust hazards pursuant to title II of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992, and grants for lead-based paint hazard reduction under Section 1011 of the Housing and Community Development Act of 1992, in accordance with section 1011(o) (42 U.S.C. 4852(o)).

3. In § 58.2, paragraph (a)(4) is revised to read as follows:

§ 58.2 Terms, abbreviations and definitions.

(a) * * *

(4) *Recipient* means:

(i) A State that does not distribute HUD assistance under the program to a unit of general local government;

(ii) Guam, the Northern Mariana Islands, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands;

(iii) A unit of general local government; or

(iv) An Indian tribe.

* * * * *

4. In § 58.4, the second sentence of paragraph (c)(1) is revised to read as follows:

§ 58.4 HUD legal authority.

* * * * *

(c) * * *

(1) * * * The State must submit the certification and RROF to HUD.

* * * * *

5. In § 58.77, a new paragraph (d) is added to read as follows:

§ 58.77 Effect of approval of certification.

* * * * *

(d) *Responsibility for monitoring and training.* (1) At least once every three years, HUD intends to conduct in-depth monitoring of the environmental activities performed by recipients that have assumed responsibilities for environmental review, decisionmaking, and action under this part. Limited monitoring of these environmental activities will be conducted during each program monitoring site visit. If through

limited or in-depth monitoring of these environmental activities or by other means, HUD becomes aware of any environmental deficiencies, HUD may take one or more of the following actions:

(i) In the case of problems found during limited monitoring, HUD may schedule in-depth monitoring at an earlier date or may schedule in-depth monitoring more frequently;

(ii) HUD may require attendance by recipient staff at HUD sponsored or approved training, which will be provided periodically at various locations around the country;

(iii) HUD may refuse to accept the certifications of environmental compliance on subsequent grants;

(iv) HUD may suspend or terminate the recipient's assumption of the environmental review responsibility;

(v) HUD may initiate sanctions, corrective actions or other remedies provided in program regulations or agreements or contracts with the recipient.

(2) HUD's responsibilities and action under paragraph (d)(1) of this section shall not be construed to limit or reduce any responsibility assumed by a recipient with respect to any particular release of funds under this part. Whether or not HUD takes action under paragraph (d)(1) of this section, the Certifying Officer remains the responsible Federal official under § 58.17 with respect to projects and activities for which the Certifying Officer has submitted a RROF and certification under this part.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

6. The authority citation for part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d) and 12701–12839.

7. In § 92.2, the definition of "*First-time homebuyer*" is removed, and the definition of "*State*" is revised to read as follows:

§ 92.2 Definitions.

* * * * *

State means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any agency or instrumentality thereof that is established pursuant to legislation and designated by the chief executive officer to act on behalf of the State with regard to the provisions of this part.

* * * * *

8. Section 92.4 is redesignated § 92.5, and a new § 92.4 is added to read as follows:

§ 92.4 Suspension of requirements for disaster areas.

The Secretary may suspend any HOME statutory requirements (except for those related to public notice of funding availability, nondiscrimination, fair housing, labor standards, environmental standards, and low-income housing affordability) or regulatory requirements, for HOME funds designated by a recipient to address the damage in an area for which a disaster is declared under title IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

9. In § 92.61, paragraph (b)(4) is revised to read as follows:

§ 92.61 Program description and housing strategy.

* * * * *

(b) * * *

(4) If the insular area intends to use HOME funds for homebuyers, the guidelines for resale or recapture as required in § 92.254(a)(4);

* * * * *

10. In § 92.150, paragraphs (b)(5) and (c)(4) are revised to read as follows:

§ 92.150 Submission of program description and certifications.

* * * * *

(b) * * *

(5) If the participating jurisdiction intends to use HOME funds for homebuyers, the guidelines for resale or recapture must be described as required in § 92.254(a)(4);

* * * * *

(c) * * *

(4) A certification that the participating jurisdiction:

(i) Is following a Residential Antidisplacement and Relocation Assistance Plan as described in § 92.353(e);

(ii) Will comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and implementing regulations at 49 CFR part 24; and

(iii) Will comply with the requirements in § 92.353.

* * * * *

11. In § 92.205, paragraph (a)(1) is revised to read as follows:

§ 92.205 Eligible activities: General.

(a) * * *

(1) HOME funds may be used by a participating jurisdiction to provide incentives to develop and support affordable rental housing and homeownership affordability through the acquisition (including assistance to homebuyers), new construction, reconstruction, or moderate or substantial rehabilitation of non-luxury housing with suitable amenities, including real property acquisition, site improvements, conversion, demolition, and other expenses, including financing costs, relocation expenses of any displaced persons, families, businesses, or organizations, to provide tenant-based rental assistance, including security deposits; to provide payment of reasonable administrative and planning costs; and to provide for the payment of operating expenses of community housing development organizations. The housing must be permanent or transitional housing, and includes permanent housing for disabled homeless persons, and single-room occupancy housing. The specific eligible costs for these activities are set forth in §§ 92.206 through 92.209.

* * * * *

12. In § 92.206, paragraph (b) is revised to read as follows:

§ 92.206 Eligible costs.

* * * * *

(b) *Acquisition costs.* Costs of acquiring improved or unimproved real property, including acquisition by homebuyers.

* * * * *

13. In § 92.211, paragraph (a)(2) is revised to read as follows:

§ 92.211 Tenant-based rental assistance.

(a) * * *

(2) The participating jurisdiction selects families in accordance with written tenant selection policies and criteria that are consistent with the purposes of providing housing to very low- and low-income families and are reasonably related to preference rules established under section 6(c)(4)(A) of the Housing Act of 1937 (42 U.S.C. 1437 et seq.). Selection policies and criteria meet the "reasonably related" requirement if at least 50% of the families assisted qualify, or would qualify in the near future without tenant-based rental assistance, for one of the three Federal preferences under section 6(c)(4)(A) of the Housing Act of 1937. These are families that occupy substandard housing (including families that are homeless or living in a shelter for homeless families); families that are paying more than 50 percent of (gross) family income for rent; or families that are involuntarily displaced. The participating jurisdiction may select low-income families currently residing in units that are designated for rehabilitation or acquisition under the participating jurisdiction's HOME program without requiring that the family meet the written tenant selection policies and criteria. Families so selected may use the tenant-based

assistance in the rehabilitation or acquired unit or in other qualified housing.

* * * * *

14. In § 92.214, paragraph (a)(7) is revised to read as follows:

§ 92.214 Prohibited activities.

(a) * * *

(7) Provide assistance (other than tenant-based rental assistance or assistance to a homebuyer to acquire housing previously assisted with HOME funds) to a project previously assisted with HOME funds during the period of affordability established by the participating jurisdiction under § 92.502 or § 92.504. However, additional HOME funds may be committed to a project up to one year after project completion (see § 92.502), but the amount of HOME funds in the project may not exceed the maximum per-unit subsidy amount established under § 92.250.

* * * * *

15. In § 92.216, paragraphs (a)(1) and (a)(2) are revised to read as follows:

§ 92.216 Income targeting: Tenant-based rental assistance and rental units—Initial eligibility determination and reexamination.

(a) * * *

(1) Not less than 90 percent of:

(i) The families receiving such rental assistance are families whose annual incomes do not exceed 60 percent of the median family income for the area, as determined and made available by HUD with adjustments for smaller and larger families (except that HUD may establish income ceilings higher or lower than 60 percent of the median for the area on the basis of HUD's findings that such variations are necessary because of prevailing levels of construction cost or fair market rent, or unusually high or low family income) at the time of occupancy or at the time funds are invested, whichever is later; or

(ii) The dwelling units assisted with such funds are occupied by families having such incomes; and

(2) The remainder of:

(i) The families receiving such rental assistance are households that qualify as low-income families (other than families described in paragraph (a)(1) of this section) at the time of occupancy or at the time funds are invested, whichever is later; or

(ii) The dwelling units assisted with such funds are occupied by such households.

* * * * *

16. In § 92.218, paragraph (a) is revised to read as follows:

§ 92.218 Amount of matching contribution.

(a) Each participating jurisdiction must make contributions to housing that qualifies as affordable housing under the HOME program, throughout a fiscal year. The contributions must total not less than 25 percent of the funds drawn from the jurisdiction's HOME Investment Trust Fund Treasury account in that fiscal year.

* * * * *

17. In § 92.252, paragraph (a)(2)(iii) is revised, to read as follows:

§ 92.252 Qualification as affordable housing and income targeting: Rental housing.

(a) * * *

(2) * * *

(iii) If the rent determined under this paragraph (a)(2) is higher than the applicable rent under (a)(1) of this section, then the applicable maximum rent for units under this paragraph would be that calculated under (a)(1) of this section.

* * * * *

18. In § 92.254, paragraphs (a)(3), (a)(4)(ii)(C) and (a)(4)(ii)(D) are revised, to read as follows:

§ 92.254 Qualification as affordable housing: homeownership.

(a) * * *

(3) Is purchased within 36 months if a lease-purchase agreement in conjunction with a homebuyer program is used to acquire the housing;

(4) * * *

(ii) * * *

(C) The HOME investment that is subject to recapture is the HOME assistance that enabled the homebuyer to buy the dwelling unit. This includes any HOME assistance, whether a direct subsidy to the homebuyer or a construction or development subsidy, that reduced the purchase price from fair market value to an affordable price. The recaptured funds must be used to carry out HOME-eligible activities. If no HOME funds will be subject to recapture, the provisions at § 92.254(a)(4)(i) apply.

(D) Upon recapture of the HOME funds used in a single-family, homebuyer project with two to four units, the affordability period on the rental units may be terminated at the discretion of the participating jurisdiction.

* * * * *

19. Section 92.257 is revised to read as follows:

§ 92.257 Religious organizations.

HOME funds may not be provided to primarily religious organizations, such as churches, for any activity including secular activities. In addition, HOME funds may not be used to rehabilitate or construct housing owned by primarily religious organizations or to assist primarily religious organizations in acquiring housing. However, HOME funds may be used by a secular entity to acquire housing from a primarily religious organization, and a primarily religious entity may transfer title to property to a wholly secular entity and the entity may participate in the HOME program in accordance with the requirements of this part. The entity may be an existing or newly established entity, which may be an entity established by the religious organization. The completed housing project must be used exclusively by the owner entity for secular purposes, available to all persons regardless of religion. In particular, there must be no religious or membership criteria for tenants of the property.

20. In § 92.352, paragraph (b) is revised to read as follows:

§ 92.352 Environmental review.

* * * * *

(b) *Responsibility for review.* (1) The jurisdiction (e.g., the participating jurisdiction or state recipient) or insular area must assume responsibility for environmental review, decisionmaking, and action for each activity that it carries out with HOME funds, in accordance with the requirements imposed on a recipient under 24 CFR part 58. In accordance with 24 CFR part 58, the jurisdiction or insular area must carry out the environmental review of an activity and obtain approval of its request for release of funds before HOME funds are committed for the activity.

(2) A state participating jurisdiction must also assume responsibility for approval of requests for release of HOME funds submitted by state recipients.

(3) HUD will perform the environmental review, in accordance with 24 CFR part 50, for a competitively awarded application for HOME funds submitted to HUD by an entity that is not a jurisdiction.

21. In § 92.353, paragraph (e) is revised to read as follows:

§ 92.353 Displacement, relocation, and acquisition.

* * * * *

(e) *Residential antidisplacement and relocation assistance plan.* Each participating jurisdiction shall comply with the Residential Antidisplacement and Relocation Assistance Plan requirements described at 24 CFR 570.606(c), or, in the case of a State-administered HOME Program, the requirements at 24 CFR 570.488(c). These policies require one-for-one

replacement of low/moderate-income housing demolished or converted to another use and the provision of relocation assistance to lower income persons displaced by such conversion or by demolition.

* * * * *

22. In § 92.354, paragraph (a)(2) is revised to read as follows:

§ 92.354 Labor.

(a) * * *

(2) The contract for construction must contain these wage provisions if HOME funds are used for any project costs (as defined in § 92.206), including construction or nonconstruction costs, of housing with 12 or more HOME-assisted units. When HOME funds are only used to assist homebuyers to acquire single-family housing, and not for any other project costs, the wage provisions apply to the construction of the housing if there is a written agreement with the owner or developer of the housing that HOME funds will be used to assist homebuyers to buy the housing and the construction contract covers 12 or more housing units to be purchased with HOME assistance. The wage provisions apply to any construction contract that includes a total of 12 or more HOME-assisted units, whether one or more than one project is covered by the construction contract. Once they are determined to be applicable, the wage provisions must be contained in the construction contract so as to cover all laborers and mechanics employed in the development of the entire project, including portions other than the assisted units. Arranging multiple construction contracts within a single project for the purpose of avoiding the wage provisions is not permitted.

* * * * *

23. Section 92.633 is revised to read as follows:

§ 92.633 Environmental review.

The Indian tribe must assume responsibility for environmental review, decisionmaking, and action for each activity that it carries out with HOME funds, in accordance with the requirements imposed on a recipient under 24 CFR part 58. In accordance with 24 CFR part 58, the Indian tribe must carry out the environmental review of an activity and obtain approval of its request for release of funds before HOME funds are committed for the activity.

Dated: August 18, 1994.

Henry G. Cisneros,

Secretary.

[FR Doc. 94-20866 Filed 8-25-94; 8:45 am]

BILLING CODE 4210-32-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

[Docket No. N-94-3720; FR-3617-N-03]

Amendment to NOFA for Fiscal Year 1994 for Indian Applicants Under the HOME Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of amendment to Fiscal Year (FY) 1994 Notice of Funding Availability (NOFA) for Indian HOME Program.

SUMMARY: This notice modifies the Fiscal Year (FY) 1994 Indian HOME NOFA to reflect statutory changes regarding environmental review requirements, as amended in the Multifamily Housing Property Disposition Reform Act of 1994. This notice also includes a modification to Appendix 1. List of Local Offices of Native American Programs, specifically pertaining to the Denver Office and clarifies the process for addressing computational errors in the rating and ranking of applications.

DATES: The application due date is not affected by this notice.

FOR FURTHER INFORMATION CONTACT: Dom Nessi, Director, Office of Native American Programs, Room 4140, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 708-1015. A telecommunications device for speech and/or hearing impaired persons (TDD) is available at (202) 708-0850. (These are not toll-free telephone numbers.)

SUPPLEMENTARY INFORMATION: This notice amends the FY 94 NOFA for Indian Applicants under the HOME Program (59 FR 11424; March 10, 1994) at section I.(e)(4)(iii)(C), which deals with the selection criteria pertaining to environmental review. The amendment is made to reflect changes resulting from The Multifamily Housing Property Disposition Reform Act of 1994 (MHPDR ACT) (Pub. L. 102-233, approved April 11, 1994). The changes involve removing the requirement that after rating and ranking but before selection for award, HUD Field ONAPs will perform an environmental review of applications in accordance with 24 CFR part 50, and that applications may be reranked or disqualified on the basis of the environmental review. These provisions are replaced with the provision that after rating and ranking, applicants with the highest scores will be selected and offered awards. The grantee must assume responsibility for completing the environmental review of the project under 24 CFR part 58. In accordance with 24 CFR part 58, until the grantee completes its environmental review and obtains a release of funds from HUD, the grantee may not commit HOME funds to activities (unless the activities are exempt from review under 24 CFR part 58), or expend any other funds for activities unless they are exempt or would not have an adverse environmental impact or limit the choice of reasonable alternatives. However, a grantee may expend HOME or other funds on environmental reviews, exempt under 24 CFR part 58, before obtaining a release of funds to be used for non-exempt purposes from HUD.

This notice adds a new paragraph I.(e)(4)(iii)(E) which clarifies that unsuccessful applicants may notify the ONAP, within 90 days of being informed of their score, of computational errors in the rating and ranking. This paragraph provides for the correction of such errors in rating and ranking and, if the error denied funding of the applicant, provides for funding the application in subsequent funding cycles.

This notice also amends Appendix 1 of the FY 1994 Indian Home Program NOFA by including a new address for the Denver Office of Native American Programs.

Accordingly, the following modifications are made in FR Doc. 94-5535 to the NOFA titled, "NOFA For Fiscal Year 1994 For Indian Applicants Under The HOME Program", published on March 10, 1994 (59 FR 11424):

1. On page 11429, paragraph I.(e)(4)(iii)(C), which appears in the first column, is revised to read as follows:

(C) *Selection.* The ranking process will produce an ordered list of projects that may receive funding. The order is established by the number of points the project received in the rating process. The eligibility requirement for further consideration will be 50 out of 100 points. Project applications scoring lower than 50 points will be set aside as non-responsive and ineligible. After rating and ranking, applicants with the highest scores will be selected and offered awards. The grantee must assume responsibility for completing the environmental review of the project under 24 CFR part 58. In accordance with 24 CFR part 58, until the grantee completes its environmental review and obtains a release of funds from HUD, the grantee may not commit HOME funds to activities (unless the activities are exempt from review under 24 CFR part 58), or expend any other funds for activities unless they are exempt or would not have an adverse environmental impact or limit the choice of reasonable alternatives. Environmental studies are exempt under 24 CFR part 58 and therefore a grantee may expend HOME or other funds on environmental reviews before obtaining a release of funds to be used for non-exempt purposes from HUD. For the purposes of geographic diversity, HUD may award at least one grant to each of the areas covered by the Offices of Indian Programs listed in Appendix 1.

2. On page 11429, a new paragraph I.(e)(4)(iii)(E) is added to read as follows:

(E) *Errors in rating and ranking.* Applicants may bring computational errors in the rating and ranking of applications to the attention of ONAP within 90 days of being informed of their score. If an ONAP review determines that there was a computational error that denied funding to the applicant, the applicant will be funded out of remaining funds in the challenged round of funding, or out of the next available round of funding.

3. On page 11430, in Appendix 1., which appears in the first column, the address for the Denver Office of Native American Programs is revised to read as follows:

Region VIII—Denver, Office of Native American Programs, First Interstate Tower North, 633 17th Street, Denver, Colorado 80202-3607, 303-672-5467, TDD Number: 303672-5259.

Dated: August 18, 1994.

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 94-20865 Filed 8-25-94; 8:45 am]

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federal register

Friday
August 26, 1994

Part V

Department of Transportation

Federal Aviation Administration

14 CFR Part 13

Civil Penalties: Streamlined Enforcement Test and Evaluation Program; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

[Docket No. 27873; Amdt. No. 94–13–25]

RIN 2120–AF36

Civil Penalties: Streamlined Enforcement Test and Evaluation Program

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: This Special Federal Aviation Regulation (SFAR) establishes a test and evaluation program designed to streamline the procedures used to process certain civil penalty enforcement actions. The program is being tested as a result of recommendations made by the Vice President's National Performance Review. If successful, the procedures and delegation of authority outlined in this SFAR may be made permanent.

DATES: This SFAR is effective August 26, 1994 through August 26, 1996.

Comments must be submitted on or before October 25, 1994.

ADDRESSES: Comments on this SFAR may be delivered or mailed, in triplicate, to the Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC–200), Docket No. 27873, 800 Independence Avenue, SW., Room 915G, Washington, DC 20591. Comments submitted must be marked: "Docket No. 27873." Comments may be inspected in Room 915G between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Brian R. Reed, Attorney, Enforcement Division (AGC–320), Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267–7158.

SUPPLEMENTARY INFORMATION:

Comments Invited

The changes in this rule are temporary and involve matters of agency organization, procedure, and practice only. Accordingly, the rule changes are being adopted without notice and prior public comment. The FAA, however, recognizes that the participation of the public may add significantly to the rulemaking process. Interested persons are, therefore, invited to comment by submitting such written data, views, or arguments as they may desire. Comments relating to environmental, energy, federalism, or economic impacts that might result from adopting this rule are also invited. Substantive comments should be accompanied by cost estimates. Comments must include the regulatory docket number and be submitted in triplicate to the address above. All comments received, as well as a report summarizing each substantive public contact with FAA personnel on this rulemaking, will be filed in the docket. The docket is available for public inspection before and after the comment closing date.

All comments received on or before the close of the comment period will be considered by the Administrator. This rule may be changed in light of the comments received.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a pre-addressed, stamped postcard with those comments on which the following statement is made: "Comments to Docket No. 27873." The postcard will be date-stamped by the FAA and returned to the commenter.

Availability of SFAR

Any person may obtain a copy of this SFAR by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center (APA–200), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–3484. Requests must include the amendment or docket number.

Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

The FAA has authority to assess civil penalties not to exceed $50,000 for certain violations of the Federal Aviation Act of 1958 (49 U.S.C. App. 1301 *et seq.*), the FAA's regulations (14 CFR parts 1–199), and certain other statutes and orders. (49 U.S.C. App. 1471(a)(3)). In the case of persons other than those acting in the capacity of a pilot, flight engineer, mechanic, or repairman, the procedures for civil penalty assessment actions are those contained in § 13.16 and part 13, subpart G of the FAA's regulations. The current civil penalty assessment process for these actions is outlined below.

