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

DEPARTMENT OF AGRICULTURE

Federal Grain Inspection Service

7 CFR Part 800

RIN 0580–AA36

FGIS To Offer Official Pesticide Residue Testing

AGENCY: Federal Grain Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises the regulations under the United States Grain Standards Act (USGSA), as amended, and establishes the fee for a new service offered by the Federal Grain Inspection Service (FGIS). This service will provide for an official pesticide residue testing program for 29 pesticides in wheat.

EFFECTIVE DATE: This regulation is effective November 18, 1994.

FOR FURTHER INFORMATION CONTACT: George Wollam, FGIS, USDA, Room 0623 South Building, (202) 720–0292.

Executive Order 12866

This rule has been determined to be significant for purposes of Executive Order 12866 and, therefore, has been reviewed by OMB.

Major importers of U.S. wheat such as Japan, China, Mexico, and Korea have indicated a strong interest in having U.S. grain officially tested for the presence of specific pesticide residues. FGIS will be offering certification of these specific pesticide levels for export and domestic wheat. The anticipated volume of requests for this service is 500 samples per year or 10 per week. This represents approximately $100,000 per year, which will reimburse the costs of providing the service.

FGIS has provided official pesticide residue testing under the Agricultural Marketing Act since the early 1980's. Producers, grain handlers, processors, and foreign buyers of U.S. grain expect FGIS to provide an impartial assessment of grain quality as required by its legislative authority. FGIS, in turn, responds to industry requests by developing testing procedures and soliciting comments regarding the specific action before implementation. It is participants in the grain industry who determine who should conduct the analysis based on the documentation needed to fulfill contract requirements established by the grain market.

Under these circumstances, the Administrator of the Federal Grain Inspection Service has determined that this proposed action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12778

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. The USGSA provides in Section 87g that no State or subdivision may require or impose any requirements or restrictions concerning the inspection, weighing, or description of grain under the Act. This final rule will not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Regulatory Flexibility Act Certification

David Shipman, Acting Administrator, FGIS, has determined that this final rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) because most users of the official inspection and weighing services and those entities that perform these services do not meet the requirements for small entities.

Information Collection Requirements

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), the information collection requirements contained in part 800 have been previously approved by OMB under control number 0580–0013.

Background

On February 28, 1994, FGIS published in the **Federal Register** (59 FR 9424) a proposed rule entitled "Fees for Official Pesticide Residue Testing." These fees were established for a new service to provide official pesticide residue determinations for 29 pesticides in wheat.

Since the early 1980's, FGIS has provided official service under the Agricultural Marketing Act (AMA) to test grain and processed grain products for three pesticide residues: carbon tetrachloride, methyl bromide, and ethylene dibromide. This service is available upon request from the FGIS Commodity Testing Laboratory in Beltsville, MD.

FGIS is expanding its pesticide residue testing program to include testing wheat for 29 additional pesticides under the authority of the USGSA. The service will be performed on a request basis; it will not be required for either domestic or export shipments. All samples will be tested at the FGIS Technical Center in Kansas City, MO. A minimum of 500 grams of wheat will be required for testing. The residues (routine compounds) that will be certified are as follows: aldrin; azinphos-methyl; alpha-BHC; beta-BHC; delta-BHC; carbofuran; chlorpyrifos; chlorothalonil; chlorpyrifos-methyl; p,p'-DDD; p,p'-DDE; 3-p,p'-DDT; diclofop-methyl; dieldrin; dimethoate; endosulfan; endrin; esfenvalerate; fenitrothion; fenthion; folpet; lindane; malathion; methidathion; methoxychlor; parathion; parathion-methyl; pirimiphos-methyl; and triallate. These compounds will be analyzed by gas chromatography/mass spectrometry. Laboratory analytical results will be provided to the applicant as soon as practicable. Generally, the testing requires a minimum of 48 hours.

The fees will be set forth in Section 800.71(a), Schedule A. The proposed fee is $200 for each sample tested during a regular workday and $300 for each sample tested during a nonregular workday. The USGSA, as amended, (7 U.S.C. 71 et seq.) provides that FGIS charge and collect reasonable fees that cover its estimated cost of performing official inspection, weighing, reinspection, and appeal services. The fees are to cover, as nearly as practicable, the FGIS costs for performance of these official services, including related administrative and supervisory costs. The testing fee does not include charges for sampling. Sampling service fees, if required, will

be assessed in accordance with the sampling rates in Section 800.71(a), Schedule A.