During the investigation phase, FAA investigative personnel ordinarily notify alleged violators of an agency investigation by issuing a letter of investigation. This notification is described in FAA Order 2150.3A, the FAA's Compliance and Enforcement Program, but is not required by statute, regulation, or that order. Following an investigation, a civil penalty may be assessed only after notice of the proposed charges and an opportunity for a hearing. This process is begun by issuing a notice of proposed civil penalty to an alleged violator (respondent). Section 13.16(c) delegates the authority to the FAA's Deputy Chief Counsel and certain Assistant Chief Counsel in the regions, centers, and headquarters to issue such notices.

Respondents have several options to respond to the notice of proposed civil penalty. The person charged with a violation is required to do one of the following:

(1) Submit the amount of the proposed civil penalty or an agreed-upon lower amount.

(2) Submit written information demonstrating that the violation did not occur, or that a penalty or the penalty amount is not warranted under the circumstances.

(3) Submit a request for a reduction of the proposed civil penalty, including the amount of reduction along with supporting reasons and documentation, such as records indicating a financial inability to pay the proposed penalty.

(4) Submit a written request for an informal conference to discuss the matter with an agency attorney and submit relevant information or documents.

(5) Request a hearing before an administrative law judge (ALJ) of the Department of Transportation (DOT) Office of Hearings.

If a respondent does not respond to the notice of proposed civil penalty, or chooses to proceed informally in response to a notice of proposed civil penalty, and the matter is not resolved, the FAA attorney then serves a final notice of proposed civil penalty. The respondent must either request a hearing before an ALJ or pay the amount of the proposed civil penalty, or an agreed-upon amount, within 15 days of receipt of the final notice. If neither a penalty is paid nor a hearing is requested during the 15-day period, the FAA attorney serves an order assessing civil penalty, which contains a finding of violation and assesses a civil penalty. That order is final and not appealable.

On September 7, 1993, the Vice President's National Performance Review published a report entitled "From Red Tape to Results: Creating a Government that Works Better and Costs Less." That report included a

recommendation that the FAA streamline its civil penalty enforcement program by eliminating several of the procedural steps it takes to issue civil penalties in certain minor, uncontested cases. The FAA has determined that streamlined procedures would be most appropriately applied to those legal enforcement actions that facially appear to be simple and factually straightforward. The SFAR adopts interim changes to the existing rules governing procedures and delegation of authority that are designed to enhance the efficiency and effectiveness of the processing of civil penalty assessment actions in these types of cases. The National Performance Review indicates that a streamlined enforcement process may reduce costs, improve efficiency, and enhance safety by notifying individuals of certain violations and processing these actions within reduced time frames.

In addition to shortening the time for initiating certain cases, it is expected that this test program also will encourage prompt settlement of proposed civil penalties in these cases. The program will not eliminate an individual's opportunity to request a hearing or otherwise contest a proposed civil penalty. This SFAR will be effective for two years, unless sooner canceled.

Discussion of Rule

Scope

These regulatory changes initially will be tested in certain civil penalty assessment actions resulting from violations occurring in two FAA regions (Great Lakes and Southwest) at three airports (Dallas/Forth Worth International Airport, O'Hare International Airport, and Indianapolis International Airport). The program may be extended to violations at other airports or regions during the duration of the test program.

In addition, the test program will apply only to alleged violations by individuals presenting dangerous or deadly weapons for screening at airports or in checked baggage, for which a civil penalty less than $5,000 is proposed. While the FAA considers these violations to be serious, the initial evaluation and processing of these cases tends to be uncomplicated. Violations of weapons prohibitions, on the other hand, for which a penalty of $5,000 or more is sought ordinarily are more factually complex and involve evidence of several aggravating factors. As a result, these cases tend to be more difficult to process, and, therefore, would not be appropriate for handling under the test program. The FAA does not intend to apply this program to complex civil penalty actions, including factually complicated cases under $5,000.

If the program is successful in streamlining the civil penalty enforcement process for the cases described above, the FAA will consider amending this rule to extend the program to include other relatively simple violations warranting civil penalty action.

Procedures and Delegations

The test program will involve several changes to current enforcement practice. The test program dispenses with the FAA's current practice of ordinarily issuing to the alleged violator a letter of investigation seeking information about the alleged violation. Experience has indicated that in the majority of factually clear, uncomplicated cases, the respondent often does not provide additional relevant information that is not already known to the FAA. The information received by the FAA from local law enforcement offices regarding weapons violations at airport screening checkpoints tends to be complete and beyond serious dispute. A respondent, however, will continue to have an opportunity to make any statements and submit any evidence regarding the alleged violation following notification of the alleged violation.

FAA Office of Civil Aviation Security Division Managers and Deputy Division Managers, instead of FAA attorneys, will initiate a legal enforcement action by issuing a notice of violation (NOV) to the respondent. The NOV will cite the relevant facts and circumstances pertaining to the alleged infraction and will include a proposed civil penalty amount. The authority to issue NOVs will not be delegated below the division level. By delegating to the Office of Civil Aviation Security the authority to send the initial notification to a respondent of an alleged violation, the FAA believes that it can reduce significantly the time currently expended before a respondent is given this notification. The name and phone number of a security agent involved in the investigation will be included in the NOV in case the respondent has any questions about the action being proposed.

The NOV will serve the same purpose that the notice of proposed civil penalty now serves under current procedures. The NOV, however, will include the following specific information:

(1) A description of the alleged violation;

(2) The proposed amount of civil penalty;

(3) An offer of settlement of the case, if appropriate, as described below;

(4) The name and phone number of an FAA security special agent involved in the investigation of the violation;

(5) Information regarding informal procedures; and

(6) Information on how to request a formal hearing before a DOT ALJ.

In appropriate cases, the agency may extend to the respondent a settlement offer to resolve the case immediately with a reduction of the proposed civil penalty, on the condition that the penalty is paid or a commitment to pay is made within 30 days. In conjunction with the publication of this rule, the FAA will issue guidance on the exercise of its discretionary settlement authority in these cases as well as other similar cases not covered by the test and evaluation program. This guidance will be published in Appendix 1 of FAA Order 2150.3A, Compliance and Enforcement Program, and may be changed during the test program.

The FAA believes that swifter notification of a violation, coupled, in most cases, with an immediate offer of settlement, may encourage quick resolution of simple cases while, at the same time, having no negative impact on the effectiveness of the enforcement process. The National Performance Review studied a similar program offered by the Federal Highway Administration and found that approximately 40 percent of proposed civil penalties were paid in this manner within 30 days.

The provisions of this SFAR will not limit the respondent's rights in any way. An individual may choose to proceed under the current informal and formal procedures, including requesting an informal conference with an FAA attorney or formal hearing before a DOT ALJ. If the FAA and respondent are unable to resolve the case informally, or if the respondent fails to respond to the NOV within 30 days after receiving it, a final notice of violation and civil penalty assessment order ("final notice and order") will be issued to the respondent. This document serves two purposes:

(1) It provides a second opportunity for the respondent to request a hearing on the record before a DOT ALJ; and

(2) It becomes an order assessing a civil penalty if the respondent pays the civil penalty proposed in the final notice and order, or the respondent does not request a hearing in accordance with the final notice and order and fails to pay the amount of the proposed civil penalty.

This streamlined process dispenses with the current procedure requiring a

separate order assessing civil penalty to be sent to the respondent when the respondent pays the amount of the civil penalty reflected in the final notice of proposed civil penalty, or when the respondent fails to request a hearing in accordance with the final notice of proposed civil penalty and fails to pay the amount of the proposed civil penalty. The final disposition of the assessment action results from the respondent's act or failure to act upon receipt of the final notice. Issuance of a separate document entitled "order assessing civil penalty" under the current procedures provides no additional rights or notice to the respondent that is not otherwise given in the final notice and order under these procedures. Accordingly, elimination of the issuance of a separate order assessing civil penalty under these circumstances will not alter the procedural protections afforded respondents.

The final notice and order will be issued by an appropriate Assistant Chief Counsel. The final notice and order will result in either a civil penalty assessment or a formal hearing.

Regulatory Evaluation Summary

Changes to Federal regulations are required to undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic effect of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effect of regulatory changes on international trade. With respect to this rule, the FAA has determined that it: (1) is not "a significant regulatory action" as defined in the Executive Order; (2) is not significant as defined in the Department of Transportation's Regulatory Policies and Procedures; (3) will not have a significant impact on a substantial number of small entities; and (4) will not constitute a barrier to international trade. Therefore, a full regulatory analysis, which includes the identification and evaluation of cost-reducing alternatives to this rule, has not been prepared. Instead, the agency has prepared a more concise analysis of this rule which is presented in the following paragraphs.

The rule establishes a test program at three airports. The program covers certain civil penalty cases against individuals submitting dangerous or deadly weapons for screening at airport checkpoints or in checked baggage. The rule will apply only to those cases that facially appear to be simple and are factually straightforward, and that are uncomplicated to process. During the test period, the rule delegates authority to program office managers to initiate legal enforcement actions and reduces the number of documents issued in this action. The rule is intended to streamline the agency's civil penalty enforcement process of notifying individuals of certain violations by processing these actions within reduced time frames.

Costs

There will be no costs associated with this rule because it consists only of changes to agency rules of procedure or practice in part 13 of the FAA's regulations. The changes do not impose any new economic requirements on the affected parties.

Benefits

The streamlined procedures will reduce the number of documents to be served upon individuals. Additionally, this rule will likely reduce the time between the violation and the processing of the enforcement action.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by Federal regulations. The RFA requires a Regulatory Flexibility Analysis if a rule will have "a significant economic impact on a substantial number of small entities." FAA Order 2100.14A outlines FAA's procedures and criteria for implementing the RFA. Small entities are defined as independently owned and operated small businesses and small not-for-profit organizations. Because this rule will directly affect certain individuals (who are not defined as entities), the rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

Because the rule only will affect certain individuals, it will not constitute a barrier to international trade, including the export of American goods and services to foreign countries and the import of foreign goods and services to the United States.

Federalism Implications

The rule will not have substantial direct effects on the states, on the relationship between the national government and that of any state, or on the distribution of power and responsibilities among the various levels of government. The respondents affected by the amendments are private citizens, not state governments. Therefore, in accordance with Executive Order 12612, it is determined that this regulation will not have federalism implications to warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

This rule contains no information collection requests requiring approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3507 et seq.).

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this regulation is not a significant regulatory action under Executive Order 12866. This rule is not considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). In addition, this rule will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 13

Administrative practice and procedure, Air transportation, Federal Aviation Administration, Investigations, Law enforcement, Penalties.

The Amendments

Accordingly, the Federal Aviation Administration amends part 13 of Title 14, Code of Federal Regulations, by adding Special Federal Aviation Regulation No. 72, as follows:

Special Federal Aviation Regulation No. 72—Civil Penalties: Streamlined Enforcement Test and Evaluation Program

1. The authority citation for part 13 is amended to read as follows:

Authority: 49 U.S.C. 106(g) and 322; 49 U.S.C. App. 1354(a) and (c), 1374(d), 1401–1406, 1421–1432, 1471–1473, 1481, 1482, 1484–1489, 1523, 1655(c), 1808–1810, 2157 (e) and (f), 2218, 2219; 18 U.S.C. 6002, 6004; 49 CFR 1.47.

2. Special Federal Aviation Regulation No. 72 is added to read as follows:

Civil Penalties: Streamlined Enforcement Test and Evaluation Program.

This SFAR may be used, at the agency's discretion, in enforcement actions involving individuals presenting dangerous or deadly weapons for screening at airports or in checked baggage where the amount of the proposed civil penalty is less than $5,000. In these cases, §§ 13.16(a), 13.16(c), and 13.16(f) through (l) of this chapter are used, as well as sections (A) through (D) below:

(A) *Delegation of authority.* The authority of the Administrator, under section 901 of the Federal Aviation Act of 1958, as amended, to initiate the assessment of civil penalties for a violation of the Act, or a rule, regulation, or order issued thereunder, is delegated to the regional Office of Civil Aviation Security Division Manager and the regional Office of Civil Aviation Security Deputy Division Manager for the purpose of issuing notices of violation in cases involving violations of the Federal Aviation Act and the FAA's regulations by individuals presenting dangerous or deadly weapons for screening at airport checkpoints or in checked baggage. This authority may not be delegated below the level of the Office of Civil Aviation Security Deputy Division Manager.

(B) *Notice of violation.* A civil penalty action is initiated by sending a notice of violation to the person charged with the violation. The notice of violation contains a statement of the charges and the amount of the proposed civil penalty. Not later than 30 days after receipt of the notice of violation, the person charged with a violation shall:

(1) Submit the amount of the proposed civil penalty or an agreed-upon amount, in which case either an order assessing a civil penalty or a compromise order shall be issued in that amount;

(2) Submit to the regional Office of the Assistant Chief Counsel any of the following:

(i) Written information, including documents and witness statements, demonstrating that a violation of the regulations did not occur or that a penalty or the penalty amount is not warranted by the circumstances;

(ii) A written request to reduce the proposed civil penalty, the amount of reduction, and the reasons and any documents supporting a reduction of the proposed civil penalty, including records indicating a financial inability to pay or records showing that payment of the proposed civil penalty would prevent the person from continuing in business; or

(iii) A written request for an informal conference to discuss the matter with an agency attorney and submit relevant information or documents; or

(3) Request a hearing in which case a complaint shall be filed with the hearing docket clerk.

(C) *Final notice of violation and civil penalty assessment order.* A final notice of violation and civil penalty assessment order ("final notice and order") may be issued after participation in any informal proceedings as provided in paragraph (B)(2) of this section, or after failure of the respondent to respond in a timely manner to a notice of violation. A final notice and order will be sent to the individual charged with a violation. The final notice and order will contain a statement of the charges and the amount of the proposed civil penalty and, as a result of information submitted to the agency attorney during any informal procedures, may modify an allegation or a proposed civil penalty contained in the notice of violation.

A final notice and order may be issued—

(1) If the person charged with a violation fails to respond to the notice of violation within 30 days after receipt of that notice; or

(2) If the parties participated in any informal procedures under paragraph (B)(2) of this section and the parties have not agreed to compromise the action or the agency attorney has not agreed to withdraw the notice of violation.

(D) *Order assessing civil penalty.* An order assessing civil penalty may be issued after notice and opportunity for a hearing. A person charged with a violation may be subject to an order assessing civil penalty in the following circumstances:

(1) An order assessing civil penalty may be issued if a person charged with a violation submits, or agrees to submit, the amount of civil penalty proposed in the notice of violation.

(2) An order assessing civil penalty may be issued if a person charged with a violation submits, or agrees to submit, an agreed-upon amount of civil penalty that is not reflected in either the notice of violation or the final notice and order.

(3) The final notice and order becomes (and contains a statement so indicating) an order assessing a civil penalty when the person charged with a violation submits the amount of the proposed civil penalty that is reflected in the final notice and order.

(4) The final notice and order becomes (and contains a statement so indicating) an order assessing a civil penalty 16 days after receipt of the final notice and order, unless not later than 15 days after receipt of the final notice and order, the person charged with a violation does one of the following—

(i) Submits an agreed-upon amount of civil penalty that is not reflected in the final notice and order, in which case an order assessing civil penalty or a compromise order shall be issued in that amount; or

(ii) Requests a hearing in which case a complaint shall be filed with the hearing docket clerk.

(5) Unless an appeal is filed with the FAA decisionmaker in a timely manner, an initial decision or order of an administrative law judge shall be considered an order assessing civil penalty if an administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found to be appropriate by the administrative law judge, is warranted.

(6) Unless a petition for review is filed with a U.S. Court of Appeals in a timely manner, a final decision and order of the Administrator shall be considered an order assessing civil penalty if the FAA decisionmaker finds that an alleged violation occurred and a civil penalty is warranted.

Issued in Washington, DC, on August 19, 1994.

David R. Hinson,

Administrator.

[FR Doc. 94–21135 Filed 8–25–94; 8:45 am]

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federal register

Friday
August 26, 1994

Part VI

Federal Communications Commission

47 CFR Part 1

Practice and Procedure: Competitive Bidding Procedures; Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[PP Docket No. 93–253; FCC 94–215]

Implementation of Section 309(j) of the Communications Act—Competitive Bidding

AGENCY: Federal Communications Commission.

ACTION: Final Rule; Petition for Reconsideration.

SUMMARY: In this *Second Memorandum Opinion and Order*, the Commission responds to petitions for reconsideration or clarification of the rules and policies adopted in the *Second Report and Order* in this proceeding, which sets forth general rules for the use of competitive bidding to award licenses for use of the spectrum. The Commission makes minor changes in the rules adopted in the *Second Report and Order*. This action is taken to implement Section 309(j) of the Communications Act of 1934, as amended. The rules will promote the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas. These rules also will promote economic opportunity and competition, and disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. This action will result in recovery for the public of a portion of the value of the public spectrum made available for commercial use.

EFFECTIVE DATE: September 26, 1994.

FOR FURTHER INFORMATION CONTACT: Jackie Chorney or Florence Setzer, Office of Plans and Policy, (202) 418–2030.

SUPPLEMENTARY INFORMATION: This *Second Memorandum Opinion and Order* in PP Docket No. 93–253, adopted August 12, 1994, and released August 15, 1994, is available for inspection and copying during normal business hours in the FCC Dockets Branch, room 230, 1919 M Street NW., Washington, DC. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW., suite 140, Washington, DC 20037, telephone (202) 857–3800.

Paperwork Reduction Act

In the *Second Memorandum Opinion and Order* in PP Docket No. 93–253, the Commission adopted no new reporting or recordkeeping requirements.

In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding PP Docket No. 93–253.

Second Memorandum Opinion and Order

Adopted: August 12, 1994; Released: August 15, 1994; By the Commission:

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I. Introduction

1. By this action, we respond to petitions for reconsideration or clarification of the rules and policies adopted in the *Second Report and Order* in this proceeding, which sets forth general rules for the use of competitive bidding to award licenses.[1] Twenty-one such petitions were received, as well as eight oppositions and five replies.

2. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added Section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. § 309(j).[2] Section 309(j) gives the Commission express authority to employ competitive bidding procedures to choose among mutually exclusive applications for initial licenses. The Commission adopted a *Notice of Proposed Rulemaking* in this proceeding on September 23, 1993.[3] The *Second Report and Order* prescribing the required regulations was adopted on March 8, 1994. The Commission has subsequently adopted specific rules for auction of narrowband Personal Communications Service (PCS) licenses,[4] Interactive Video and Data Service (IVDS) licenses,[5] and broadband PCS licenses.[6]

3. The *Second Report and Order* established rules for determining what types of services and licenses may be subject to auctions. The *Second Report and Order* also set forth a range of auction designs and procedures, from which the Commission stated it would choose in establishing procedures for awarding licenses in specific services. The *Second Report and Order* addressed a variety of procedural issues regarding announcement of auctions, filing of applications, bidder and licensee qualifications, payment requirements, and penalties for default or disqualification, as well as safeguards to deter possible abuses of the bidding and licensing process. In response to statutory directive, the *Second Report and Order* also identified provisions designed to ensure that small businesses, rural telephone companies, and businesses owned by women or members of minority groups (designated entities) are given the opportunity to participate in the provision of spectrum-based services.

[1] *Second Report and Order*, PP Docket No. 93–253, 9 FCC Rcd 2348, 59 FR 22980, May 4, 1994 (*Second Report and Order*).

[2] *See*, Omnibus Budget Reconciliation Act of 1993, 47 U.S.C. 309(j)(3)(B).

[3] *Notice of Proposed Rule Making* in PP Docket No. 93–253, 8 FCC Rcd 7635, 58 FR 53489 (Oct 15, 1993), (*NPRM*). In the *First Report and Order* in PP Docket No. 93–253, FCC 94–32, released February 4, 1994, 59 FR 09100 (Feb 25, 1994), (*First Report and Order*), the Commission prescribed transfer disclosure requirements with respect to licenses awarded by random selection.

[4] *Third Report and Order* in PP Docket No. 93–253, 9 FCC Rcd 2941, 59 FR 26741, May 24, 1994 (*Third Report and Order*).

[5] *Fourth Report and Order* in PP Docket No. 93–253, 59 FR 24947, May 13, 1994 (*Fourth Report and Order*).

[6] *Fifth Report and Order* in PP Docket No. 93–253, FCC 94–178, 59 FR 37566, July 29, 1994, adopted June 29, 1994, released July 15, 1994 (*Fifth Report and Order*).

4. In many cases, the appropriate auction procedures and rules vary from service to service. In the *Second Report and Order* we retained the flexibility to choose, from within a defined range, the appropriate procedures for particular services, depending on characteristics of the service such as the likely value and interdependence of the licenses being auctioned and the capital required to construct a system. We also retained the flexibility to alter our procedures in response to our experience with different auction techniques.

5. We dispose of all but two of the petitions for reconsideration of the *Second Report and Order* in this Order. We defer consideration of Brown and Schwaninger's petition concerning Finder's Preferences. We plan to issue a Further Notice addressing the applicability of Finder's Preferences to auctionable services in the near future, and we will consider Brown and Schwaninger's petition in the context of that Notice. We also defer to a future Order consideration of MCI's petition concerning auctioning of BETRS licenses.