Testing for additional residues (special compounds) within FGIS capabilities will be charged at a proposed rate of $100 per hour during a regular workday and $150 per hour during a non regular workday. Testing of residues in other grains, oilseeds, and commodities may be provided as a service at a later date.

Major importers of U.S. wheat such as Japan, China, Mexico, and Korea have indicated a strong interest in having U.S. grain officially tested for the presence of specific pesticide residues. FGIS will be offering certification of these specific pesticide levels for export and domestic wheat. The anticipated volume of requests for this service is 500 samples per year or 10 per week. This represents approximately $100,000 per year, which will reimburse the costs of providing the service.

Comment Review

During the 30-day comment period, three comments were filed in response to the proposal. The two comments in support of the proposal were received from a grain industry association and a state department of agriculture. A third comment in opposition to the proposal was filed by an independent (private) laboratory association and was received after the close of the comment period.

One comment in support of the proposal encouraged FGIS to use statistically valid quality control methods in offering pesticide testing. The commentor also requested that the testing not be mandatory. In addition, the commentor asked about the memorandum of understanding between FGIS and the Food and Drug Administration (FDA). In response to the comment, the testing service will be performed on a request basis; it will not be required for either domestic or export wheat shipments. Grain samples that have been officially sampled and determined to contain violative levels of pesticide residues will be reported to the FDA.

Another comment in support of the proposal stated that the service would help to strengthen the marketing of U.S. wheat abroad and the service would meet importers' needs for more thorough testing for pesticide residues. The commentor also pointed out that importers often request official testing rather than what is offered by private laboratories and that only FGIS would be able to provide a chain-of-custody for the tested products from sampling to analysis.

The third comment was received after the 30-day comment period. This comment objected to FGIS testing on the grounds that the government would be competing with private laboratories. FGIS has provided official pesticide residue testing under the AMA on pesticide residue since the early 1980's. Producers, grain handlers, processors, and foreign buyers of U.S. grain expect FGIS to provide impartial assessment of grain quality as required by its legislative authority. FGIS, is turn, responds to industry requests by developing testing procedures and soliciting comments regarding the specific action before implementation. It is participants in the grain industry who ultimately determine who will conduct the analysis (FGIS or independent lab) based on documentation needed to fulfill contract requirements established by the grain market.

Final Action

Accordingly, FGIS is revising part 800.71(a), Schedule A, of the regulations to establish new fees for testing pesticide residues in wheat.

List of Subjects in 7 CFR Part 800

Administrative practice and procedure, Grain. For reasons set out in the preamble, 7 CFR part 800 is amended as follows:

1. The authority citation for Part 800 continues to read as follows:

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended, (7 U.S.C. 71 et seq.).

2. Section 800.71(a), Schedule A, is revised to read as follows:

§ 800.71 Fees assessed by the Service.

(a) * * *

SCHEDULE A.—FEES FOR OFFICIAL INSPECTION, WEIGHING, AND APPEAL INSPECTION SERVICES PERFORMED IN THE UNITED STATES [1]

Inspection and weighing service (bulk or sacked grain)	Regular workday (Monday to Saturday)	Non regular workday (Sunday and Holiday)
(1) Original inspection and official weighing: [2]		
(i) Contract (per hour per service representative)	$31.50	$43.10
(ii) Noncontract (per hour per service representative)	41.90	57.00
(2) Reinspection, appeal inspection, Board appeal inspection, and review of weighing services: [3 4]		
(i) Grading service:		
(A) Grade and factors (per sample)	61.10	79.50
(B) Protein test (per sample)	15.30	19.90
(C) Factor determination (per factor)	30.60	39.75
(D) Vomitoxin test (per test):		
Qualitative	35.00	44.00
Quantitative	40.00	50.00
(ii) Sampling services (per hour per service representative)	61.10	79.50
(iii) Review of weighing service (per hour per service representative)	61.10	79.50
(3) Extra copies of certificates (per copy)	3.00	3.00
(4) Official track scale testing service	44.00	59.90
(5) Pesticide residue testing: [5]		
(A) Routine compounds (per sample)	200.00	300.00
(B) Special compounds (per hour per service representative)	100.00	150.00

[1] Official inspection and weighing services include but are not limited to: grading, weighing, sampling, stowage examination, equipment testing, scale testing and certification, test weight reverification, evaluation of inspection and weighing equipment, demonstrating official inspection and weighing functions, furnishing standard illustrations, and certifying inspection and weighing results.

[2] For vomitoxin tests, a charge of $7.50 per qualitative test and a charge of $12.00 per quantitative test will be assessed in addition to the applicable hourly rate for original inspection service.

[3] Fees for reinspection and appeal inspection services performed at locations where FGIS is providing original inspection service shall be assessed at the applicable contract or noncontract hourly rate as the original inspection, except that for vomitoxin tests, a charge of $7.50 per qualitative test and a charge of $12.00 per quantitative test will be assessed in addition to the applicable hourly rate. If additional personnel are required to perform the reinspection or appeal inspection service, the applicant will be assessed the noncontract original inspection hourly fee.

[4] If at the request of FGIS a file sample is located and forwarded by an agency for an official appeal, the agency may, upon request, be reimbursed at the rate of $2.50 per sample by the FGIS.

[5] Testing fees are applicable to any level of service (original inspection, reinspection, appeal inspection, or Board appeal inspection) and do not include a sampling service fee which, if applicable, will be assessed separately in accordance with the fees in this schedule.

* * * * *

Patricia A. Jensen,

Acting Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 94–25748 Filed 10–18–94; 8:45 am]

BILLING CODE 3410–EN–P

FEDERAL RESERVE SYSTEM

12 CFR Part 230

[Regulation DD; Docket No. R–850]

Truth in Savings; Regulatory Amendments

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is publishing amendments to Regulation DD (Truth in Savings) and the official staff commentary to implement recent changes made to the Truth in Savings Act by the Riegle Community Development and Regulatory Improvement Act of 1994. The law narrows the scope of accounts covered by the Truth in Savings Act to accounts held by individuals for a personal, family or household purpose. Accounts held by unincorporated nonbusiness associations of individuals are no longer subject to Truth in Savings requirements. The amendments to Regulation DD would merely implement this change by deleting references to "unincorporated nonbusiness associations of individuals." The Board has made a finding that publishing a proposed amendment for comment is unnecessary and contrary to the public interest; therefore, the amendment is adopted in final form.

EFFECTIVE DATE: September 23, 1994.

FOR FURTHER INFORMATION CONTACT: Jane Ahrens, Senior Attorney, or Kyung Cho-Miller, Staff Attorney, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for the hearing impaired *only* contact Dorothea Thompson, Telecommunications Device for the Deaf, at (202) 452–3544.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the Truth in Savings Act (12 U.S.C. 4301 et seq.) is to assist consumers in comparing deposit accounts offered by depository institutions. Institutions must disclose fees, the interest rate, the annual percentage yield (APY), and other account terms whenever a consumer requests the information and before an account is opened. Fees and other information also must be provided on any periodic statement sent to the consumer. Deposit account advertisements and advance notices to account holders of adverse changes in terms are also covered. The act restricts how institutions determine the account balance on which interest is calculated. The act is implemented by the Board's Regulation DD (12 CFR part 230). (See final rule published on September 21, 1992 (57 FR 43337), correction notice published on October 9, 1992 (57 FR 46480), and amendments published on March 19, 1993 (58 FR 15077).) An official staff commentary was published on August 8, 1994 (59 FR 40217).

II. Regulatory Amendment

The Riegle Community Development and Regulatory Improvement Act of 1994 was enacted September 23, 1994 (Pub. L. 103–325, 108 Stat. 2160). Section 332 of the act amends the Truth in Savings Act. The amendment narrows the scope of covered accounts to those held by individuals primarily for personal, family or household purposes. Accounts held by unincorporated nonbusiness associations of individuals are no longer covered by Truth in Savings, effective on the law's date of enactment.