6. The issues raised in the petitions for reconsideration fall into three categories: those dealing with the applicability of competitive bidding to specific services and particular circumstances, those dealing with auction design and procedures, and those dealing with the definition of the groups eligible for special provisions (the "designated entities") and the nature of these provisions. We consider issues raised by these petitions below.

II. Applicability of Competitive Bidding

A. Cellular Unserved Areas

7. Two cellular systems operate on separate frequency blocks in each cellular market.[7] The geographic areas not covered after five years by the initial licensees are considered cellular "unserved areas" that are licensed separately. In 1991, we adopted random selection procedures to govern licensing of the cellular unserved areas,[8] and stated that we would revisit this decision to use lotteries if Congress authorized Commission use of competitive bidding procedures.[9] As noted above, competitive bidding authority was in fact enacted in 1993.[10]

8. After receiving comment and considering the extensive record, the Commission indicated in the *Second Report and Order* that, unless specifically excluded, mutually exclusive applications for licenses in the Public Mobile Services, including the Cellular Service, will be subject to competitive bidding if they were filed after July 26, 1993.[11] We noted, however, that applications filed before July 26, 1993 present special issues due to the "special rule" of Section 6002(e) of the Budget Act.[12] That rule does not require the Commission to award licenses or permits by competitive bidding if the license applications were filed before July 26, 1993, even if the applications otherwise meet the criteria that would subject them to selection by bidding.[13] We therefore stated in the *Second Report and Order* that we would determine in a separate order how to authorize Public Mobile systems if applications were filed before July 26, 1993.[14] Subsequently, after thorough consideration of the record, we adopted a *Memorandum Opinion and Order* stating that in such situations we will award licenses for the unserved areas by random selection.[15]

9. *Petitions.* We received three petitions for reconsideration of the provisions of the *Second Report and Order* related to authorization of the cellular unserved areas.[16] John G. Andrikopoulos, et al. (Andrikopoulos) states that where applications for cellular unserved area licenses were accepted for filing before July 26, 1993, the applications should not be subject to competitive bidding. Andrikopoulos asserts that auctioning these licenses would be unreasonable, retroactive application of the Budget Act.[17] The Houston, Dallas, Oxnard and Huntington Cellular Settlement Groups (Cellular Settlement Groups; Groups) assert that the Commission should accept full-market settlements between mutually exclusive applicants for cellular unserved area licenses.[18] These Groups state that Congress intended the Commission to continue use of its existing policy favoring full-market settlements, and express concern that the *Second Report and Order* appears to profit full-market settlements where licenses will be awarded through competitive bidding procedures.[19] Finally, Thumb Cellular, a party to a full-market settlement agreement filed for a Detroit unserved area, asks the Commission to process its settlement agreement immediately.[20]

10. *Discussion.* The issues raised by these petitioners are fully addressed in the *Memorandum Opinion and Order,* which was released shortly after these petitions were filed. We stated in that item that we will grant licenses for cellular unserved areas by random selection from the pool of applicants that filed lottery applications prior to July 26, 1993, and we will permit full-market settlements among lottery applicants to avoid mutual exclusivity.[21] Applications for cellular unserved areas accepted for filing prior to July 26, 1993 will not be subject to competitive bidding. Accordingly, the issues raised by these three petitioners are moot.

B. Principal Use of PCS

11. Section 309(j)(1) of the Communications Act, as amended, permits auctions only where mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission and where the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals.[22] In the *Second Report and Order* we concluded that PCS service would meet the criteria for auctionablility.[23] Millin requests that we reverse that decision and conduct further inquiry concerning the possibility of non-subscription PCS.[24] We consider and rejected Millin's arguments in the *Fifth Report and Order* in this docket, stating that the overwhelming weight of the comments in that proceeding, as well as our experience with the PCS experiments that we have licensed, reflect that licensed PCS spectrum is likely to be used principally for the provision of service to subscribers for

[7] The Domestic Public Cellular Service is governed by Part 22 of the Commission's Rules, 47 CFR Part 22.

[8] *See First Report and Order and Memorandum Opinion and Order on Reconsideration,* CC Docket No. 90–6, 6 FCC Rcd 6185, 56 FR 58503, Nov 20, 1991.

[9] *Id.* at 6217.

[10] *See* Budget Act, 107 Stat. 387–392.

[11] *See Second Report and Order* at ¶ 61 & n.58.

[12] *See id.* at n.55, citing Budget Act, § 6002(e).

[13] *See* Budget Act, § 6002(e).

[14] *See Second Report and Order* at n.55.

[15] *See* Memorandum Opinion and Order, PP Docket No. 93–253, FCC No. 94–123, 59 FR 37163, July 21, 1994, adopted May 27, 1994, released July 14, 1994 (*Memorandum Opinion and Order).*

[16] *See* petitions of Thumb Cellular Limited Partnership (Thumb Cellular), John Andrikopoulos, *et al.* (Andrikopoulos), and cellular settlement groups in Houston, Dallas, Oxnard and Huntington (Cellular Settlement Groups).

[17] *See* Andrikopoulos Petition at 4–5.

[18] *See* Cellular Settlement Groups Petition at 3–7.

[19] *Id.*

[20] Thumb Cellular Petition at 3–4.

[21] *See Memorandum Opinion and Order* at ¶¶ 10–18.

[22] 47 U.S.C. § 309(j)(1).

[23] *See Second Report and Order* at ¶¶ 55–56.

[24] *See* petition of Millin Publications, Inc. (Millin).

compensation.[25] We continue to believe that the record strongly supports the likelihood that PCS spectrum will be used principally for the provision of service to subscribers for compensation. Accordingly, we deny Millin's request.

III. Auction Design and Procedures

A. Activity and Stopping Rules

12. Activity rules and stopping rules are intended to govern the speed and duration of bidding in an auction. An activity rule encourages each bidder to participate actively through the course of an auction. Activity rules are intended to ensure that simultaneous auctions with simultaneous stopping rules will close within a reasonable period of time and that bid prices will convey meaningful information during the course of the auction. In the *Second Report and Order*, the Commission adopted a three-stage Milgrom-Wilson activity rule as the preferred activity rule when a simultaneous stopping rule is employed.[26] Under this rule the auction moves from stage I to stage II when, in each of three consecutive rounds of bidding, the high bid has increased on less than some specified percent of the spectrum (measured in terms of MHz-pops) being auctioned.[27] The auction will move from stage II to stage III when in each of three consecutive rounds the high bid has increased on less than some specified percent of the spectrum (measured in terms of MHz-pops). The Commission, however, retained the flexibility to decide whether to use an activity rule, and if so what type of activity rule to use. We described possible activity rules, and stated the range of alternatives from which we would choose and the circumstances that might cause us to choose particular rules. We stated that we would announce the activity rule to be used by Public Notice before an auction.[28] A stopping rule specifies when an auction is over. In the *Second Report and Order* we stated that, for simultaneous auctions, our preferred stopping rule was that all markets would close simultaneously if a single round passed in which no new acceptable bids are submitted for any license. We retained the discretion, however, to announce at any point during a multiple round auction would end after a specified number of rounds.[29]

13. *Petitions*. Southwestern Bell Corporation (SBC), the GTE Service Corporation (GTE), and the Association of Independent Designated Entities (AIDE) argue that the three-stage Milgrom-Wilson activity rule is unnecessarily complex and should be simplified or eliminated.[30] SBC points out that the three-stage Milgrom-Wilson activity rule would require the Commission to track a large number of upfront payments and eligibility levels, and notes that the software the Commission intends to develop to track activity levels may not be developed in time. SBC states that allowing five automatic waivers, as the Commission proposes to do, does not reduce the uncertainty and expense which the activity rule imposes and may make bidding strategy more complex.[31] GTE states that the upfront payment formula, when combined with the activity rule, unnecessarily restricts bidder flexibility.[32] GTE states that the activity rules limit the ability of bidders to revise their plans in the course of the auction, particularly if information revealed during the latter stages of the auction causes a bidder to become interested in additional properties. The activity rules, according to GTE, discourage qualified entities from participating as fully as they might otherwise do, so that some licenses may not be awarded to the entity placing the highest value on them.[33]

SBC urges the Commission to alter the stopping rule to allow the agency to issue a notice that bidding will close after a given number of rounds.[34] GTE and SBC ask the Commission to adopt a simpler activity rule, such as a requirement that bidders be active on a single license in each round.[35] AIDE urges that the activity rules be withdrawn, at least in the case of designated entities.[36] Pacbell counters that the three-stage Milgrom-Wilson activity rule avoids delay, provides meaningful information, and allows bidders the flexibility to react to that information, and that software is available to help ensure that the Milgrom-Wilson rule will not be hard to implement.[37]

14. *Discussion*. As we noted in the *Second Report and Order*, the decision to use activity rules and the choice among activity rules involve tradeoffs among the speed of the auction, bidder flexibility, and simplicity.[38] The petitioners raise no issues relating to activity rules that we did not consider carefully in the *Second Report and Order*.[39] We see nothing in the petitions for reconsideration to cause us to change our opinion concerning the choices we made among these goals.

15. We do not believe that the Milgrom-Wilson activity rules will excessively restrict bidders' flexibility to bid for desired combinations of licenses or cause licenses to be awarded to bidders who value them less than other bidders. The rules were expressly designed to counteract the incentive to delay serious bidding that occurs in simultaneous auctions, without unduly limiting bidders' flexibility to pursue backup strategies and to use new information.[40] The restrictions placed on bidders at the beginning of the three-stage auction procedure are modest. In the first stage, to retain full eligibility a bidder need only bid on, or have the highest bid from the previous round on, licenses representing at least one-third of the MHz-pops he or she ultimately hopes to win. In the second stage, the bidder must bid on, or hold the high bid on, two-thirds of the MHz-pops he or she hopes to win. Only in the third stage are bidders required to bid on the full amount of MHz-pops they hope to acquire.[41] Bidders may shift bids among any combination of licenses from round to round.[42] Paul Milgrom points out that at the shift from stage I to stage II there will be no more than three bidders on an average license, and at the shift to stage III there will be at most 1½ bidders on an average license.[43] Because the progression to higher stages imparts such information, it gives the bidders important signals concerning the state of

[25] *Fifth Report and Order* at n.8.

[26] *Second Report and Order* at ¶ 144.

[27] The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license.

[28] *Id.* at ¶ 133.

[29] *Id.* at ¶ 132.

[30] SBC Petition at 1–6; GTE Petition at 6–11; AIDE Petition at 12–13.

[31] SBC Petition at 3–6.

[32] GTE Petition at 7.

[33] *Id.* at 9–10.

[34] SBC Petition at 5.

[35] GTE Petition at 10–11; SBC Petition at 5.

[36] AIDE Petition at 12–13.

[37] Bell Opposition at ii.

[38] *Second Report and Order* at ¶ 134.

[39] For instance, GTE notes that a bidder may be interested in some properties only if it can also acquire other key properties. GTE states that "under the modified Milgrom-Wilson rule, the bidder could be forced to choose between dropping out of the auction prematurely or staying active in markets that may prove to be less valuable if the bidder loses out in the other key markets." GTE Petition at 9–10. The *Second Report and Order* considers the same situation of interdependency and concludes that a bidder would have more flexibility with the three-stage Milgrom-Wilson rule than with another possible activity rule, that of starting the bidding with the third stage of the Milgrom-Wilson rule. *See Second Report and Order* at ¶ 142.

[40] *Id.*

[41] *Id.* at ¶ 137.

[42] *Id.* at ¶ 136.

[43] *Ex parte* submission of Paul Milgrom, June 21, 1994 at 2.

bidding. By stage III, bidding should be rapidly drawing to a close, and any major shifts in strategy should already have been implemented. Bidders who believe that they may want to expand their purchases if prices are unexpectedly low can guarantee their ability to do so by making a sufficiently high upfront payment.

16. In the *Second Report and Order*, we also stated our intention to reduce the complexity faced by bidders by developing bidding software and making it available to all bidders in auctions in which a Milgrom-Wilson activity rule is used.[44] SBC expresses concern that the software may not be available in time. Software was in fact developed in time for the July nationwide narrowband auction, and performed successfully in that auction. In light of that success, we have no doubt that appropriate software will also be available for the remaining narrowband and broadband auctions.

17. Finally, we remind petitioners that, in the *Second Report and Order*, we adopted the three-stage Milgrom-Wilson activity rules only as a preferred option.[45] We deferred to later, service-specific Orders the choice of actual rules to be used in auctions for individual services, depending, as discussed in the *Second Report and Order*, on the characteristics of the services and our experience with the conduct of auctions. In addition, we retained the flexibility to decide on an auction-by-auction basis, and to announce by Public Notice before the auction, whether to use an activity rule, and if so what type of rule.[46] Thus, if experience shows that the Milgrom-Wilson rules are unduly difficult to administer, we may shift to other activity rules, including the one recommended by petitioners requiring only that bidders be active on a single license in each round. We also expressly retained the discretion, requested by SBC, to announce at any point during a multiple round auction that the auction will end after some specified number of additional rounds.[47]

18. In the *Second Report and Order* the Commission also retained the ability to speed up an auction by announcing at any time during an auction that the next stage of the auction will begin in the next bidding round.[48] In this Order the Commission wishes to make explicit that this discretion could be exercised by employing an alternative rule for moving from one stage of the auction to the next. The Commission will announce by Public Notice prior to an auction its intent to use an alternative rule. One possible alternative rule would be that the auction will move to the next stage if in each of some fixed number of rounds, bidding activity is below some level measured as the ratio of new bids (measured in terms of MHz-pops) to available licenses (measured in terms of MHz-pops). The ratio of new bids to licenses may be a better measure of bidding activity than the percentage of total licenses on which the high bid has increased (measured in terms of MHz-pops) because it accounts for the possibility that bidding may be concentrated on a few licenses. In contrast, the latter measure indicates the same level of bidding activity regardless of how many bids are made on a given set of licenses.

B. Suggested Opening Bid

19. In the *Second Report and Order*, we stated that in multiple round auctions the Commission will generally specify minimum bid increments to speed the progress of the auction.[49] The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round. We retained the discretion to use a "suggested" minimum bid increment rather than a required bid increment.[50]

20. In the recent nationwide narrowband auctions, it became apparent that the Commission may need further tools to avoid unnecessarily long auctions. In order to expedite the auction process further, we also reserve the discretion to establish a suggested opening bid on each license in addition to the minimum bid increment.[51] Where we adopt a suggested opening bid, initial bids will have to be above the minimum bid increment but may be below the suggested opening bid. Generally, we will establish suggested opening bids in the range of $.02–$.20 per pop per MHz for each license. This suggested opening bid will provide bidders with an incentive to start bidding at a substantial portion of the license value, thus ensuring a rapid conclusion of the auction.

C. Commission Discretion During Auctions

21. In the *Second Report and Order*, and discussed *supra*, we chose our primary auction methodology, but noted that no one auction design is optimal for all auctionable services. We stated that we would adopt auction rules for specific services in subsequent Report and Orders, based on criteria established in the *Second Report and Order*. We further stated that when we announced individual auctions for specific services, we would specify more detailed procedures for those auctions in a Public Notice, but that those procedures also would be governed by criteria set forth in the *Second Report and Order*.[52] Our rules also afforded flexibility with respect to some auction procedures, such as those governing the duration of bidding rounds, minimum bid amounts, and stopping rules, and we stated that we might make decisions regarding such matters during the course of an auction.[53]

22. *Petition*. The National Association of Business and Educational Radio, Inc. ("NABER") asserts that the auction rules do not comply with the public interest and the Administrative Procedure Act[54] because they allow the Commission to circumvent the normal notice and comment procedure, and that the rules prevent providers of service from devising a business plan and auction strategy in advance.[55] NABER states that the Commission should eliminate its discretion to change the auction rules or procedures during a particular auction, that bidders need to know the rules which will apply for a particular service auction, and that interested parties should have the opportunity to provide meaningful comment before the final auction rules for particular services and frequencies are set.[56] NABER asserts that should the Commission change bidding methods in mid-stream without prior public comment, the Commission would violate the notice and comment rulemaking requirements of the Administrative Procedure Act, by its failure to keep a record and analyze and consider all relevant matter regarding those new rules.[57]

23. *Discussion*. We believe that the process we have used to adopt auction designs and implementation procedures and the rules themselves fully comply

[44] *Second Report and Order* at ¶ 143.

[45] *Second Report and Order* at ¶ 144.

[46] *Id.* at ¶ 133.

[47] *Id.* at ¶ 132.

[48] *Id.* at n.110.

[49] *Second Report and Order* at ¶ 124.

[50] Under a suggested minimum bid increment rule, the auction would close if no bids or only one bid was submitted that was above the minimum bid increment. *Id.* at n. 102.

[51] *See ex parte* submission of Paul Milgrom, May 19, 1994.

[52] *Id.* at ¶ 68.

[53] *Id.* at ¶¶ 123, 126, 132.

[54] *See* Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

[55] NABER Petition at 2.

[56] *Id.* at 8.

[57] *Id.* at 9; *see* 5 U.S.C. § 553.

with the Administrative Procedure Act. In the NPRM in this docket, we provided notice of the auction designs we were considering and requested comment on issues of auction design and procedure. We received voluminous public comment on these issues. In the *Second Report and Order*, we carefully considered all comments and suggestions concerning a wide variety of proposed auction designs, including the comments and proposals of numerous experts in auction theory. We have established a broad framework for the conduct of license auctions, specifying a menu of auction designs and procedures from which we will choose for individual auctions. We have identified our preferred options, and have discussed the circumstances in which we believe the various options will be most appropriate in order to serve our statutory goals, and which are therefore most likely to be chosen. After the *Second Report and Order* was issued, we made, in addition, more specific choices of auction designs for particular services in Orders dealing with those services.[58] We have also established application, payment, and penalty procedures for individual services.[59] The procedures, we believe, afforded members of the public all of the procedural rights to which they are entitled under the Administrative Procedure Act.

24. Our rules, however, must also be flexible enough so that we can adjust our procedures to fit the circumstances of individual auctions. We will not know until we have gained some experience with simultaneous multiple round auctions exactly what values of such parameters as bidding increments and triggers for movement to the next auction phase work best under what circumstances. Consequently, we believe that it is important for those running the auctions to be able to use information generated in the early auctions and in the early rounds of individual auctions. Further, it may be important to be able to respond to the behavior of bidders in the course of particular auctions. We may find it desirable to allow more time for consultation between bidding rounds in complex auctions, for instance, or, in light of the statutory requirement to issue licenses expeditiously, to increase the bidding increment to hasten the conclusion of an auction if the auction is proceeding slowly. Clearly, notice and comment procedures would be unworkable in such cases. The flexibility that our rules permit us is analogous to the *ad hoc* decisional authority that may be exercised within other types licensing proceedings, and our discretion here is similarly constrained by the general framework and standards embodied in our rules. The latitude remaining to the Commission to alter auction procedures is, however, necessary to ensure that we can make improvements as we become aware of the need for them, and that we can manage auctions efficiently. The Commission will exercise its discretion in a manner consistent with our clearly articulated goals and the general procedures we have established.

25. We have also taken care to safeguard bidders' interests. During the course of an auction only minor adjustments in procedures are permitted that will necessitate no major changes of strategy on their part. Further, we have stated clearly which procedures are, and which are not, subject to change during the course of an auction, so that bidders will know what kinds of changes to expect and to prepare for. We have stated that when we announce auctions for particular services by public notice, we will also announce the procedures to be used in those auctions.[60] We believe that this approach will provide prospective bidders with ample information to plan rational bidding strategies.

26. Finally, although the Commission has never before used auctions as a licensing method, we note that our auction procedures afford as much, or more, detailed guidance to bidders than is usually provided in advance of an auction. For example, in conventional oral auctions the auctioneer customarily has the discretion to alter bid increments and other procedures at will in any manner and at any time during an auction. As in other types of auctions, we believe that it will be critically important to the success of our auctions to leave the Commission some discretion to fine-tune auction procedures between auctions and, in some cases, on an *ad hoc* basis, during the course of an auction. Accordingly, we affirm our original decisions to adopt rules that afford the Commission some flexibility to modify its procedures during the course of an auction, within the scope of the options we have delineated and under the circumstances described above.

D. Treatment of Upfront Payments

27. In the *Second Report and Order* we required bidders to tender a substantial payment in advance of the auction in order to deter frivolous or insincere bidding.[61] Upfront payments were also intended to provide a source of funds for collection of penalties for bid withdrawal.[62] The amount of the upfront payment was related to the level of eligibility the bidder wished to establish, measured in terms of the population and amount of spectrum encompassed by the licenses on which the bidder was permitted to bid. In some cases the upfront payment could amount to millions of dollars.[63] We required that upfront payments be submitted prior to bidding, and we did not permit use of letters of credit or Treasury bills for upfront deposits due to administrative difficulties in accepting payment in such forms, at least until the Commission has more experience in conducting auctions.[64] We stated that upfront payments made by a winning bidder would be applied to satisfy its down payment obligations, and that losing bidders' upfront payments would be returned if they wished to withdraw from further bidding.[65]

28. *Petitions*. GTE asserts that the Commission should adopt an interest-bearing evergreen deposit procedure for upfront deposits.[66] GTE states that, since the Commission is not currently authorized to establish interest-bearing accounts, substantial sums of money could be tied up in upfront deposits without any accrual of interest for substantial periods of time. GTE asserts that maximum bidder flexibility can be achieved by allowing bidders to add or withdraw deposit funds during the course of the auction. GTE states that the Commission needs to ensure that it has the requisite authority to permit the accumulation and payment of interest.