The Board is adopting amendments to the regulation and commentary to implement this change. The Administrative Procedure Act provides that notice and opportunity for public comment are not required if the Board finds that notice and public comment are unnecessary or would be contrary to the public interest. 5 U.S.C. 553(b)(B). The Board believes such a finding is appropriate in this case. The Congress has eliminated a class of accounts from Truth in Savings coverage, and the amendments merely effect that change. These amendments—which only delete references to accounts held by unincorporated nonbusiness associations of individuals—are technical and not subject to interpretation. In light of the Congress' action, the Board has no discretion with regard to this regulatory change. It is essentially ministerial. The Board is required by law to amend Regulation DD in the manner proposed. This amendment to 12 CFR part 230 relieves depository institutions from the requirement that they treat "unincorporated nonbusiness associations of individuals" as "consumers" under Regulation DD. Because this regulatory amendment eliminates requirements, it is effective September, 23, 1994—the effective date of the statutory amendment.

For these reasons, the Board has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment for the following amendments is unnecessary and would be contrary to the public interest.

Section 230.2—Definitions

(a) Account

The reference to existing accounts held by an unincorporated nonbusiness association of natural persons prior to June 21, 1993 is deleted.

(h) Consumer

The reference to accounts held by unincorporated nonbusiness associations of natural persons is deleted.

Supplement I to Part 230—Official Staff Interpretations

Section 230.2—Definitions

(h) Consumer

Comment 2(h) –5, which provides guidance for determining whether an account held by an unincorporated association of individuals is for a business or nonbusiness purpose, is deleted.

III. Economic Impact Statement

The amendment has no significant impact on institutions' costs, including those of small institutions.

List of Subjects in 12 CFR Part 230

Advertising, Banks, banking, Consumer protection, Federal Reserve

System, Record and recordkeeping requirements, Truth in savings.

For the reasons set forth in the preamble, 12 CFR part 230 is amended as follows:

PART 230—TRUTH IN SAVINGS (REGULATION DD)

1. The authority citation for part 230 continues to read as follows:

Authority: 12 U.S.C. 4301 *et seq.*

§ 230.2 [Amended]

2. In § 230.2, the last sentence of paragraph (a) and the second sentence of paragraph (h) are removed.

Supplement I to Part 230—[Amended]

3. In Supplement I to Part 230 under the heading Section 230.2—Definitions., paragraph *(h)5. Unincorporated associations.* is removed.

By order of the Board of Governors of the Federal Reserve System, October 13, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–25706 Filed 10–18–94; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 303 and 338

Applications, Requests, Submittals, Delegations of Authority, and Notices Required To Be Filed by Statute or Regulation; Fair Housing

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC has adopted final amendments concerning delegations of authority and other technical amendments to its regulations in order to reflect the name, duties and powers of the FDIC's new Division of Compliance and Consumer Affairs, which was established under a recent internal reorganization. The Division of Compliance and Consumer Affairs was created by abolishing the FDIC's Office of Consumer Affairs and transferring its functions, as well as those of the FDIC's Division of Supervision relating to compliance with consumer protection, fair lending, community reinvestment, civil rights, and other laws not directly affecting the safety and soundness of depository institutions, to the new division. The intended effect of these amendments is to provide officials in the new division with appropriate delegated authority and to make other technical and conforming amendments.

EFFECTIVE DATE: This regulation becomes effective on October 19, 1994.

FOR FURTHER INFORMATION CONTACT: Claude A. Rollin, Senior Counsel, Legal Division (202–898–3985), Grovetta N. Gardineer, Senior Attorney, Legal Division (202–898–3905), or Lori J. Sommerfeld, Law Clerk, Legal Division (202–898–8515).

SUPPLEMENTARY INFORMATION:

Background

On August 29, 1994, the Acting Chairman of the Board of the FDIC approved a reorganization of the Corporation resulting in the establishment of a new Division of Compliance and Consumer Affairs. This was accomplished by abolishing the Office of Consumer Affairs and transferring its functions and duties to the new division. The functions and duties of the Division of Supervision relating to compliance with consumer protection, fair lending, community reinvestment, civil rights, and other laws not directly affecting the safety and soundness of depository institutions were also transferred to the new division. The Board adopted a resolution on August 30, 1994 approving the restructuring in order to reaffirm and strengthen its commitment to enforcing consumer protection, fair lending, community reinvestment, and civil rights laws and to better utilize FDIC resources.

Discussion

The FDIC has identified portions of its regulations that will be directly affected by the aforementioned corporate reorganization and thus require modification. These amendments include delegations of authority and other technical amendments to part 303 as well as a technical amendment to part 338.

A. Amendments to Part 303

Part 303 of the FDIC's regulations generally sets forth the procedures to be followed by both the FDIC and applicants with respect to applications, requests, or notices required to be filed by statute or regulation. Part 303 also currently sets forth delegations of authority from the FDIC's Board of Directors to the Director of the Division of Supervision, associate directors, regional directors and deputy regional directors of that division to act on certain applications and other matters.

These amendments primarily provide delegations of authority, where appropriate, to the Director and the regional managers of the Division of Compliance and Consumer Affairs to act on certain matters within the purview of the new division. The amendments also replace certain obsolete terminology and legal citations with current nomenclature and accurate citations where applicable. Specific changes are described below.

1. Scope and Definitions (§ 303.0)

The description of the scope of part 303 has been revised to reflect the delegations of authority added to part 303 for the new Division of Compliance and Consumer Affairs as well as to reflect that part 303 prescribes where applications, requests and notices required to be filed by statute or regulation should be filed. Definitions of "Director (DCA)" and "regional manager" have been added to reflect the management of the new Division of Compliance and Consumer Affairs. The new term "DCA" has been added and defined to mean the Division of Compliance and Consumer Affairs or any successor thereto. The term "Director" has been revised to "Director (DOS)". The term "Associate Director" has been redefined to include any associate director of the Division of Supervision or the Division of Compliance and Consumer Affairs. The revisions clarify that the terms "associate director," "regional director," "deputy regional director," "Associate General Counsel for Compliance and Enforcement," and "regional counsel" include officials of equivalent authority. A definition of "institution-affiliated party" has replaced the term "individual" throughout, incorporating by reference the meaning provided in 12 U.S.C. 1813(u). The term "order of correction" relating to actions terminating deposit insurance has been replaced with the term "notification to primary regulator," which is the nomenclature currently found in 12 U.S.C. 1818(a). The definition of "notice of assessment of civil penalties" has been revised to conform with current law. The term "final order to pay" relating to the assessment of civil money penalties has been deleted as unnecessary, and the term "amended order to pay" added to provide for orders which change the amount originally assessed in civil money penalty actions. The definition of "total assets" has been revised and a definition of "Tier 1 capital" added, incorporating by reference the definitions found at 12 CFR 325.2(n) and (m), respectively. The term "protest" has been revised to reflect the appropriate regional manager's duties with respect to Community Reinvestment Act protests. Section 303.0(c)(1) has been added to explain

that any authority delegated to the Director of the Division of Supervision or the Director of the Division of Compliance and Consumer Affairs may be exercised by the Executive Director, Divisions of Compliance, Resolutions and Supervision. Similarly, § 303.0(c)(2) explains that any authority delegated to the regional manager may, where confirmed in writing, be exercised by his or her principal assistant. Finally, § 303.0(d) is added to clarify that, if appropriate, any use of the singular includes the plural and the plural includes the singular and that any use of the masculine, feminine or neuter gender encompasses all three.

2. Application Procedures (§ 303.6)

a. *Investigations and examinations (§ 303.6(b))*. This section has been amended to provide delegations of authority to the Director and the regional manager of the Division of Compliance and Consumer Affairs to authorize investigations and examinations pursuant to this section as deemed appropriate. Upon receipt of any report of investigation or examination, authority is delegated to the Director or regional manager of the new division to take any action determined necessary or appropriate under the circumstances.

b. *Opportunity to petition for reconsideration of a denied application, petition, or other request (§ 303.6(e))*. This section has been amended to indicate that a petition or request relating to compliance with consumer protection, fair lending, community reinvestment or civil rights laws should be filed with the appropriate regional manager. This section has also been amended to include the Director of the Division of Compliance and Consumer Affairs and, where confirmed in writing, the associate director or the appropriate regional manager, in the exercise of authority under this section.