29. AIDE states that when a winning bidder's upfront payments, less bid withdrawal penalties, exceed the required deposit, the excess upfront payment should remain available for crediting to another auction or for refund to the winning bidder.[67] AIDE points out that, in the case of designated entities, the required deposit is only 10 percent. AIDE notes that the Commission has stated that it will apply this policy for losing bidders, and as a

[58] *See Third Report and Order* at ¶¶ 16–40, *Fourth Report and Order* at ¶ 11–18, and *Fifth Report and Order* at ¶¶ 27–57.

[59] *See Third Report and Order* at ¶¶ 41–60, *Fourth Report and Order* at ¶¶ 19–29, and *Fifth Report and Order* at ¶¶ 58–92.

[60] *Second Report and Order* at ¶ 68.

[61] *Second Report and Order* at ¶ 171.

[62] *Id.* at ¶ 176.

[63] *Id.* at ¶ 172, 173.

[64] *Id.* at ¶ 182, 184, 185.

[65] *Id.* at ¶ 187, n.140.

[66] GTE Petition at 11–13.

[67] AIDE Petition at 15.

matter of equal protection the Commission should apply the same policy to winning bidders with excess upfront payments.[68]

30. AIDE requests clarification of footnote 133 in the *Second Report and Order*.[69] Footnote 133 reads:

For example, an entity that is interested in bidding on several 30 MHz PCS licenses with a goal of providing service to a population of at most 50 million should make an upfront payment of $30 million ($.02 x 30 MHz x 50,000,000). That bidder will not be permitted to bid (at any time) in the auction, or be permitted to win, 30 MHz licenses covering more than 50 million pops.

31. *Discussion*. Allowing bidders to add funds to upfront deposits in order to increase their eligibility level, or to withdraw funds from upfront deposits, as GTE recommends, would add greatly to the complexity of the Commission's administrative task. The Commission would have to keep track of changes in eligibility due to changes in upfront payments, as well as to changes in bidders' activity levels, and would have to ascertain that fund transfers had taken place before permitting bidders to bid at the levels to which the additional payments entitled them. Because of the short intervals between rounds, delays in the transfer of funds would likely create problems for both bidders and the Commission. For these reasons, we believe it is prudent to require bidders to submit upfront payments that represent the maximum level of bidding that they anticipate before the beginning of the auction. Bidders can always ensure that they will be able to expand their bidding above their originally anticipated level by submitting a sufficiently large upfront payment and maintaining a high activity level.

32. We agree with AIDE that winners' upfront deposits, in excess of their required down payment deposits and any penalties they may owe, should be refunded expeditiously. We intend to refund excess upfront deposits of all bidders as soon as possible. We will not apply excess upfront deposit balances to subsequent auctions, however, due to the additional administrative difficulty of tracking the funds.

33. With respect to AIDE's request for clarification, we clarify that footnote 133 means that in any round of the auction, a bidder who has made an upfront payment of $30 million may bid on, or hold the high bid from the previous round on, 30 MHz licenses in markets with a combined population totaling not more than 50 million. The specific licenses on which the bidder submits bids may vary from round to round, but the total MHz-pop ceiling cannot be exceeded in any single round.

E. Default Penalty

34. In the *Second Report and Order* the Commission imposed a default penalty for withdrawing a bid after a simultaneous multiple round auction has closed.[70] This default penalty was set at 3 percent of the amount of the winning bid the next time the license is offered by the Commission, or 3 percent of the amount of the defaulting bidder's bid, whichever is less. The default penalty would be imposed in addition to the bid withdrawal penalty, which was set at the difference between the amount bid and the amount of the subsequent winning bid. We stated that the default penalty was intended to provide an incentive for bidders who wished to withdraw their bids to do so before the close of the auction. We stated that such a penalty was appropriate because a withdrawal that occurs after an auction closes is likely to be more harmful than one that occurs before closing. We stated that if a withdrawal occurs after the auction closes, other bidders will have little opportunity to revise their strategies, and the likelihood will be lower that the licenses will be awarded to those who value them most. We also stated that default imposes on the government the extra costs of re-auctioning the license.

35. *Petition*. AIDE asserts that the default penalty will produce a windfall to the Treasury if the winning bid exceeds the defaulting bid by more than 3 percent.[71] AIDE states that the defaulting bidder should pay no penalty if the second bid exceeds the defaulting bid by 3 percent or more, and that if the second bid exceeds the defaulting bid by less than 3 percent, the defaulting bidder's penalty should be the difference between the second winning bid and 103 percent of the defaulting bid.

36. *Discussion*. We believe that it is appropriate to charge the full 3 percent default penalty in addition to the bid withdrawal penalty whether or not the winning bid in the second auction exceeds the defaulting bid. As we stated in the *Second Report and Order*, the function of the default penalty is to encourage bidders who plan to withdraw their bids to do so before the close of the auction.[72] The additional costs to the Commission and to other bidders of auctioning the license a second time, and the increased likelihood that the license will not be won by the bidder who values it most, are incurred as a consequence of default regardless of the level of the bids. Even if the winning bid is higher than the defaulting bid, we have no reason to believe that it is higher than the winning bid would have been had the defaulting bidder withdrawn before the close of the auction, nor have we reason to believe that a high winning bid compensates for the undesirable effects of default. Consequently, we retain the default penalty as set forth in the *Second Report and Order*.

F. Disclosure of Bidding Information

37. In the *Second Report and Order* the Commission recognized the informational benefits to be gained from releasing bidder identities during an auction, but concluded that such information should not be released because "the risk of collusion and strategic manipulation outweighs the benefits of the additional information." Instead the Commission adopted an intermediate approach pursuant to which the bidder identification numbers and bid amounts for each bidder will be released at the end of each round of bidding. This approach provides bidders with useful information without incurring excessive risks of collusion and strategic manipulation.[73]

38. *Petitions*. GTE and Southwestern Bell request that the identities of bidders be released during the course of the auction. GTE requests that the identity of the bidder associated with each bidder identification number be disclosed during the bidding process.[74] SBC states that the Commission should announce both the identity of the highest bidder and the bid amount for each round of the auction.[75] GTE argues that a bidder must construct a strategy based on its own valuation of the spectrum as well as estimates of its competitors' valuations and past bids, and that a fundamental component of this exercise is knowledge of who the competitors are. GTE notes that the Commission's sole justification for not furnishing information about the identity of bidders is a concern for collusion, and states that the *Second Report and Order* includes other mechanisms for minimizing collusion. GTE states that increases in available information raise the level of competition and the efficiency of license assignments, and that access to

[68] *Id.* at 16.

[69] *Id.* at 13.

[70] *Second Report and Order* at ¶ 154.

[71] AIDE Petition at 14.

[72] *Second Report and Order* at ¶ 154.

[73] *Id* at ¶ 158.

[74] CTE Petition at 4–6.

[75] SBC Petition at 8–10.

bidder identification information may increase revenue from the auction process while ensuring award to the bidder who most highly values the license.[76] SBC argues that the decision to keep winning bidder identities secret creates an opportunity for collusive behavior because cartels could coordinate activities and punish violators without detection. SBC notes that if the identity of all bidders is known, the Commission and bidders need not be concerned with protecting bidders' identity. SBC states that knowing who the successful bidders are affects other bidders' ability to assess the accuracy of their valuation of the spectrum and allows them to ascertain that an aggregation of licenses is underway which might pose a competitive threat. MCI states that because of the potential for bidder collusion and strategic manipulation, bidder identities should not be revealed.[77]

39. *Discussion.* Arguments in favor of disclosing bidder identities primarily turn on the value of the information in improving the quality of bids. Some auction experts argue that bidders' estimates of license values can be improved by comparing them to the valuations of their competitors.[78] Bidders' valuations of licenses may also be highly dependent on knowing the identity of neighboring carriers, especially regional leaders and competitors, and on knowing the manner in which complementary licenses are likely to be used and the compatibility of standards both inside and outside their desired service areas. Maximizing information available to bidders may increase bids by decreasing bidders' incentives to reduce their bids to avoid the "winner's curse," the tendency for the bidder who most overestimates the value of the item for sale to win an auction. Revealing bidder identities may facilitate awarding licenses to those who value them most highly by providing more information to bidders. More accurate valuation of licenses by bidders can thus improve the efficiency of license assignments. In addition, publicly disclosing the identity of other bidders may encourage vigorous bidding for licenses. Releasing bidder identities may increase interest in and media coverage of the auctions.

40. Our experience with the first narrowband PCS auction showed that preventing bidder identities from being revealed can be extremely difficult. In addition, if some but not all bidders know other bidders' identities, those bidders have an advantage in the quality of information available to them and in the potential ability to thwart others' bidding strategies. Concealing bidder identities may give an advantage to larger bidders that have the resources to devote to discovering other bidders' identities.

41. As we noted in the *Second Report and Order*, however, releasing the identities of high bidders may foster strategic manipulation, such as bidding up the prices of licenses needed by rivals, and may facilitate collusion.[79] Some auction experts argue that anonymity makes it harder to target a firm for strategic hold-up because the bidding and aggregation strategies of specific competitors cannot be easily detected.[80] Concealing bidder identities makes initiating collusive arrangements during the course of an auction more difficult because bidders will not easily be able to identify the parties against whom they are bidding, unless those parties voluntarily reveal their identities. On the other hand, concealing bidders' identities may not be critical to preventing collusion during an auction; existing antitrust laws and the FCC's collusion rules should be adequate to prevent collusive conduct. In any event, under an anonymous bidding scenario, if bidders want to collude they can simply disclose their bidder identification numbers to one another before the auction.

42. Because of the advantages of providing more information to bidders and the difficulties involved in ensuring that bidder identities remain confidential, we will generally release the identities of bidders before each auction. However, we recognize that experts disagree on the potential for knowledge of bidders' identities to facilitate collusion and other strategic behavior. Consequently we wish to have the flexibility to conceal bidder identities if further experience shows that it would be feasible and desirable to do so. We may also wish to test the effects of releasing identities of bidders. Consequently we are reserving the option to withhold bidder identities on an auction-by-auction basis. If we decide to withhold bidder identities for a particular auction, we will announce that decision by a service-specific auction Order. We will announce by Public Notice prior to each auction whether the identities of bidders will be made public in that auction.

G. Standby Queue

43. *Petition.* GTE states that for 10 MHz blocks in broadband PCS the Commission should adopt the "standby queue" bidding mechanism considered in experiments sponsored by the National Telecommunications and Information Administration and conducted at the California Institute of Technology.[81] The standby queue allows parties seeking individual licenses to coordinate their bids in order to beat a bid for a combination of licenses. GTE asserts that the standby queue would allow bidders seeking to combine smaller blocks into a larger set of frequencies, or to combine blocks on a geographic basis, to obtain information about the status of bidding that would permit them to bid rationally and efficiently.

44. *Discussion.* The standby queue is a mechanism to be used in conjunction with combinatorial auctions. In the *Fifth Report and Order* we concluded that the disadvantages of combinatorial bidding were likely to outweigh the advantages for auctions of broadband PCS licenses, and we adopted simultaneous multiple round bidding as our auction methodology for broadband PCS licenses. Nevertheless, we left open the option to use combinatorial auctions if simultaneous multiple round auctions do not result in efficient aggregation of licenses, and if there are significant advances in the development of combinatorial auctions.[82] Although we have no current plans to use combinatorial auctions, if in the future we do adopt such an auction methodology we will consider the use of a standby queue mechanism.

H. Filing Fees

45. *Petition.* William E. Zimsky (Zimsky) states that the rule imposing filing fees for the filing of short-form applications for auctions should be deleted.[83] Zimsky asserts that because there is no provision in 47 U.S.C. § 158(g) for imposing the filing fee for the new short-form application, the Commission lacks the statutory authority to impose such a fee. Zimsky also asserts that, even if the Commission has such statutory power, to impose a filing fee on all bidders is unreasonable because the filing fee was designed to recoup the costs of fully processing the

[76] GTE Petition at 5–6.

[77] MCI Comments at 3.

[78] *See e.g.* comments of PacBell on NPRM, Attachment by Paul R. Milgrom and Robert B. Wilson at 21.

[79] *Second Report and Order* at ¶ 158.

[80] Comments of NYNEX on NPRM, attachment by Robert G. Harris and Michael L. Katz, "A Public Interest Assessment of Spectrum Auctions for Wireless Telecommunications Services" at 9.

[81] GTE Petition at 13–14.

[82] *Fifth Report and Order* at ¶ 35.

[83] *See* William E. Zimsky Petition.

application. Since only auction winners will submit long-form applications and have their applications scrutinized, the losing bidders do not receive this service. Consequently, the Commission's proposed scheme is unconstitutional, he argues, because a user fee which is not reasonably related to, or a fair approximation of, the cost incurred by the government in providing the service for which the fee is assessed, effects a taking of applicants' property without just compensation, in violation of their fifth amendment rights. Zimsky cites *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980); *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989) in support of his argument.

46. *Discussion.* The Commission has requested express statutory authority to impose section 8 application fees for short-form applications. In the absence of such express authority, we do not currently impose fees for short-form applications. However, long-form applications in most services are subject to fees under section 8. Consequently we find Zimsky's petition to be moot, and we dismiss it.

I. Waiver Requests in Short-Form Applications

47. Cable & Wireless, Inc. (CWI) asks that the Commission reconsider its rules that appear to mandate dismissal of the short-form application (Form 175) that do not certify compliance with the foreign ownership provision of Section 310 of the Communications Act, notwithstanding the filing of a request for waiver or other relief.[84] CWI asserts that the Commission should permit participation at auction where the applicant certifies to the pendency of such a waiver request. In considering the acceptance for filing of short-form applications, the Commission will accept certifications that state that a request for waiver or declaratory ruling concerning the requirements of section 310 is pending.[85]

J. Rules Prohibiting Collusion

48. In order to prevent collusion in bidding, the Commission in the *Second Report and Order* stated, * * * bidders will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. Bidders will also be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid * * *. After such applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short form application.[86]

49. *Petition.* BET Holidays, Inc. (BET) states that the above requirements prevent bidders from entering into any new agreements, joint ventures or similar arrangements with other entities after filing a short-form application.[87] BET claims that as a consequence bidders may be locked into bidding arrangements significantly before the commencement of the auctions, and will be unable to modify their bidding strategies, consult with experts or others, or enter into alliances with new parties any time after the filing of the short-form application. BET states that the collusion rule is an unrealistic constraint on lawful business behavior. For example, according to BET, if a company does not identify affiliates or others with whom it must consult, the company would be forbidden from soliciting research, sharing resources, or discussing its bids until after the winning bidder tenders its down payment.[88] BET requests that the Commission rely on antitrust law as a safeguard against collusion.

50. *Discussion.* While we intend to rely primarily on the antitrust laws to prevent bidding collusion, we believe that the anticollusion rules in the *Second Report and Order* will provide an important tool that will enable the Commission to detect, prevent, and punish collusion. To prevent and detect collusion, we believe that it is important to have clearly stated rules concerning the entities with whom communication about bidding strategies is permissible. The requirement that an entity identify at the time of the short-form application those affiliates, or others with whom it has agreements concerning bidding, and the prohibition of communication concerning bidding with entities identified by other bidders, serve this purpose and are not particularly burdensome. Similarly, prohibiting additional agreements and alliances concerning bidding between applicants bidding for the same licenses, after applications have been filed and the identities of all applicants are known, seems a prudent deterrent to collusion that should have only a minimal and temporary effect on bidders' flexibility. We wish to make explicit our intention that the prohibition extend to post-application settlement agreements and discussions concerning settlement agreements.

51. We do believe, however, that our prohibition on communication among bidders and formation of agreements among bidders after applications have been filed may have been excessively broad in that it includes communications and agreements with bidders who are not bidding against each other, and so may prevent useful agreements that have no effect on the competitiveness of bidding. Consequently, we are modifying our collusion rules, which currently prohibit bidders from communicating with another after short-form applications have been filed regarding the substance of their bids or bidding strategies and which also prohibit bidders from entering into consortium arrangements or joint bidding agreements of any kind after the deadline for short-form applications has passed. In order to permit certain bidders to respond to higher than expected license prices by combining their resources during an auction, we will now permit bidders who have not filed Form 175 applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of an auction. We conclude that where bidders have not applied for any of the same licenses there is little risk of anticompetitive conduct and therefore we believe that it is appropriate to relax our collusion rules to permit bidders in this context to have great flexibility to increase their competitiveness in the auction by combining their resources, provided that no change of control of any applicant takes place.

52. In addition, we now believe that entering into consortium arrangements or adding equity partners during an auction may have a useful effect in

[84] *See* petition of CWI.

[85] On January 5, 1994, CWI also filed a petition seeking a declaratory ruling that the public interest warrants grant of common carrier radio license applications to U.K. citizens and/or corporations that possess ownership interests in excess of the foreign ownership benchmarks in Section 310(b)(4) of the Communications Act. We expect to address the merits of this petition in a separate Declaratory Ruling.

[86] *Second Report and Order* ¶ 225.

[87] BET Petition at 10.

[88] Id. at 11.

enabling bidders to acquire the capital necessary to bid successfully for licenses. We have concluded that formation of consortia or changes in ownership after the filing of short-form applications will not necessarily have anticompetitive effects, provided they do not involve parties that might have bid against each other and do not result in a change in control of the applicant. Consequently, we wish to modify our rules regarding amendments to short-form applications. As a result of our experience in the nationwide narrowband PCS auction, we believe that it is necessary to allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change in control of the applicant. Permitting such amendments will provide bidders with flexibility to seek additional capital after applications have been filed, whole ensuring that the real party in interest does not change. Accordingly, we will modify Section 1.2105(c) to permit applicants to amend their FCC Form 175 applications to reflect ownership changes that do not result in a change in control of the applicant, provided the parties have not filed Form 175 applications for any of the same licenses. Such changes shall not be regarded as major amendments to an application, provided they do not result in a transfer of control of the license or the applicant and do not change control of the company.

53. Situations may arise in which an applicant has some common ownership interest with another bidder. We wish to clarify that, unless that other entity is expressly identified as an entity with whom the applicant has an agreement concerning bidding, we will prohibit communication concerning bidding with that bidder, as described in the *Second Report and Order*, even if the other bidder is identified on the applicant's short form application as having some common ownership interest with the applicant. We will retain the anticollusion rule as set forth in the *Second Report and Order*, with these clarifications.

K. Information Disclosure by Applicants and Licensees

54. *Petitions*. Two petitions deal with the amount of information auction participants are required to disclose. GTE requests that the Commission require applicants to provide full ownership disclosure in their short form applications.[89] GTE asserts that by enabling the Commission and competing applicants to assess the legitimacy of auction applicants, full disclosure facilitates the award of licenses to qualified and eligible service providers. According to GTE, full disclosure also promotes open and informed bidding decision.

55. SBC asks that the Commission minimize requirements for disclosure of information upon transfer of licenses.[90] SBC states that the point of transfer disclosures is to "prevent unjust enrichment as a result of the methods employed to issue licenses and permits."[91] SBC assserts that rules designed to prevent unjust enrichment should be solely applicable, if at all, to designated entities that receive special accommodations, since the risk of unjust enrichment is high only in auctions where such special accommodations are provided. SBC asserts that the formation of reasonable and efficient alliances would be discouraged by the mandate to expose the details of the alliance to competitors. SBC particularly objects to the requirement that any management agreements or consulting contracts be filed. SBC seeks clarification that the disclosure requirements will apply only to the licensees which either have not begun to offer service or have only offered service for some minimal period of time.

56. *Discussion*. With respect to ownership disclosure in short-form applications, in the *Second Report and Order* we decided to require applicants to furnish only minimal information in short-form applications and bidder certifications prior to auctions in order to reduce administrative burdens and minimize the potential for delay.[92] Further ownership disclosure requirements, however, were adopted on a service specific basis in later Reports and Orders.[93] We believe that GTE's concerns are fully met by these requirements.

57. As for transfer disclosure requirements, Congress in the Budget Act required us to develop and test alternative auction designs.[94] We noted in the *Second Report and Order* that in addition to allowing detection of unjust enrichment, transfer disclosure requirements would provide data necessary for evaluation on our auction designs.[95] We noted that the reporting requirements would allow us to monitor our compliance with the Congressional directive in Section 309(j)(3)(B) to ensure that "new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants. * * *."[96] The information will be useful in meeting our statutory obligation to report to Congress on the outcome of the auctions.[97] The information we acquire from transfer disclosures, including purchase price and other aspects of the sale contracts and management agreements, will enable us to determine the ultimate distribution of licenses and the value of the spectrum for particular uses, and will permit comparisons between licenses awarded with and without designated entity provisions. Such analyses require collection of data from all licensees, not just from designated entities or those who have not begun to offer service or have only offered service for a short period of time. As we stated in the *Second Report and Order*, we do not expect the transfer disclosure requirements to be burdensome to licensees because the documents to be submitted will have been prepared for other purposes in any event. Moreover, parties may request confidential treatment of competitively sensitive information pursuant to §§ 0.457 and 0.459 of our Rules.[98] Consequently we will retain transfer disclosure requirements for all transfers of licenses obtained by competitive bidding.

L. Application-Processing Rules

58. In the *NPRM* in this proceeding the Commission stated:

In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3–22.45 and 22.917(f), and 22.918–22.945, 47 CFR 22.3–22.45, 22.917(f), and 22.918–22.945. For those PCS applicants who file on Form 574, we believe that §§ 90.113–90.159 of our rules, 47 CFR 90.113–90.159, could be used to process those applications with appropriate modifications.[99]

59. *Petition*. AIDE asserts that the Commission acted improperly in proposing substantive PCS application-processing rules in the *NPRM* because, it argues, such rules are outside the scope of this rulemaking, which is limited to implementation of the

[89] GTE Petition at 2–4.

[90] SBC Petition at 6–8.

[91] *Id.* at 6 (*citing* 47 U.S.C. § 309(j)(4)(E)).

[92] *Second Report and Order* at ¶165.

[93] *See Third Report and Order*, Appendix at 13; *Fifth Report and Order* at ¶62.

[94] 47 U.S.C. 309(j)(3).

[95] *Second Report and Order* at ¶214.

[96] *Id.* at ¶215.

[97] *See* Budget Act, 47 U.S.C. § 309(j)(2).

[98] *Second Report and Order* at ¶215, *citing* 47 CFR 0.457, 0.459.

[99] *NPRM* at ¶128.

competitive bidding requirements of § 390(j) of the Communications Act.[100] AIDE argues that the Commission's proposal of application-processing rules is legally insufficient to constitute a valid notice of proposed rules, and that some of the rules cited have no immediate applicability to PCS service. AIDE asserts that in the *Second Report and Order* the Commission failed to respond to the merits of the arguments concerning filing and processing rules in AIDE's comments on the *NPRM*. AIDE concludes that the Commission needs to issue a supplemental *Notice of Proposed Rulemaking* to adopt license-processing rules for PCS.

60. *Discussion*. The competitive bidding process is a means of assigning licenses, and rules and procedures for processing of license application are an integral and necessary part of that process. The Commission adopted few filing or processing rules in the *Second Report and Order*. Those rules that the Commission did adopt pertaining to the filing and processing of applications and certifications were clearly proposed in the NPRM.[101] The rules to which AIDE refers were adopted not in the *Second Report and Order* but in subsequent Orders establishing auction rules for specific services.[102] We address AIDE's petition relating to those rules either in the Orders in which they were adopted or in reconsiderations of those Orders.[103]

M. Financial Qualifications

61. In the *Second Report and Order*, the Commission stated that applicants filing short form applications would be required to certify that they are financially qualified pursuant to Section 308(b) of the Communications Act. The applicants would also be required to certify that they satisfy any financial qualification requirements for the service in question.[104]

62. *Petition*. AIDE states that applying competitive bidding and payment requirements in addition to existing financial qualification requirements disadvantages designated entities, who have historically been constrained by difficulties in capital formation and financing. AIDE recommends that short-form applications not require and certification of financial qualification. If an application become mutually exclusive, according to AIDE, the applicant's payment of its winning bid would demonstrate that it was financially qualified. If the application did not become mutually exclusive, then the applicant should have a short period in which to file any required demonstration of financial qualifications by amendment.[105]

63. *Discussion*. We believe that, in order to prevent the delay in bringing service to the public that might be occasioned by bankruptcies or by prolonged financial negotiations, it is important to require licensee to have the financial ability to construct and operate a system in addition to being able to purchase the license. Consequently we will continue to require applicants to certify on their short-form applications that they meet any existing financial qualification requirements of the services in which licenses are auctioned. We will not, however, impose additional showings of financial qualification as part of the auction process.

IV. Designated Entities

A. Introduction

64. Several provisions of the Budget Act address participation by small businesses, rural telephone companies, and businesses owned by women and minorities (referred to collectively as "designated entities") in the competitive bidding process and in the provision of spectrum-based services. Specifically, Section 309(j)(4)(D) of the Act, provides that, in prescribing competitive bidding regulations, the Commission shall, *inter alia*, ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures * * *[106]

In addition, section 309(j)(3)(B), provides that in establishing eligibility criteria and bidding methodologies the Commission shall seek to promote the objectives of "economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." To promote these objectives, section 309(j)(4)(A) expressly states that the Commission is required "to consider * * * alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods."[107]

65. In the *Second Report and Order* we adopted a broad menu of provisions that the Commission might employ to implement these statutory provisions. We adopted general provisions and eligibility rules designed to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women were afforded the opportunity to participate in both the competitive bidding process and in the provision of spectrum-based services. Specifically, we provide that small businesses (including those owned by women and/or minorities and rural telephone companies) that are winning bidders for certain blocks of spectrum could pay in installments over the term of their licenses. We also indicated that rural telephone companies may be eligible for bidding credits for licenses obtained in their service areas if they make an additional infrastructure build-our commitment beyond any existing performance requirements. We indicated that bidding credits may be available to designated entities on certain frequency blocks. In addition, we retained the option of establishing set-aside spectrum in certain services, in which eligibility to bid may be limited to some or all designated entities. Finally, we stated that we would consider the use of tax certificates as a means of creating incentives both for designated entities to attract capital from non-controlling investors and to encourage licensees to assign licenses to designated entities in post-auction transactions.

66. In the *Second Report and Order* we recognized that the provisions applicable to particular designated entities would vary depending on the

[100] AIDE Petition at 20–21.

[101] *See Second Report and Order* at ¶¶164–168, *NPRM* at ¶¶96–101.

[102] *See Third Report and Order* at ¶41, n. 18; *Fifth Report and Order* at ¶83.

[103] *See Fifth Report and Order* at ¶83.

[104] *Second Report and Order* at ¶166.

[105] AIDE Petition at 19–20.

[106] 47 U.S.C. § 309(j)(4)(D).

[107] *See also* 47 U.S.C. § 309(j)(4)(C)(ii), requiring the Commission, when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women"; section 309(j)(3)(A), establishing the objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays"; section 309(j)(12)(D)(iv), requiring that the Commission's 1997 report to Congress evaluate, *inter alia*, whether and to what extent "small businesses, rural telephone companies, and businesses owned by members of minority groups and women wee able to participate successfully in the competitive bidding process."

nature of each individual service. For example, we retained the discretion to modify our general designated entity provisions for capital intensive services such as broadband PCS. In this regard, we stated that we would evaluate on a service-specific basis the capital requirements and other characteristics of the service to determine the appropriate provisions. We continue to believe that it is essential for the Commission to retain flexibility to select, and if necessary to modify, the general designated entity provisions and eligibility requirements on a service-specific basis depending on the capital requirements and construction costs of the particular service.

B. Rural Telephone Company Definition

67. *Background.* In the *Second Report and Order*, we adopted a definition of "rural telephone company" that includes independently owned and operated local exchange carriers that (1) do not serve communities with more than 10,000 inhabitants in the licensed area, and (2) do not have more than 50,000 access lines, including all affiliates.[108] We stated our belief that a limitation on the size of eligible rural telephone companies was appropriate because Congress did not intend for us to provide special treatment to large LECs that happen to serve small rural communities.[109]

68. *Petitions.* Several parties filed petitions for reconsideration of the *Second Report and Order* requesting that we modify our standard definition for rural telephone companies. Petitioners' proposals include requests that the Commission amend its definition of "rural telephone company" (1) to expressly include municipal- and government-owned telephone companies within the "rural telephone company" definition in accordance with the earlier Senate version of the Budget Act,[110] (2) to define "rural telephone company" as a local exchange carrier with annual revenues of less than $100 million or serving no more than 100,000 access lines;[111] and (3) to include within the definition of "independently owned and operated" LECs that either operate 50,000 access lines or less serve communities of 10,000 or fewer inhabitants.[112]

69. In addition, Blooston, Mordkofsky, Jackson & Dickens (Blooston) and South Dakota Networks, Inc. (SDN) request that the Commission eliminate the term "independently owned and operated" from the definition of "rural telephone company." According to Blooston, this restriction is unnecessary to prevent the largest telephone companies from taking advantage of provisions provided for rural telephone companies, since this same purpose is already served by the 50,000 access line limit, Blooston argues the Commission should amend its eligibility rules to indicate that they include the access lines of affiliates. Similarly, SDN indicates that the Commission should include "and affiliates" after "50,000 or fewer access lines" in the current definition. SDN maintains that the current language penalizes holding companies structured to permit telephone companies to offer paging and other nonregulated services.

70. The National Telephone Cooperative Association (NTCA) requests that the Commission amend the definition of rural telephone company to include any local exchange carrier with annual revenues of less than $100 million or serving no more than 100,000 access lines. NTCA also indicates that the term "independently owned" should not exclude small rural telephone companies that are affiliated with each other and that rural telephone company consortia should be permitted. USIN similarly advocates a "rural telephone company" definition based annual revenues of less than $100,000,000 or less than 100,000 access lines. According to USIN a revenue-based test is more accurate than net worth/net profit test.

71. The Rural Cellular Association (RCA), South Dakota Network, Inc. (SDN) and NTCA ask that the Commission amend the definition of rural telephone companies to include any independently owned and operated local exchange carriers ("LECs") that *either* operate 50,000 access lines or less *or* serve communities of 10,000 or fewer inhabitants. According to NTCA and RCA, the existing definition needlessly excludes many small independent telephone companies that serve rural areas. SDN alternatively requests that we revise the definition to include carriers with 100,000 or fewer access lines or up to $100 million in annual revenues.

72. Finally, Anchorage Telephone Utility (ATU) requests that the Commission modify the definition of rural telephone companies to include government-owned telephone companies. According to ATU, such a modification is necessary to achieve congressional intent. ATU notes that the Senate bill included municipally-owned telephone companies in its definition of rural telephone companies. ATU's argues that the Senate Bill mandates special consideration for rural telephone companies and directed the FCC to grant "rural program licenses" to "qualified" common carriers and explicitly said that the category of "qualified" carriers included all state-owned and municipally-owned telephone companies.[113] As evidence Congress' intent to include these provisions in the enacted version of Budget Act, ATU asserts that the Conference Report declares that the Senate's "findings" are incorporated by reference.

73. *Oppositions and Replies.* In its Comment on Petitions for Reconsideration, BET supports retention of the Commission's existing generic rural telephone company definition.[114] BET maintains that adoption of RCA's proposal to define rural telephone companies as LECs that have 50,000 access or fewer or serve communities with no more than 10,000 inhabitants will allow large LECs that "happen to serve rural areas" to qualify for designated entity provisions. In response to BET's Comments, RCA asserts that the "independently owned and operated" requirement for rural telephone company eligibility will prevent large LECs from qualifying for rural telephone company provisions. RCA also restates its request for an amendment to the general rural telephone company definition to include LECs that serve 100,000 access lines or fewer.[115]

74. In light of the Commission's decision in *Fifth Report and Order* in this proceeding, which adopted an alternative rural telephone company definition, NTCA argues that the Commission should abandon its generic rural telephone company definition and instead establish rural telephone company eligibility criteria on a service-specific basis. Alternatively NTCA proposes that we define rural telephone companies to include LECs that have annual revenues not in excess of $125 million or that serve no more than 100,000 access lines.[116] Tri-County Telephone Company, Inc. (Tri-County) supports SDN's proposed rural telephone company definition (50,000 access lines *or* serves no community with more than 10,000 inhabitants or

[108] 47 CFR 1.2110(b)(3).

[109] *See Second Report and Order* at ¶ 282.

[104] *See* Anchorage Telephone Utility (ATU) Petition.

[111] *See* Petitions of The National Telephone Cooperative Association (NTCA), South Dakota Network, Inc. (SDN) and U.S. Intelco Networks, Inc. (USIN).

[112] *See* Petitions of the Rural Cellular Association (RCA) and SDN.

[113] *See* ATU Petition at 2–3.

[114] BET Comments at 2.

[115] RCA Reply at 2.

[116] NTCA Reply Comments at 4.

alternatively 100,000 access lines or less).[117]

75. *Discussion.* We are persuaded by petitioner's arguments that the current generic "rural telephone company" definition is overly restrictive and effectively excludes many independently owned telephone companies that serve rural areas.[118] In the *Fifth Report and Order* we departed from our generic definition of rural telephone companies in the context of broadband PCS by adopting a definition that includes any local exchange carrier having 100,000 or fewer access lines, including all affiliates.[119] In adopting this definition of a "rural telephone company," we sought to achieve the congressional goal of promoting the rapid deployment of service in rural areas by targeting only those telephone companies whose service territories are predominantly rural in nature, and who are thus likely to use their wireline telephone networks to build infrastructures to serve rural America.[120] For purposes of our rules governing broadband PCS licenses, we indicated our belief that this goal could best be achieved if we defined "rural telephone companies" as those local exchange carriers having 100,000 or fewer access lines, including all affiliates. We concluded that this definition included virtually all telephone companies whose service areas are predominantly rural.

76. For the foregoing reasons, we also believe that using the 100,000 access line definition as our standard rural telephone company definition will better serve our goals of encouraging the provision of service to rural areas than the definition previously adopted in the *Second Report and Order*. Accordingly, we will amend our standard definition of "rural telephone company" to include all local exchange carriers with 100,000 access lines or fewer, including affiliates. In general, we believe that this definition will more precisely capture those carriers that are truly rural in nature, while excluding the largest telephone carriers that do not face similar capital formation problems. We believe that this definition will also better achieve Congress' goal for fostering the development and rapid deployment of new technologies and services to rural areas by making special measures available to legitimate rural telephone companies that require such provisions in order to meaningfully participate in the provision of service to rural areas without giving such benefits to large companies that do not require such assistance. Rural telephone companies that satisfy this definition thus will be eligible for rural telephone company provisions in each service where such provisions are established.[121]

77. As indicated above, Blooston, SDN and NTCA request that we eliminate the phrase "independently owned and operated" from the definition of "rural telephone company." These petitioners assert that the "independently owned and operated" restriction in the rural telephone company definition was intended to prevent large telephone companies from taking advantage of rural telephone company benefits, but that this purpose is served by the access line limit. In this regard, SDN argues that such language unduly penalizes holding companies of nonregulated services and entities created by groups of telephone companies to provide equal access, SS7, and other services.

78. We agree. The new 100,000 access line rural telephone company definition adopted above includes the access lines of affiliates. Under the affiliation rules established in the context of broadband PCS, and adopted below as our generic affiliation rules, the access lines of holding companies, parent companies or affiliates of rural telephone companies that are not independently owned will be attributed for purposes of determining eligibility. This definition will capture most of the independently owned rural telephone companies, while excluding carriers affiliated with the largest LECs. In addition, we are concerned that the requirement that a rural telephone company must be independently owned would unnecessarily exclude rural telephone companies that are part of a holding company structure. Therefore we will delete the "independently owned and operated" requirement from our standard rural telephone company definition.

79. With respect to ATU's request that we amend our definition of rural telephone company to include municipal and government owned telephone companies that are owned by governmental authorities, we do not believe that such a change is warranted. ATU contends that Congress meant to mandate special consideration not only for telephone carriers serving rural areas but also for all municipally-owned telephone companies, even those with wholly or predominantly urban service areas.[122] This argument is based on ATU's interpretation of the Senate bill which preceded the enacted Budget Act. ATU argues that the Senate bill containing the prototype of a mandate for special consideration for rural telephone companies directed the FCC to grant "rural program licenses" to "qualified" common carriers and explicitly said that the category of "qualified" carriers included all state-owned and municipally-owned telephone companies. ATU further states that the report of the conference committee that drafted the Budget Act declares that the Senate's "findings" are incorporated by reference.[123] ATU also asserts that without the aid of special assistance it and most other state-owned and municipal telephone companies will not be able to purchase spectrum licenses at auction because it is politically infeasible for them to generate and retain enough surplus revenue to fund such investments, due to popular aversion to increases in taxes or telephone rates.[124]

80. As we indicated in the *Fifth Report and Order*, we are not persuaded by ATU's arguments.[125] We can find no specific evidence that Congress intended the term "rural telephone companies" to include all state or municipally-owned telephone companies. In fact, the preceding bill contained an explicit mandate for preferential treatment of government-owned telephone companies that was deleted from the enacted bill. To the contrary, the fact that an antecedent bill contained an explicit mandate for preferential treatment of government-owned telephone companies that was deleted from the enacted bill could just as easily be interpreted as an indication that Congress rejected such a rule. We also disagree that state and municipal governments are without the means to participate successfully in auctions. As we noted in *Fifth Report and Order* such governments have substantial capabilities to raise funds through private financing, bond offerings and taxation.[126]

[117] Tri-County Reply at 3.

[118] *See* RCA Petition at 4–5; USIN Petition at 10; NTCA Petition at 2.

[119] *See Fifth Report and Order* at ¶ 198.

[120] We also note that the unique technological requirements and the capital intensive nature of broadband PCS dictated that we adopt this definition of "rural telephone company."

[121] Such companies also will be eligible for special treatment under our cellular attribution rules for broadband PCS. *See* 47 CFR 24.204(d)(2)(ii).

[122] ATU Petition at 2–3.

[123] *Id.*

[124] *Id.* at 4–5.

[125] *See Fifth Report and Order* at ¶203.

[126] *See Fifth Report and Order* at ¶200. In any event, most state and municipally owned telephone systems (although not ATU) will be captured by our new 100,000 access line rural telephone company definition.

C. Rural Telephone Company Consortia

81. *Petitions.* Telephone and Data Systems, Inc. (TDS) requests that the Commission relax the eligibility requirements for rural telephone company bidding consortia by (1) eliminating the 50,000 access line limit for rural telephone company consortium applicants; (2) allowing companies with more than 50,000 access lines, directly or through affiliates, to participate in rural telephone company consortia by demonstrating that more than 50 percent of their access lines company-wide (including affiliates) and over 50 percent of those in the proposed service area serve only communities with 10,000 or fewer inhabitants and (3) providing that all rural telephone companies in consortia with 50,000 access lines or less have the right to hold up to 60 percent of the equity in the consortium. SDN and NTCA also argue that the Commission should allow rural telephone companies to form consortia, since combining telephone companies would not alter their rural nature, so long as the rural telephone company retains at least 50.1 percent equity and control.

82. USIN similarly requests that small businesses, including rural telephone companies, be allowed to qualify for special provisions if they pool their resources into consortia, provided such consortia are controlled by designated entities. According to USIN, if such consortia are not permitted, rural telephone companies and other small businesses may be foreclosed from participation in the auction process and in the provision of auctionable services. USIN also indicates that efficiencies and economies of scale are created by aggregation and thus special measures should be provided to these entities who may be able to provide service most efficiently.

83. *Discussion.* We deny the requests of TDS, SDN,[127] and NTCA that we modify the standard definition of rural telephone company to eliminate or relax the access line limit for rural telephone company consortia. In the *Second Report and Order* as a general matter, we declined to provide exceptions to our designated entity eligibility criteria for applicants that are consortia of various individual entities, which in combination fail to qualify as designated entities.[128] We found that such combinations, if they deviate from our standard definitions of designated entities, should not be eligible for provisions expressly designed for designated entities. This conclusion was based on our desire to provide economic opportunity to those entities designated in the statute and to ensure such entities the opportunity to provide spectrum-based services. We concluded that establishing exceptions to our definitions for consortia (even those wholly comprised of otherwise qualified designated entities) would undermine this objective by diluting the economic opportunity for individual qualified designated entities. We also found that allowing applicants to be formed from a combination of eligible and ineligible entities would invite attempts to abuse the designated entity provisions by those not entitled to them.

84. However, in the *Second Report and Order* we noted that we may determine on a service-specific basis to allow a designated entity consortium to receive other benefits based on equity and operational participation in the consortium by one or more designated entities. We retained the flexibility to enable designated entity consortia to qualify for special provisions particularly where the capital costs of a particular service are high and the formation of consortia is thus essential to foster investment in designated entity ventures and to enable such entities to compete in the provision of such service. In this regard, in the *Fifth Report and Order* we allowed consortia comprised of small businesses to qualify for all of the measures applicable to individual small businesses provided each member of the consortium individually satisfies the definition of a small business. We found that given the "exceptionally large capital requirements" associated with broadband PCS, allowing small businesses to pool their resources in this manner was necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong broadband PCS competitors.

85. As a general matter, we will continue to determine whether to permit designated entities to receive benefits based on their participation in consortia on a service-specific basis, depending on the capital requirements and other characteristics of the particular service. We modify the *Second Report and Order*, however, to provide that consortia may be permitted to qualify for any designated entity provisions (where each member individually meets the eligibility requirements) on a service-specific basis, where the capital requirements of the service are high. Where, as in broadband PCS, we will find that the capital requirements necessitate allowing designated entities to pool their resources to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and in the provision of service, we may adopt rules allowing such consortia to qualify for designated entity provisions.

D. Affiliation Rules

86. *Petitions.* Blooston and NTCA request that the Commission clarify the meaning of "affiliate" for purposes of access line aggregation. According to Blooston, passive investments by a rural telephone holding company in other telephone companies should not preclude eligibility for rural telephone company status, so long as there is no common control between the rural telephone company and the other carrier. Blooston reasons that the common control definition is used in the auction rules for small businesses' affiliates, has been used by the Commission when defining connecting carriers, and is generally used by the financial community and the Securities and Exchange Commission. Finally, Blooston requests that the Commission amend its designated entity provisions to allow rural telephone companies to combine into consortia and partner with investors without losing designated entity status so long as the majority equity control resides with members who are rural telephone companies. NTCA similarly requests that the term "affiliates" be clarified to indicate what organizational structures are permitted.

87. *Discussion.* In response to the requests of the NTCA and Blooston that we clarify the meaning of the term affiliate to indicate the types of organizational structures that will be included, we amend the *Second Report and Order* to establish as our standard affiliation rules the same affiliation rules adopted by the Commission in the *Fifth Report and Order.*[129] Blooston specifically requests that we clarify the meaning of "affiliate" so that passive investments by a rural telephone company in other rural telephone companies do not preclude designated entity status if there is no common control. As described more fully below, under our affiliation rules a passive interest in another telephone company, which does not constitute control of that

[127] SDN argues that the Commission should allow rural telephone companies to form consortia among themselves, since combining telephone companies does not alter their rural nature. SDN also argues that consortia with investors should be permitted so long as the rural telephone company retains at least 50.1 percent equity and control. SDN Petition at ¶¶ 20–23.

[128] *See Second Report and Order* at ¶ 286.

[129] See *Fifth Report and Order* at ¶¶ 201–217.

company would not be considered an affiliation for purposes of access line aggregation.

88. In the *Second Report and Order*, we referenced the SBA's affiliation rules for purposes of defining generally whether an entity qualifies as a small business and gave examples of how the affiliation rules would be applied. In the *Fifth Report and Order* we expanded on the SBA's affiliation rules in establishing detailed affiliation standards for broadband PCS to be used in the context of determining designated entity eligibility where our criteria are based on the size of the entity seeking special treatment and require applicants to include "affiliates" when calculating their eligibility. These affiliation requirements are intended to prevent entities that do not meet these size standards for receiving benefits targeted to smaller entities.[130] We believe that these rules are appropriate for determining affiliations generally, and therefore we will incorporate these standards into our generic auction rules for purposes of determining all size-based eligibility requirements. We summarize these standards below.

89. Where we adopt sized-based eligibility rules and provide that such eligibility determinations shall include the applicant and all its "affiliates," the following rules shall govern determinations regarding affiliation. Apart from determining affiliation between the applicant itself and outside entities, the need to determine affiliation arises where an investor has an attributable interest in a designated entity.[131] In this context it is necessary for the Commission to examine whether such investor has a relationship with other persons or outside entities that rise to the level of an affiliation with the applicant, and if so, whether the affiliate's assets, revenues, net worth, number of access lines, or other applicable financial thresholds, when aggregated with the applicant's, exceed the Commission's size eligibility thresholds.

90. *General Principles of Affiliation.* An affiliation under the SBA rules would arise, first, from "control" of an entity or the "power to control it." Thus, under the SBA rules, entities are affiliates of each other when either directly or indirectly (i) one concern controls or has the power to control the other, or (ii) a third party or parties controls or has the power to control both.[132] In determining control, the SBA's rules provide generally that every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. The rules, in addition, provide specific examples of where control resides under various scenarios, such as through stock ownership or occupancy of director, officer or management positions. The rules also articulate general principles of control, and note, for example, that control may be affirmative or negative and that it is immaterial whether control is exercised so long as the power to control exists.[133] Second, an affiliation, under SBA rules, may also arise out of an "identity of interest" between or among parties.[134] We adopted these same general provisions as our affiliation rules for broadband PCS and will also incorporate them into our general affiliation rules.

91. In adopting these affiliation rules, we emphasize that these rules will not be applied in a manner that defeats the objectives of our service specific attribution rules. For example, in the context of broadband PCS, our attribution rules expressly permit applicants to disregard the gross revenues, total assets and net worth of certain passive investors, provided that an eligible control group has *de facto* and *de jure* control of the applicant.[135] Our attribution rules are designed to preserve control of the applicant by eligible entities, yet allow investment in the applicant by entities that do not meet the size restrictions in our rules. Therefore, so long as the requirements of our attribution rules are met, the affiliation rules will not be used to defeat the underlying policy objectives of allowing such passive investors. More specifically, if a control group has *de facto* and *de jure* control of the applicant, we shall not construe the affiliation rules in a manner that causes the interests of passive investors to be attributed to the applicant.

92. Applying these SBA affiliation rules, an affiliation would arise, for example, where an entity with an attributable interest in an applicant is under the control of another entity. An affiliation would also arise where an entity with an attributable interest in an applicant controls, or has the power to control, another entity. For example, if an attributable investor in an applicant is also a shareholder in a large Corporation X, when should Corporation X be deemed an affiliate of the applicant as a result of the shareholder's ownership interest in both entities? Under the SBA rules and the rules we adopt here, Corporation X would be deemed an affiliate of the applicant if the shareholder controlled or had the power to control Corporation X, in which case, Corporation X's gross revenues must be included in determining the applicant's gross revenues.[136]

93. For purposes of determining control, ownership interests will be calculated on a fully-diluted basis. Thus, for example, stock options, convertible debentures, and agreements to merge (including agreements in principle) will generally be considered to have a present effect on the power to control or own an interest in either an outside entity or the PCS applicant or licensee. We will treat such options, debentures, and agreements generally as though the rights held thereunder had been exercised.[137] However, an affiliate cannot use such options and debentures to appear to terminate its control over or relationship with another concern before it actually does so.[138]

94. *Voting and Other Trusts.* In a similar vein, we also borrow from the SBA's rules and our own rules in other services to find affiliation under certain voting trusts in order to prevent a circumvention of eligibility rules. The SBA's rules provide that a voting trust, or similar agreement, cannot be used to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control an outside concern, if the primary purpose of the trust is to

[130] *See, e.g., Second Report and Order* at ¶ 272.

[131] In the context of broadband PCS, we stated that, generally, investors owning more than 25 percent of the applicant's passive equity would be considered to have "attributable" interests. *See Fifth Report and Order* at ¶ 158. With regard to IVDS, we used the SBA standard to determine attributable interests, *i.e.*, control.

[132] 13 CFR § 121.401(a)(2) (i), (ii).

[133] *Id.* § 121.401(c)(1).

[134] *Id.* § 121.401(a)(2)(iii), (d).

[135] *See Fifth Report and Order* at ¶ 205.

[136] *See Fifth Report and Order* at ¶ 206.

[137] *See* 13 CFR 121.401(f). SBA's rules provide the following examples to guide the application of this provision: Example 1. If company "A" holds an option to purchase a controlling interest in company "B," the situation is treated as though company "A" had exercised its rights and had become owner of a controlling interest in company "B." The [annual revenues] of both concerns must be taken into account in determining size. Example 2. If company "A" has entered into an agreement to merge with company "B" in the future, the situation is treated as though the merger has taken place. [A and B are affiliates of each other].

[138] *Id.* SBA's rules provide this example: If large company "A" holds 70 percent (70 of 100 outstanding shares) of the voting stock of company "B" and gives a third party an option to purchase 66 of the 70 shares owned by A, company "B" will be deemed to be an affiliate of company "A" until the third party actually exercises its option to purchase such shares. In order to prevent large company "A" from circumventing the intent of the regulation which [gives] present effect to stock options, the option is not considered to have present effect in this case.

meet size eligibility rules.[139] Similarly, under the Commission's broadcast multiple ownership rules, stock interests held in trust may be attributed to any person who holds or shares the power to vote such stock, has the sole power to sell such stock, has the right to revoke the trust at will or to replace the trustee at will.[140] Also, under the broadcast rules, if a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary of a trust, the stock interests held in trust will be considered assets of the grantor or beneficiary, as appropriate.[141] Because we believe the broadcast rules provide more definitive guidance in this particular area, we shall use them as a model for the general affiliation rules adopted here. Thus, for example, if an investor with an attributable interest in an applicant holds a beneficial interest in stock of another firm that amounts to a controlling interest in that other firm, depending on the identity of the trustee, the other firm may be considered an affiliate and its assets and gross revenues may be attributed to the applicant.

95. *Officers, Directors and Key Employees.* Under the SBA's affiliation rules, which we adopt as our generic approach, affiliations also generally arise where persons serve as the officers, directors or key employees of another concern and they represent a majority or controlling element of that other concern's board of directors and/or management of the outside entity.[142] Thus, if a person with an attributable interest in an applicant, through his or her other key employment positions or positions on the board of another firm, controls that other firm, then the other firm will be considered an affiliate of the applicant. Such affiliations may or may not result in the applicant's exceeding our size limitations. As this rule reflects, for purposes of attributing the financial position of an outside entity in this context, officers and directors of an outside concern are not foreclosed entirely from holding attributable or non-attributable interests in an applicant. Whether or not such persons control the outside entity, we also do not want to prohibit these persons, who may be experienced in the telecommunications, finance, or communications and equipment industries, from assisting start-up companies by serving as officers or directors of the applicant. Thus, if such persons serving as officers or directors of the applicant do not control the applicant or otherwise have an attributable interest in the applicant, their outside affiliations (even if controlling) will not be considered at all for purposes of determining the applicant's eligibility under our rules.[143]

96. *Affiliation Through Identity of Interest: Family and Spousal Relationships.* Consistent with the SBA's rules, an affiliation may arise not only through control, but out of an "identity of interest" between or among parties.[144] For example, affiliation can arise between or among members of the same family or persons with common investments in more than one concern. In determining who controls or has the power to control an entity , persons with an identity of interest may be treated as though they were one person.[145] For example, if two shareholders in Corporation X are both attributable shareholders in an applicant, to the extent that together they have the power to control Corporation X, Corporation X may be deemed an affiliate of the applicant.

97. Similarly, as under the SBA rules, we will consider spousal and other family relationships in determining whether an affiliation exists. Under the SBA rules for determining small business status, for example, members of the same family may be treated as though they were one person because they have an "identity of interest." [146] Likewise, in order to determine whether individuals are economically disadvantaged, the SBA rules governing eligibility for participation in the government's "section 8(a)" program for socially and economically disadvantaged small businesses have special provisions for attributing spousal interests. The latter rules provide generally that half of the joint-owned interests of an applicant and his or her spouse must be attributed to the applicant for purposes of determining the applicant's net worth.[147]

98. In the context of auction size-based eligibility standards at issue here, we begin by clarifying that our reason for considering spousal and kinship relationships is not to determine whether the spouse or other kin of a women-owned applicant actually is controlling the applicant, thereby violating our eligibility rules for woman-owned businesses. Our rules do not embody any presumptions concerning spousal control in that context. Rather, our objective here is to ensure both that entities are actually in need of the assistance provided by our rules and that entities otherwise ineligible under applicable size criteria do not circumvent the rules by funding family members that purport to be eligible applicants.

99. In formulating these rules, we need to consider also that, as a practical matter, it will not be possible for us prior to the auctions to resolve all questions that pertain to the individual circumstances of particular applicants. Furthermore, if we determine subsequent to an auction that a winning bidder in fact was ineligible to bid or to benefit from special provisions, such as bidding credits, because of spousal or kinship relationships, not only will authorization of service be delayed but, as discussed above, disqualified applicants may be subject to substantial penalties. In these circumstances, we think that the public interest requires that we endeavor, insofar as possible, to establish bright-line tests for determining when the financial interests of spouses and other kin should be attributed to the applicant.

100. We have decided that, for purposes of determining whether the financial limitations in our eligibility rules have been met, interests of an applicant's spouse to the applicant. This will resolve any concern that an applicant might transfer his or her assets to a spouse in order to satisfy the financial restrictions that apply to eligible entities. For example, an applicant could not transfer stock or other assets to his or her spouse and thereby dispose of interests that, I held by the applicant, would render the applicant ineligible. Just as importantly, this approach will resolve any concern that an applicant might participate in bidding by using the personal assets of an ineligible spouse, which would defeat entirely the objective of providing special financial measures for designated entities.

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[139] 13 CFR 121.401(g).

[140] *See* 47 CFR 73.3555 note 2(e).

[141] *Id.*

[142] *See* 13 CFR 121.401(h). A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern. 13 CFR 121.405.

[143] SBA's size standard affiliation rules also provide that affiliations can arise in a variety of other scenarios, such as where one concern is dependent upon another for contracts and business, where firms share joint facilities, or have joint venture or franchise license agreements. To the extent we believe these rules may have general applicability we shall codify them in our affiliate rules. We caution parties that issues relating to *de facto* control of the applicant (or parties with attributable interests in the applicant) could also arise under arrangements not expressly codified in the rules.

[144] *See* 13 CFR 121.401(a)(2)(iii).

[145] *Id.* § 121.401(d).

[146] 13 CFR 121.401(d).

[147] *See* 13 CFR 124.106(a)(2)(i)(A)(1).

101. In adopting this rule, we fully recognize that instances could arise in which, if all factors were considered, attributing a spouse's financial interests to the applicant could lead to harsh results. As a general matter, however, we think it provides a workable bright-line standard that resolves fully our policy concerns and avoids undesirable ambiguity concerning the nature of our requirements. As in the SBA rules, however, one exception is clearly warranted; this affiliation standard would not apply if the applicant and his or her spouse are subject to a legal separation recognized by a court of competent jurisdiction. In calculating their personal net worth, for example, investors in the applicant who are legally separated must, of course, still include their share of interests in community property held with a spouse.

102. As indicated above, circumstances could also arise in which other kinship relationships are used as a means to evade our eligibility requirements. Because we believe kinship relationships in many cases do not present the same potential for abuse that exists with spousal relationships, particularly in terms of the "identity of interests" that are likely to exist between the persons involved, we shall adopt a more relaxed standard for determining when kinship interests must be attributed to applicants. In this area, we shall follow the same standard that is applied by the SBA when interpreting its "identity of interest" rule described above. Specifically, an identity of interests between family members and applicants will be presumed to exist, but the presumption can be rebutted by showing that the family members are estranged, or that their family ties are remote, or that the family members are not closely related in business matters.[148] For purposes of determining who is a family member under this rule, we shall use a definition that is identical to the definition of "immediate family member" in the SBA's rules, 13 CFR 124.100.

103. In appropriate cases, an applicant should be able to rebut the presumption regarding kinship affiliations with relative ease, simply by demonstrating that the applicant has no close relationship in business matters with the relevant family members. Of course, should such business relationships arise with a winning applicant after the auction, we might need to consider whether the applicant intended to circumvent the requirements of our eligibility rules.

104. The affiliation requirement is intended to prevent entities that, for all practical purposes, do not meet the size standard required for eligibility from receiving benefits targeted to smaller entities.[149] We believe that the affiliation rules described above will accomplish this objective.

E. Rural Telephone Company Bidding Credits.

105. *Petitions.* NCTA, USIN and SDN argue that the FCC should retain the rural telephone company bidding credit provision adopted in the *Second Report and Order* but delete the accelerated build-out requirement as a condition for receipt of bidding credits. USIN asserts that bidding credits will not help attract capital when tied to such an expanded build-out requirement. According to USIN, making bidding credits contingent on an accelerated build-out effectively nullifies the provision because the commitment of additional capital for network build-out will reduce the amount available to finance the license price by enough to offset any benefit conferred by the availability of the credit.[150] SDN agrees that additional build-out should not be required as a prerequisite for rural telephone company bidding credits, but states that a rural telephone company should receive additional bidding credits if it substantially covers its certified rural service area during its license term.[151] NTCA argues that the accelerated build-out requirement for bidding credits should be eliminated since this requirement is unrelated to the statutory purpose of promoting investment in and rapid deployment of new technologies and services in rural areas.[152]

106. SDN also contends that the risk of forfeiting the bidding credit (plus interest) for failure to meet the expanded build-out commitment will have a chilling effect because of the difficulty of anticipating potential problems that may be encountered in attempting to extend service rapidly to remote areas. Further, SDN maintains that an accelerated build-out requirement could engender a perverse incentive for a rural telephone company that would otherwise concentrate primarily on providing PCS service in the rural portions of a BTA or MTA (which, according to SDN might be a commercially-attractive strategy because of in densely-populated areas.[153]

107. Finally, SDN and USIN contend that it is inequitable to provide rural telephone companies with a less favorable bidding credit provision than other designated entities. In this regard, USIN argues that the *Second Report and Order* fails to explain why rural telephone company bidding credits should contain more restrictive terms than other designated entity bidding credits. On the contrary, SDN contends that rural telephone companies should receive a greater bidding credit than other entities, because they face higher service and construction costs. Accordingly, SDN maintains that if accelerated build-out is to be included in the rural telephone company provision, an incentive should be provided in the form of bonus credit over and above the standard bidding credit available to other designated entities.

108. *Discussion.* In the *Second Report and Order* we adopted a system of bidding credits for rural telephone companies designed to further promote the investment in and rapid deployment of new technologies and services in rural areas.[154] We generally concluded that any special measures adopted for rural telephone companies, including bidding credits, should be limited to bidding for licenses, in their rural service areas. We found that this limitation satisfied Congress' objectives without unduly favoring rural telephone companies in markets where there was no compelling reason to do so. Specifically, we concluded that Congress was primarily concerned with assuring rural consumers the benefits of new technologies and providing opportunities for participation by rural telephone companies in the provision of wireless services that supplement or replace their landline facilities.[155] Accordingly, we provided that rural telephone companies would be eligible for bidding credits for specified licenses only in their service areas.

109. However, unlike bidding credits available to women and minority-owned firms, we linked the amount of the bidding credit for rural telephone companies to their commitment to achieve certain expanded infrastructure build-out requirements in their rural service areas. We provided that the amount of the bidding credit would be proportionately linked to the amount by which the rural telephone company agreed to expand its build-out

[148] *See generally Texas-Capital Contractors, Inc. v. Abdnor*, 933 F.2d 261 (5th Cir. 1990).

[149] *See, e.g., Second Report and Order* at ¶ 272.

[150] USIN Petition at 12.

[151] SDN Petition at 14.

[152] *See* 47 U.S.C. 309(j)(3)(A).

[153] SDN Petition at 14–15.

[154] *See* 47 U.S.C. 309(j)(3)(A).

[155] *Second Report and Order* at ¶ 243.

commitment. In this regard, we indicated that failure to meet the expanded build-out commitment would result in liability for a penalty in the amount of the bidding credit, plus interest at the rate applicable to installment payments. We further provided that grant of the licenses to rural telephone companies utilizing bidding credits would be conditioned upon payment of this penalty, if and when it becomes applicable. We concluded that this added construction requirement would fulfill the congressional objective of developing and rapidly deploying new services to those residing in rural areas.

110. On reconsideration of this issue, we no longer believe the provision in the *Second Report and Order*, which links the availability of bidding credits for rural telephone companies to their agreement to satisfy an expanded construction requirement, is necessary or appropriate to promote the statutory objectives. We agree with petitioners' assertions that the expanded build-out requirement may have adverse consequences contrary to the purpose of bidding credit provision. We are also concerned that the expanded construction requirement may be unduly burdensome both to rural telephone company licensees and the Commission. In this regard, we are concerned that the accelerated build-out requirement may not be economically feasible in some rural areas and thus may result in frequent forfeitures of the bidding credit amount by rural telephone companies. As discussed more fully below, we now believe that Congress' objectives of promoting investment in and rapid deployment of new technologies and services to rural areas will best be achieved through the use of other provisions such as installment payments, bidding credits (without an expanded build out requirement), and service area partitioning. Thus, we amend our rules to retain flexibility to adopt any of these or other provisions for rural telephone companies on a service-specific basis after considering the characteristics and capital requirements of the particular service.

F. Rural Telephone Company Eligibility for Installment Payments

111. *Petitions*. SDN, USIN, and NCTA all request that installment payments be extended to rural telephone companies regardless of their status as small businesses. AIDE and Cook Inlet argue that all designated entities should be permitted to pay for their licenses in installment payments irrespective of their size. These parties all object to the decision to limit eligibility for installment payments to small businesses as defined in § 1.2110(b)(1), (*i.e.*, companies with net worth including that of affiliates of $6 million or less and no more than $2 million of annual after-federal-tax profit for the last two years). USIN argues that there is no statutory support in the provisions cited by the Commission as authority for adopting different provisions for one designated entity group as opposed to another.

112. Citing the legislative history to the Budget Act and H.R. Report No. 103–111 in particular, USIN also maintains that the statutory purpose of requiring special provisions for designated entities was to promote entry by firms with difficulty in obtaining access to capital. Petitioners maintain that the $6 million net worth/$2 million net revenue standard for installment payment eligibility is too strict and will prevent rural telephone companies from qualifying for the installment payment option although they face significant difficulty in obtaining access to capital. USIN asserts that as a practical matter rural telephone companies may have high levels of non-amortized assets and yet have less capital available for investment than many businesses that meet the small business definition. SDN maintains that rural telephone companies should be eligible for installment payments regardless of whether they qualify as small businesses because they will generally incur higher build out costs with lower revenue streams than other designated entities. According to USIN, a rural telephone company bidding for a license in a capital-intensive service should be eligible for installment payments if its annual revenue are under $100 million. USIN asserts that without installment payments such telephone companies will be unable to bid for broad-coverage licenses as traditional rural telephone company lenders have indicated unwillingness to finance auction bids.

113. AIDE objects to the determination in the *Second Report and Order* that limits the installment payment option to small businesses bidding on licenses for "those smaller spectrum blocks that are most likely to match the business objectives of *bona fide* small businesses."[156] According to AIDE, such the installment payment option should be available to all designated entities bidding on all licenses. AIDE maintains that Congress did not intend to give the FCC discretion to offer special provisions to some designated entities in some auctions but not in others. AIDE argues, moreover, that these limitations on the availability of installment payments are not justified by the Commission's desire to prevent abuse of its designated entity provisions since there are other safeguards designed specifically for that purpose, such as the rules for disclosure of real parties in interest, the definitional requirements including the assets of affiliates and the financial qualification rules.

114. *Discussion*. For the reasons set forth below, we deny petitioners' requests to expand the installment payment option to other designated entities irrespective of their economic status. However, we will retain the flexibility to expand or modify the installment payment option on a service-specific basis for other appropriately-sized entities where the spectrum costs and capital infrastructure requirements necessitate their application to other entities. For example, in the *Fifth Report and Order* we recognized that the substantial expected capital required to acquire and construct broadband PCS licenses warranted expansion of the installment payment option to most entities acquiring licenses in the entrepreneurs' blocks.[157] Under the broadband PCS rules, installment payments are available to smaller entities that do not technically qualify as small businesses and an enhanced installment payment option is available to eligible small businesses and businesses owned by women and/or minorities.

115. In the *Second Report and Order*, we concluded that for some auctions, small businesses would be eligible for installment payments. We noted that by allowing payment in installments, the government would be extending credit to an eligible winning bidder, thus reducing the amount of private financing needed in advance of the auction by a prospective licensee. We noted that this will assist small entities who are likely to have difficulty obtaining adequate private financing. As a result, we concluded that installment payments would be an effective way to promote efficiently the participation of small businesses in the provision of spectrum-based telecommunications service and an effective tool for efficiently distributing licenses and services among geographic areas.[158] Thus, we limited application of installment payments to small entities, including such entities that are owned by minorities and/or women. We found

[156] *See Second Report and Order* at ¶ 237.

[157] *See Fifth Report and Order* at ¶¶ 136–140.

[158] *See Second Report and Order* at ¶¶ 233–240.

that this approach best served the intent of Congress in enacting section 309(j)(4)(A), to avoid a competitive bidding program that has the effect of favoring incumbents, with established revenue streams, over new companies or start-ups.[159]

116. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments for minorities and/or women also were intended to assist only minorities and women who are small businesses. The House Report states that these related provisions were drafted to "ensure that *all small businesses* will be covered by the Commission's regulations, *including those owned by members of minority groups and women.*" [160] (emphasis added). It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups." [161] Because the Congressional objective here was to assist "new companies or start-ups," we therefore concluded that the Commission should use installment payments only for smaller sized entities. As indicated by the legislative history, large entities with established revenue streams were not intended to be beneficiaries of this particular means of financial assistance. We concluded that the statutory language, when read in conjunction with the legislative history, does not indicate that Congress's purpose was to accord special financial assistance measures under section 309(j)(4)(A) to entities other than those with small economic status.[162] In this regard, we reject petitioner's proposals to allow installment payments for rural telephone companies or other designated entities irrespective of their size. We will continue to determine on a service-specific basis the appropriate economic eligibility criteria for installment payments. And we may, as we did in the context of broadband PCS, establish different installment payment options for entities who face different economic barriers.

117. In addition, and consistent with our decision to limit installment payments to small entities, we decline to make installment payments available for all licenses in all auctions. Rather, in order to match the provisions with eligible recipients, we will continue to make installment payments available only for certain licenses that do not involve the largest spectrum blocks and service areas. In this regard, in the context of narrowband PCS, we adopted installment payments only for the regional, MTA and BTA licenses. Similarly, for broadband PCS, we limited eligibility for installment payments to the BTA licenses contained in the entrepreneurs' blocks. We continue to believe that where large, valuable blocks of spectrum are being auctioned we should not give ineligible entities the incentive to create small business "fronts," thereby enabling large businesses to become eligible for low-cost government financing. Nor do we desire to delay service to the public by encouraging under-capitalized firms to receive licenses for facilities which they may lack the resources adequately to finance.[163] Accordingly, we will continue to allow installment payments only for licenses in those smaller spectrum blocks and service areas that are most likely to match the business objectives of *bona fide* small entities in the context of a particular service. The particular spectrum block sizes that will be eligible for installment payments will be decided in the context of each particular service taking into account the cost of acquiring the spectrum and constructing the system.

G. Rural Telephone Company Partitioning

118. *Petitions.* SDN requests that rural telephone companies be allowed to partition their rural service areas either pursuant to an agreement with the BTA or MTA licensee, or by licensing a separate PCS service area using a system similar to the cellular unserved area application process.[164]

119. Several commenters responding to the NPRM in this proceeding suggested that the Commission allow partitioning of PCS licenses so as to permit rural telephone companies to hold licenses to provide service only in their service areas.[165] In the *Second Report and Order* we recognized that partitioning may be an effective means to achieve Congress's goal of ensuring that advanced services are provided in rural areas.[166] In the context of broadband PCS, we adopted a system of geographic partitioning, for rural telephone companies which allows rural telephone companies to acquire partitioned broadband PCS licenses in one of two ways: (1) they may form bidding consortia to participate in auctions, and then partition the licenses won among consortia participants, or (2) they may acquire partitioned broadband PCS licenses from other licensees through private negotiation and agreement either before or after the auction (provided the partitioned area is reasonably related to the size of the rural telephone company's rural service area).[167] We require that partitioned areas conform to established geopolitical boundaries and that each area include the wireline service area of the rural telephone company applicant. We believe that this system of partitioning of rural service areas will provide a significant opportunity for many of these designated entities who desire to offer PCS to their customers as a complement to their local telephone services. Therefore, we will retain the flexibility in the generic auction rules to adopt a system of partitioning on a service-specific basis where the capital requirements and construction costs are such that a system is necessary to assist rural telephone companies who cannot afford or do not desire to bid for or construct systems for an entire service area.[168]

H. Unjust Enrichment Provisions

120. *Petitions.* AIDE requests that when the Commission recaptures the benefits accruing to a designated entity pursuant to the unjust enrichment provisions, the unjust enrichment penalty should credit the licensee's pre-sale investments in the license and should be based on the portion of the licensee's taxable gain on the sale allocated to the license, with appropriate adjustments. BET similarly requests that the Commission revise the unjust enrichment provisions to credit the designated entity for its pre-transfer expenditures on the license including construction costs.

121. *Discussion.* We deny the requests of AIDE and BET. In the *Second Report and Order* the Commission crafted unjust enrichment provisions designed to prevent designated entities from profiting by the rapid sale of licenses

[159] *See* H.R. Rep. No. 103–111 at 255.

[160] *Id.*

[161] *Id.*

[162] Under authority of Section 309(j)(4))(D), we have, however, afforded other types of financial assistance measures, such as bidding credits, to other designated entities. *See e.g., Third Report and Order,* in PP Docket No. 92–253, 59 FR 26741, May 24, 1994, at ¶¶ 72–81 (which provides bidding credits to businesses owned by minorities and/or women).

[163] *See* 47 U.S.C. § 309(j)(3)(A).

[164] *See* SDN Petition at 7.

[165] *See, e.g.,* comments of GVNW at 2–4, and NTCA at 13.

[166] *See Second Report and Order at ¶ 243 n. 186.*

[167] *See Fifth Report and Order* at ¶ 152.

[168] In a Further Notice of Proposed Rulemaking in this docket, the Commission will also explore the merits of allowing businesses owned by minorities and/or women to acquire partitioned PCS licenses, as well as partitioned licenses in other services.

acquired through the benefit of provisions and policies meant to encourage their participation in the provision of spectrum-based services. These rules were intended to deter designated entities from prematurely transferring licenses obtained through the benefit of provisions designed to create opportunities for such designated entities in the provision of spectrum-based services. We sought through our unjust enrichment provisions to discourage designated entities who do not intend to provide service to the public from abusing our provisions by obtaining a license at a lower cost than other licensees and then selling the license after a short time to a non-designated entity at a profit. In addition, the unjust enrichment rules were intended to recapture for the government a portion of the value of the bidding credit or other special provision if such a designated entity prematurely transfers its licenses to an ineligible entity, thereby frustrating the government's efforts to encourage the inclusion of designated entities in the provision of new spectrum-based services.

122. We recognize that over time, a designated licensee may have made substantial investments in a license prior to transfer. In order to reward efficiency and encourage such investments in infrastructure development, we provided that we will generally reduce the amount of the recapture penalty as time passes or construction benchmarks are met.[169] We further provided that our recapture provisions would not apply to the transfer or assignment of a license that has been held for more than five years.[170] In addition, where a recapture penalty is assessed, we stated that the penalty will not prevent the transferring designated entity from recovering the depreciated value of its capital investment. Moreover, we indicated that in appropriate circumstances, we might waive recapture "if the licensee has incurred substantial start-up costs or made significant capital investments with the intention of starting service, but due to circumstances beyond its control, was unable to provide service."[171]

123. We believe that these measures adequately account for a designated entity's pre-transfer investments in a license, including construction expenses. Therefore, we decline to adopt AIDE's proposal that we credit the licensee's pre-sale investments in the license and base the recapture amount on the portion of the licensee's taxable gain on the sale allocated to the license, because such provisions would require the government to undertake lengthy and complex accounting and allocation proceedings to determine the amount of the penalty. Similarly, we deny BET's request that we credit designated entities for their pre-transfer expenditures on a license because we believe that our recapture provisions adequately account for these expenditures by reducing the amount of the penalty over time. Moreover, the unjust enrichment provisions were designed to act as a penalty to deter premature license transfers by designated entities. Therefore we decline to modify the recapture provisions adopted in the *Second Report and Order*. We note, however, that because license terms and construction requirements vary by service, and because we may adopt different designated entity provisions for different services, we will set forth the specific recapture provisions in the service-specific competitive bidding rules of each auctionable service. Moreover, we modify our general recapture provisions to provide flexibility on a service-specific basis to extend the duration of the recapture provisions beyond five years.

I. Upfront Payment Amount

124. *Petitions*. AIDE requests that the Commission reduce the amount of the upfront payment for designated entities. AIDE asserts that a reduced upfront payment would help ensure that capital constrained designated entities have the opportunity to participate in the competitive bidding process. According to AIDE, a reduced upfront payment is necessary to create opportunities for designated entities to participate in competitive bidding and will allow such entities to preserve their limited resources for post-auction infrastructure development.

125. *Discussion*. The Commission adopted an upfront payment requirement in order to ensure that only serious, qualified bidders participate in our auctions. We reasoned that an upfront payment requirement would ensure the validity of the information generated during auctions and increase the likelihood that licenses will be awarded to the qualified bidders who value them the most, thus promoting the rapid deployment of new technology. Upfront payments will also provide the Commission with a source of available funds in the event a bid withdrawal penalty must be assessed. By requiring a substantial upfront payment amount, the Commission seeks to deter speculative and frivolous bidding by all bidders, including designated entities. Moreover, the standard upfront payment formula ($.02 per MHz per pop for the maximum MHz-pops a bidder intends to bid on in any single round of bidding), is based on the amount of spectrum and population coverage on which a bidder seeks to bid and therefore is directly linked to the expected value of the license and anticipated construction costs a licensee will incur.

126. Nevertheless, in the *Second Report and Order* we retained the flexibility to cap, reduce or modify the upfront payment amount for designated entities.[172] We indicated that such decisions would be made in the service-specific competitive bidding rules for individual services. In the *Fifth Report and Order*, recognizing that the standard upfront payment formula may create a barrier for smaller entities wishing to participate in auctions, we reduced by 25 percent the upfront payment amount required for designated entities bidding in the entrepreneur's blocks.[173] Given the varied spectrum costs of different services, we will continue to consider such reduced upfront payments for designated entities on a service-specific basis. Generally, we will only reduce the upfront payment amounts for designated entities in capital intensive services, such as broadband PCS, where the spectrum bandwidth will result in upfront payment amounts that may be prohibitive for some smaller entities.

J. Installment Payments

127. In the *Second Report and Order*, we stated that, for some auctions, winning bidders that are small businesses would be eligible to use installment payments in paying for licenses.[174] We provided that for these winning bidders, a down payment of 10 percent would be due within five business days of the close of the auction, and that an additional 10 percent would be due within five days of grant of the license.[175] We stated that we would impose interest on installment payments at a rate equal to the rate for U.S. Treasury obligations of maturity equal to the license term. We stated that the schedule of installment payments would begin with interest-only payments for the first two years, and that thereafter principal and interest would be amortized over the remaining term of the license.[176]

[169] *See Second Report and Order* at ¶ 262.

[170] *Id.*

[171] *Id.* at n.205.

[172] *See Second Report and Order* at ¶ 178 n.37

[173] *See Fifth Report and Order* at ¶ 156.

[174] *Id.* at ¶ 233.

[175] *Id.* at ¶ 238.

[176] *Id.* at ¶ 239.

128. Upon reconsideration, we have decided that we may need to tailor installment payment provisions more precisely to needs of various groups of designated entities and the characteristics of particular services. In the *Fifth Report and Order* we provided installment payments for minorities and women in some blocks, and provided different installment provisions for small businesses of different sizes.[177] We will continue to establish different installment payment provisions on a service-specific basis. We may offer installment payments to minorities and women, in some circumstances, and may offer installment payments having differing terms to different classes of designated entities. We may vary the interest rate and the payment schedule for installment payments, including the amount and timing of the down payment and the schedule for amortization of principal and interest. Installment payment provisions for each service will be specified in Orders establishing auction rules for that service. We believe that this additional flexibility will allow us to take account of differences in capital requirements across services and license blocks, and to provide access to capital in ways that will give various groups of designated entities a realistic chance to participate in offering service.

K. Eligibility Issues

129. *Petitions.* Black Entertainment Television Holdings, Inc. (BET) requests that the FCC reconsider the public company restriction on the availability of provisions for minority and women-owned companies in broadband PCS. BET argues that given the costs of acquiring spectrum and the construction expense, such a limitation would defeat realistic opportunities for a wide range of minority-owned firms. BET also requests that we clarify that provisions for minority and women-owned firms are separate and distinct from provisions for small businesses. Finally, BET argues that rights, privileges, options or other forms of ownership that do not affect the ability of a designated entity to control a company, or diminish a designated entity financial stake in a venture, should not be considered in the definitional analysis for purposes of determining eligibility.

130. *Discussion.* In the *Second Report and Order*, we stated that publicly traded minority and women-owned companies would not be eligible for provisions applicable to these designated entities. In the *Fifth Report and Order*, however, we deviated from this restriction to allow publicly traded minority and women-owned companies to qualify to bid in the entrepreneurs' block, and under certain circumstances to qualify for bidding credits.[178] We will continue to consider exceptions to our restriction on publicly traded company eligibility for minority and women-owned businesses on a service-specific basis, in each case considering the capital requirements and the expected build-out cost of the service. We agree with BET that in services with high entry costs, precluding publicly traded companies from receiving measures intended for minority and women-owned businesses may undermine our objective of ensuring the opportunity for these designated entities to participate in the provision of spectrum-based services.

131. As requested by BET, we clarify that the provisions for businesses owned by women and minorities are separate and distinct from the provisions for small businesses. Thus, women and minority-owned businesses may qualify for measures adopted for these entities irrespective of their size, and small businesses may qualify for small business provisions regardless of their ownership by minorities and women. And small businesses that are owned by members of minorities and/or women may qualify for provisions applicable to both groups.

132. Finally, in the general auction rules, we indicated that in determining designated entity eligibility we would consider all rights, warrants and options on a fully diluted basis, *i.e.*, they will be treated as if already exercised.[179] We intend to maintain the existing rule of calculating these ownership interests on a fully diluted basis, since we expect that such ownership interests will almost always have the potential either to impact the ability of a designated entity to control a company or to diminish a designated entity's financial stake in the venture. However, in the rare circumstance where such ownership interests have no effect on a designated entity's ability to control a firm or to diminish the designated entity's financial stake, we will consider requests for waivers.[180] We note, however, that we expect such instances to be rare, and petitioners will be required to make an affirmative showing sufficient to overcome the presumption that such ownership interests should be calculated as if exercised for purposes of determining eligibility issues.

133. *Petitions.* AIDE and Cook Inlet propose stricter eligibility and anti-sham measures to avoid designated entity shams. Specifically, Cook Inlet proposes requiring that a designated entity maintain clear structural control of an entity in order to be eligible for designated entity provisions. In this regard, Cook Inlet argues that in limited partnerships, the general partner should be required to be a designated entity and restrictions should be imposed on the ability of other general partners to exercise management control. Cook Inlet also proposes that the Commission require designated entities to document their eligibility by attaching documentation to their long form application.

134. We agree with AIDE that in some instances stricter eligibility requirements are appropriate to ensure that only legitimate designated entities are the beneficiaries of the special provisions established under our rules. In particular, we clarify that, when an applicant or a licensee is a partnership, because each general partner generally has the ability to act on behalf of the partnership, all general partners in the license applicant must be designated entities in order to qualify for designated entity status. We believe that this clarification is consistent with the Commission's long-standing practice of attributing control in the context of partnerships to the general partners. This clarification will ensure that designated entities in partnerships retain *de facto* as well as *de jure* control.

135. In addition, we agree with AIDE that documentation of designated entity status should be submitted along with the applicants' long-form applications in order to enable the Commission to verify designated entity eligibility. Accordingly, we will require designated entities to substantiate their eligibility by describing on their long-form application how they satisfy the requirements for eligibility. We will also require designated entity applicants to list on their long-form application all agreements that effect designated entity status, such as all partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. In addition, we will require that such information be maintained at the licensee's facilities, or by its designated agent, for the term of the license, and that the information be made available to Commission staff upon request in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

[177] *Fifth Report and Order* at ¶¶ 137–139

[178] *See Fifth Report and Order* at ¶¶ 163–164.

[179] 47 CFR 1.2110(b)(2).

[180] *See* 47 CFR 1.2110.

136. In addition, if an applicant for designated entity status proves unqualified, and the Commission determines that the application for designated entity status involved willful misrepresentation or other serious misconduct, the Commission will impose severe penalties. These may include monetary forfeitures, revocation of licenses, and prohibition of participation in future auctions.

137. With respect to AIDE's proposal that clear structural control should be required to establish designated entity eligibility, we believe that as a general rule, our strict requirement that women and minority principals control the applicant and maintain a 50.1 percent voting interest (in a corporate applicant) and a 50.1 percent equity stake in the entity is sufficient to prevent "fronts" and to ensure that our provisions are only made available to legitimate qualified designated entities. However, we reserve the flexibility on a service-specific basis, taking into account the nature of the specific provisions applicable in that service, to adopt additional or different requirements for designated entity eligibility.[181]

138. While we conclude that our requirement that control and substantial equity rest with minorities and/or women will generally be adequate to ensure that parties do not attempt to evade the statutory requirement to provide economic opportunities and ensure participation by businesses owned by these groups, we also reaffirm our commitment to investigate all allegations of fronts, shams or other methods used to try to evade our eligibility rules. In this regard, we remind parties that we will conduct random pre and post-auction audits to ensure that applicants receiving designated entity benefits are *bona fide* designated entities.

L. Small Businesses

139. *Petitions.* NTCA and USIN request that we amend the small business definition so that it can be flexibly modified in the context of a particular service. NTCA and USIN advocate that such flexibility is appropriate because the existing $6 million net worth/$2 million net income test is too low to reflect the capital-intensive nature of the broadband PCS business. NTCA asserts that most telephone companies are unable to meet this test even though they have few subscribers and few employees. USIN states that the current definition discriminates against small rural telephone companies, and that the proper measure for small businesses in capital-intensive service is those with annual revenues of less than $100 million.

140. *Discussion.* We agree with NTCA. In the *Second Report and Order* we relied on the Small Business Administration's (SBA) standard definition. The SBA definition permits an applicant to qualify for financial assistance based on a net worth not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million.[182] The record in this proceeding reflected broad disagreement about the appropriate definition of small businesses. Many commenters, including the Chief Counsel for Advocacy of the SBA, argued that the SBA net worth/revenue definition was too restrictive and would exclude businesses of sufficient size to survive, much less succeed, in the competitive wireless communications marketplace. The SBA's Chief Counsel for Advocacy and Suite 12 Group advocated adoption of a revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel recommended that the revenue standard be raised to include firms that (together with affiliates) have less than $40 million in revenue. The SBA Chief Counsel suggested that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.[183]

141. Other parties indicated that the definition used by the Commission might impede the ability of small businesses to raise capital in anticipation of auctions. They noted that many small firms are soliciting investors to enable these firms to compete better in auctions, and argued that their designated entity status should not be jeopardized as a result. Thus, these commenters suggested, if the FCC adopts the SBA's net worth standard, the net worth valuation should relate back to the date of the PCS Final Report and Order (September 23, 1993).

142. In contrast, several commenters argue that the small business definition must be made more restrictive in order to prevent large firms from spinning off companies to compete as designated entities. In this regard, some parties recommend limiting provisions to those small businesses that were in existence for the previous two years.

143. In the *Second Report and Order*, we adopted the existing SBA net worth/net income size standard as the generic threshold for small businesses to qualify as designated entities because at that time we were unable to conclude that the other proposals suggested by commenters were superior to this established standard. However we acknowledged that for certain telecommunications industry sectors this standard may not be high enough to encompass those entities that require the benefits, but also have the financial wherewithal to construct and operate the systems. Accordingly, we indicated that this "threshold could be adjusted upward on a service-by-service basis to accommodate such situations." We also noted that we may modify the small business definition if the SBA changed its definition or the Commission determined that an alternative definition was more appropriate for capital intensive services.

144. In this regard, in the *Fifth Report and Order* we revised the definition of a small business set forth in the *Second Report and Order* to include entities with up to $40 million in gross revenues, and we provided that these small businesses would permit to pool their resources and form consortia to bid in the entrepreneurs' blocks or to receive other small business benefits. We also adopted rules that allow small businesses and businesses owned by women and/or minorities to raise capital by selling passive ownership interests in their companies. Thus, for example, under certain conditions, businesses owned by women and minorities have the option of taking on one large passive partner (holding up to 49.9 percent of the enterprise) or selling a greater portion of their companies' equity (up to 75 percent of the equity) to passive investors in smaller increments. Either of these structures should enhance the ability of these entities to obtain the necessary funding

[181] For example, in the *Fifth Report and Order* we allowed minority or women-owned broadband PCS applicants to sell up to 75 percent of the company's equity to passive investors so long as the control groups retained control and 25 percent of the equity and each other investor owned less than 25 percent of the passive equity. We also established control group tests for small businesses and entities that wished to bid in certain blocks.

[182] 13 CFR 121.802.

[183] Some parties recommend using the SBA's 1500 employee standard. *See, e.g.*, comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2, and Iowa Network at 17. A number of other commenters argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria. Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment outlined by Congress in the Budget Act. *See, e.g.*, comments of LuxCel Group, Inc. at 4, Suite 12 Group at 10–11.

to meet long-term construction, operation and expansion goals.[184]

145. Given the diversity of services that may be subject to competitive bidding and the varied spectrum costs and build-out requirements associated with each, we conclude that it is more appropriate to define the eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements of each particular service in establishing the appropriate threshold. Therefore we will amend our generic auction rules to replace the small business definition with a provision enabling the Commission to establish a small businesses definition in the context of each particular service.

V. Final Regulatory Flexibility Analysis

146. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

A. Need for, and Purpose of, this Action

147. As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, within the *Notice of Proposed Rule Making* in this proceeding, and published a Final Regulatory Flexibility Analysis within the *Second Report and Order* (at ¶¶ 299–302). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

B. Summary of the Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

148. No comments were submitted in response to our Initial Regulatory Flexibility Analysis.

C. Significant Alternatives Considered

149. Although, as described in (B) above, no comments were received pertaining to our Initial Regulatory Flexibility Analysis, the *Second Report and Order* addressed at length the general policy considerations raised as a result of the Commission's new auction authority.

[184] *See Fifth Report and Order* at ¶ 185.

VI. Procedural Matters and Ordering Clauses

150. Accordingly, It Is Ordered, that the petitions for reconsideration Are Granted to the extent described above and Denied in all other respects, and that the petition of William E. Zimsky Is Dismissed as moot.

151. It Is Further Ordered, that Part 1 of the Commission's Rules Is Amended as set forth in Appendix B, attached. It Is Ordered that the rule changes made herein Will Become Effective 30 days after their publication in the **Federal Register**. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

List of Subjects in 47 CFR Part 1

Administrative practice and procedure, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

LaVera F. Marshall,

Acting Secretary.

Final Rules

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

2. Subpart Q of Part 1 is revised to read as follows:

Subpart Q—Competitive Bidding Proceedings

General Procedures

1.2101 Purpose.
1.2102 Eligibility of applications for competitive bidding.
1.2103 Competitive bidding design options.
1.2104 Competitive bidding mechanisms.
1.2105 Bidding application and certification procedures: prohibition of collusion.
1.2106 Submission of upfront payments.
1.2107 Submission of down payment and filing of long-form applications.
1.2108 Procedures for filing petitions to deny against long-form applications.
1.2109 License grant, denial, default, and disqualification.
1.2110 Designated entities.
1.2111 Assignment or transfer of control: unjust enrichment.

Subpart Q—Competitive Bidding Proceedings

§ 1.2101 Purpose.

The provisions of this subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (P.L. 103–66), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

§ 1.2102 Eligibility of applications for competitive bidding.

(a) Mutually exclusive initial applications in the following services or classes of services are subject to competitive bidding:

(1) Interactive Video Data Service (*see* 47 CFR Part 95, Subpart F). This paragraph does not apply to applications which were filed prior to July 26, 1993;

(2) Marine Public Coast Stations (*see* 47 CFR Part 80, Subpart J);

(3) Multipoint Distribution Service and Multichannel Multipoint Distribution Service (*see* 47 CFR Part 21, Subpart K). This paragraph does not apply to applications which were filed prior to July 26, 1993;

(4) Exclusive Private Carrier Paging above 900 MHz (*see* 47 CFR Part 90, Subpart P.)

(5) Public Mobile Services (*see* 47 CFR Part 22), except in the 800 MHz Air-Ground Radiotelephone Service, and in the Rural Radio Service. This paragraph does not apply to applications in the cellular radio service, such as cellular unserved area applications, that were filed prior to July 26, 1993;

(6) Specialized Mobile Radio Service (SMR) (*see* 47 CFR Part 90, Subpart S) including applications based on finder's preferences for frequencies allocated to the SMR service (*see* 47 CFR 90.173); and

(7) Personal Communications Services (PCS) (*see* 47 CFR Part 24).

Note to paragraph (a): To determine the rules that apply to competitive bidding in the foregoing services, specific service rules should also be consulted.

(b) The following types of license applications are not subject to competitive bidding procedures:

(1) Applications for renewal of licenses;

(2) Applications for modification of license; provided, however, that the Commission may determine that applications for modification that are mutually exclusive with other applications should be subject to competitive bidding;

(3) Applications for subsidiary communications services. A "subsidiary communications service" is a class of service where the signal for that service is indivisible from that of the main channel signal and that main channel

signal is exempt from competitive bidding under other provisions of these rules. *See, e.g.*, § 1.2102(c) (exempting broadcast services). Examples of such subsidiary communications services are those transmitted on subcarriers within the FM baseband signal (*see* 47 CFR 73.295), and signals transmitted within the Vertical Blanking Interval of a broadcast television signal; and

(4) Applications for frequencies used as an intermediate link or links in the provision of a continuous, end-to-end service where no service is provided directly to subscribers over the frequencies. Examples of such intermediate links are:

(i) Point-to-point microwave facilities used to connect a cellular radio telephone base station with a cellular radio telephone mobile telephone switching office; and

(ii) Point-to-point microwave facilities used as part of the service offering in the provision of telephone exchange or interexchange service.

(c) Applications in the following services or classes of services are not subject to competitive bidding:

(1) Alaska-Private Fixed Stations (*see* 47 CFR Part 80, Subpart O);

(2) Broadcast radio (AM and FM) and broadcast television (VHF, UHF, LPTV) under 47 CFR Part 73;

(3) Broadcast Auxiliary and Cable Television Relay Services (*see* 47 CFR Part 74, Subparts D, E, F, G, H and L and Part 78, Subpart B);

(4) Instructional Television Fixed Service (*see* 47 CFR Part 74, Subpart I);

(5) Maritime Support Stations (*see* 47 CFR Part 80, Subpart N);

(6) Marine Operational Fixed Stations (*see* 47 CFR Part 80, Subpart L);

(7) Marine Radiodetermination Stations (*see* 47 CFR Part 80, Subpart M);

(8) Personal Radio Services (*see* 47 CFR Part 95), except applications filed after July 26, 1993, in the Interactive Video Data Service (*see* 47 CFR Part 95, Subpart F);

(9) Public Safety, Industrial/Land Transportation, General and Business Radio categories above 800 MHz, including finder's preference requests for frequencies not allocated to the SMR service (*see* 47 CFR 90.173), and including, until further notice of the Commission, the Automated Vehicle Monitoring Service (*see* 47 CFR 90.239);

(10) Private Land Mobile Radio Services between 470–512 MHz (*see* 47 CFR Part 90, Subparts B–F), including those based on finder's preferences, (*see* 47 CFR 90.173);

(11) Private Land Mobile Radio Services below 470 MHz (*see* 47 CFR Part 90, Subparts B–F) except in the 220 MHz band (*see* 47 CFR Part 90, Subpart T), including those based on finder's preferences (*see* 47 CFR Section 90.173); and

(12) Private Operational Fixed Services (*see* 47 CFR Part 94).

§ 1.2103 Competitive bidding design options.

(a) The Commission will select the competitive bidding design(s) to be used in auctioning particular licenses or classes of licenses on a service-specific basis. The choice of competitive bidding design will generally be made pursuant to the criteria set forth in PP Docket No. 93–253, FCC 94–61, adopted March 8, 1994, available for purchase from the International Transcription Service, Inc., 2100 M St. NW, suite 140, Washington, DC 20037, telephone (202) 857–3800, but the Commission may design and test alternative methodologies. The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding: (1) Single round sealed bid auctions (either sequential or simultaneous); (2) Sequential oral auctions; (3) Simultaneous multiple round auctions.

(b) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses, in addition to bids on individual licenses. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction.

(c) The Commission may use single combined auctions, which combine bidding for two or more substitutable licenses and award licenses to the highest bidders until the available licenses are exhausted. This technique may be used in conjunction with any type of auction.

§ 1.2104 Competitive bidding mechanisms.

(a) *Sequencing*. The Commission will establish the sequence in which multiple licenses will be auctioned.

(b) *Grouping*. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) *Reservation Price*. The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) *Minimum Bid Increments*. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission may also establish suggested minimum opening bids on a service-specific basis.

(e) *Stopping Rules*. The Commission may establish stopping rules before or during multiple round auctions in order to terminate the auctions within a reasonable time.

(f) *Activity Rules*. The Commission may establish activity rules which require a minimum amount of bidding activity.

(g) *Withdrawal, Default and Disqualification Penalties*. As specified below, when the Commission conducts a simultaneous multiple round auction pursuant to § 1.2103, the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in paragraph (g)(1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission. When the Commission conducts single round sealed bid auctions or sequential oral auctions, the Commission may modify the penalties to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such penalties shall not exceed the penalties specified above.

(h) The Commission will generally release information concerning the identities of bidders before each auction but may choose, on an auction-by-

auction basis, to withhold the identity of the bidders associated with bidder identification numbers.

(i) The Commission may delay, suspend, or cancel an auction in the event of a natural disaster, technical obstacle, evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning of the current or some previous round or cancel the competitive bidding in its entirety.

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) *Submission of Short Form Application (FCC Form 175).* In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate filing fee set forth by Public Notice. Unless otherwise provided by Public Notice, the Form 175 need not be accompanied by an upfront payment (see § 1.2106).

(1) All Form 175s will be due:

(i) On the date(s) specified by Public Notice; or

(ii) In the case of application filing dates which occur automatically by operation of law (*see, e.g.*, 47 CFR 22.902), on a date specified by Public Notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The Form 175 must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons;

(iii) The identity of the person(s) authorized to make or withdraw a bid;

(iv) If the applicant applies as a designated entity pursuant to § 1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under § 1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of Section 310 is pending;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid;

Note to paragraph (a): The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) *Modification and Dismissal of Form 175.* (1) Any Form 175 that is not signed or otherwise does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to any applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. Form 175 may be amended or modified to make minor changes or correct minor errors in the application (such as typographical errors). The Commission will classify all amendments as major or minor, pursuant to rules applicable to specific services. An application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by Public Notice will have their applications dismissed with no opportunity for resubmission.

(c) *Prohibition of Collusion.* (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, after the filing of short-form applications, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other bidders until after the high bidder makes the required down payment, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii).

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for the same license. Such changes will not be considered major modifications of the application.

(3) after the filing of short-form applications, applicants may make agreements to bid jointly for licenses, provided the parties to the agreement have not applied for the same license.

§ 1.2106 Submission of upfront payments.

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. No interest will be paid on upfront payments.

(b) Upfront payments must be made either by wire transfer or by cashier's check drawn in U.S. dollars from a

financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

(c) If an upfront payment is not in compliance with the Commission's Rules, or if insufficient funds are tendered to constitute a valid upfront payment, the applicant shall have a limited opportunity to correct its submission to bring it up to the minimum valid upfront payment prior to the auction. If the applicant does not submit at least the minimum upfront payment, it will be ineligible to bid, its application will be dismissed and any upfront payment it has made will be returned.

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount after determining that no bid withdrawal penalties are owed by that bidder.

(e) In accordance with the provisions of paragraph (d), in the event a penalty is assessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default penalty before being applied toward any additional payment obligations that the high bidder may have.

§ 1.2107 Submission of down payment and filing of long-form applications.

(a) After bidding has ended, the Commission will identify and notify the high bidder and declare the bidding closed.

(b) Within five (5) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy penalties) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under § 1.2103, however, bidders may be required to submit their down payments with their bids.) This down payment must be made by wire transfer or cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Winning bidders who are qualified designated entities eligible for installment payments under § 1.2110(d) are only required to bring their total deposits up to ten (10) percent of their winning bid(s). Such designated entities must pay the remainder of the twenty (20) percent down payment within five (5) business days of grant of their application. *See* § 1.2110(e) (1) and (2). Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties. No interest will be paid on any down payment.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder (unless it has already submitted such an application, as contemplated by § 1.2105(a)(1)(b). For example, if the applicant is high bidder for a license in the Interactive Video Data Service (*see* 47 CFR Part 95, Subpart F), the long form application will be submitted on FCC Form 574 in accordance with § 95.815 of this chapter. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, the high bidder's long-form application must be mailed or otherwise delivered to: Office of the Secretary, Federal Communications Commission, Attention: Auction Application Processing Section, 1919 M Street, N.W., Room 222, Washington, D.C. 20554.

An applicant that fails to submit the required long-form application as required under this subsection, and fails to establish good cause for any late filed submission, shall be deemed to have defaulted and will be subject to the penalties set forth in § 1.2104.

(d) As an exhibit to its long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. Such agreements must have been entered into prior to the filing of short-form applications pursuant to § 1.2105.

§ 1.2108 Procedures for filing petitions to deny against long-form applications.

(a) Where petitions to deny are otherwise provided for under the Act or the commission's Rules, and unless other service-specific procedures for the filing of such petitions are provided for elsewhere in the Commission's Rules, the procedures in this section shall apply to the filing of petitions to deny the long-form applications of winning bidders.

(b) Within thirty (30) days after the Commission gives public notice that a long-form application has been accepted for filing, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such opposition and replies will be those provided in § 1.45.

(d) If the Commission determines that:

(1) an applicant is qualified and there is no substantial and material issue of fact concerning that determination, it will grant the application.

(2) an applicant is not qualified and that there is no substantial issue of fact concerning that determination, the Commission need not hold a evidentiary hearing and will deny the application.

(3) substantial and material issues of fact require a hearing, it will conduct a hearing. The Commission may permit all or part of the evidence to be submitted in written form and may permit employees other than administrative law judges to preside at the taking of written evidence. Such hearing will be conducted on an expedited basis.

§ 1.2109 License grant, denial, default, and disqualification.

(a) Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within five (5) business days following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within five (5) business days after the

commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default penalty specified in § 1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in § 1.2107(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the penalty set forth in § 1.2104(g)(2). In such event, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications for the license.

(d) Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject, in addition to any other applicable sanctions, to forfeiture of their upfront payment, down payment or full bid amount, and may be prohibited from participating in future auctions.

§ 1.2110 Designated entities.

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) Definitions.

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(3) Rural telephone companies. A rural telephone company is any local exchange carrier including affiliates (as defined in 1.2110(b)(4)), with 100,000 access lines or fewer.

(4) Affiliate. (i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant under § 24.709 (both referred to herein as "the applicant") if such individual or entity—

(A) directly or indirectly controls or has the power to control the applicant, or

(B) is directly or indirectly controlled by the applicant, or

(C) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) has an "identity of interest" with the applicant.

(ii) Nature of *control* in determining affiliation.

(A) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(B) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(C) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(iii) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(A) Spousal Affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship Affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother,

sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

Example. A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation Y is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(iv) Affiliation through stock ownership.

(A) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(B) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(C) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(v) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had come owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(vi) Affiliation under voting trusts.

(A) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(vii) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(viii) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(ix) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(x) Affiliation under joint venture arrangements.

(A) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a point venture.

(B) The parties to a joint venture are considered to be affiliated with each other.

(C) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(D) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(E) The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer or cashier's check in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within five (5) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(2) Within five (5) business days of the grant of the license application of a

winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) allow installment payments for the full license term;

(iii) begin with interest-only payments for the first two years; and

(iv) amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O.

(f) The Commission may award bidding credits (*i.e.*, payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(g) The Commission may establish different upfront payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(h) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(i) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(j) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(k) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

§ 1.2111 Assignment or transfer of control: unjust enrichment.

(a) *Reporting requirement.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission's statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the local consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (*e.g.*, management or consulting contracts either with or without an option to purchase; below market financing).

(b) *Unjust enrichment payment: set-aside.* As specified in this paragraph an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor pursuant to a set-aside for eligible designated entities under § 1.2110(c), or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, must seek Commission approval and may be required to make an unjust enrichment payment (Payment) to the Commission by cashier's check or wire transfer before consent will be granted. The Payment will be based upon a schedule that will take account of the term of the license, any applicable construction benchmarks, and the estimated value of the set-aside benefit, which will be calculated as the difference between the amount paid by the designated entity for the license and the value of comparable non-set-aside license in the free market at the time of the auction. The Commission will establish the amount of the Payment and the burden will be on the applicants to disprove this amount. No payment will be required if:

(1) The license is transferred or assigned more than five years after its initial issuance, unless otherwise specified; or

(2) The proposed transferee or assignee is an eligible designated entity under § 1.2110(c) or the service-specific competitive bidding rules of the particular service, and so certifies.

(c) *Unjust enrichment payment: installment financing.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor through a competitive bidding procedure utilizing installment financing available to designated entities under § 1.2110(d) will be required to pay the full amount of the remaining principal balance as a condition of the license transfer. No payment will be required if the proposed transferee or assignee assumes the installment payment obligations of the transferor or assignor, and if the proposed transferee or assignee is itself qualified to obtain installment financing under § 1.2110(d) or the service-specific competitive bidding rules of the particular service, and so certifies.

(d) *Unjust enrichment payment: bidding credits.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor through a competitive bidding procedure utilizing bidding credits available to eligible designated entities under § 1.2110(e) or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, must seek Commission approval and will be required to make an unjust enrichment payment (Payment) to the government by wire transfer or cashier's check before consent will be granted. The Payment will be the sum of the amount of the bidding credit plus interest at the rate applicable for installment financing in effect at the time the license was awarded. *See* § 1.2110(e). No payment will be required if the proposed transferee or assignee is an eligible designated entity under § 1.2110(e) or the service-specific competitive bidding rules of the particular service, and so certifies.

[FR Doc. 94–21182 Filed 8–25–94; 8:45 am]

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federal register

Friday
August 26, 1994

Part VII

Department of Housing and Urban Development

Office of the Assistant Secretary for Community Planning and Development

Federal Property Suitable as Facilities to Assist the Homeless; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N-94-1917; FR-3350-N-98]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATE: August 26, 1994.

ADDRESS: For further information, contact David Pollack, Department of Housing and Urban Development, Room 7262, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708-4300; TDD number for the hearing- and speech-impaired (202) 708-2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1-800-927-7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88-2503-OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Correction: Property No. 319240011 published August 12, 1994 is unavailable for homeless assistance use.

Dated: August 19, 1994.

Jacquie M. Lawing,

Deputy Assistant Secretary for Economic Development.

[FR Doc. 94-21326 Filed 8-25-94; 10:32 am]

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