c. *Delegation of authority to act on certain enforcement matters (§ 303.9)*. References throughout the section have been revised to include the authority of the Director of the Division of Compliance and Consumer Affairs or designee to act on certain enforcement matters involving consumer compliance issues. With respect to enforcement matters involving both safety and soundness and consumer compliance matters, authority to act is delegated to the Director of the Division of Supervision and the Director of the Division of Compliance and Consumer Affairs, or their designees, jointly.

d. *Actions pursuant to 12 U.S.C. 1818(a) (§ 303.9(a))*. This section continues to allow for the delegation of authority to various Division of Supervision personnel to initiate termination of insurance actions pursuant to 12 U.S.C. 1818(a). However, it replaces the obsolete term, "order of correction", with the current term, "notification to primary regulator", and provides that the delegates may act when the insured depository institution's Tier 1 capital is less than 2% of its total assets, which is essentially the current delegation updated to reflect changes in the capital regulations. Paragraphs (a)(2) and (a)(3) modify the certification requirements to conform with the terminology currently found in 12 U.S.C. 1818(a).

e. *Actions pursuant to 12 U.S.C. 1818(b) and 12 U.S.C. 1818(c) (§§ 303.9 (b) and (c))*. These sections have been changed to provide delegations of authority to both the Director of the Division of Supervision and the Director of the Division of Compliance and Consumer Affairs to initiate actions pursuant to sections 8 (b) and (c) of the Act as appropriate. The amendment also provides for the joint issuance of notices and orders by the Division of Supervision and the Division of Compliance and Consumer Affairs when both safety and soundness and consumer compliance matters will be addressed in the action.

f. *Actions pursuant to 12 U.S.C. 1818(e) (§ 303.9(d))*. In this section, the term "individual" is replaced with the current terminology, "institution-affiliated party." The section has also been revised to provide delegations of authority to both the Director of the Division of Supervision and the Director of the Division of Compliance and Consumer Affairs and, where confirmed in writing, to an associate director to issue notices of intent to remove from office pursuant to 12 U.S.C. 1818(e). The amendment also provides for the joint issuance of notices and orders by the Division of Supervision and the Division of Compliance and Consumer Affairs when both safety and soundness and consumer compliance matters will be addressed in the action.

g. *Actions pursuant to 12 U.S.C. 1818(g) (§ 303.9(e))*. The delegations have been revised to provide delegated authority to the Director of the Division of Supervision and the Director of the Division of Compliance and Consumer Affairs to issue orders of suspension or prohibition pursuant to section 8(g) of the Federal Deposit Insurance Act (FDI Act). The amendment also provides for the joint issuance of such orders by the Division of Supervision and the Division of Compliance and Consumer Affairs when both safety and soundness and consumer compliance matters will be addressed in the action. The language has also been revised to conform with the statute as it currently reads. Hence, the reference to "indicted director, officer or person participating in the conduct of the affairs" has been replaced with "institution-affiliated party who is charged in any information, indictment, or complaint as set forth in section 8(g) of the Act."

h. *Civil money penalty actions (§ 303.9(g))*. Current § 303.9 delegates to the Director of the Division of Supervision and, where confirmed in writing, an associate director the authority to issue notices of assessment of civil money penalties. The amendment provides an additional delegation of authority to the Director of the Division of Compliance and Consumer Affairs and, where confirmed in writing, to an associate director of that division. The amendment also provides for the issuance of joint notices of assessment of civil money penalties by the Division of Supervision and the Division of Compliance and Consumer Affairs when both safety and soundness and consumer compliance matters will be addressed in the action.

i. *Investigations and examinations pursuant to 12 U.S.C. 1820(c) (§ 303.9(i))*. Current § 303.9 provides a delegation to the Director of the Division of Supervision or the Director of the Division of Liquidation and, where confirmed in writing, to an associate director or the appropriate regional director or deputy regional director and the General Counsel or his designee to issue an order of investigation pursuant to section 10(c) of the Act. This section has been amended to include a delegation of authority to the Director of the Division of Compliance and Consumer Affairs and, where confirmed in writing, to the appropriate regional manager of that division. The amendment also provides for the joint issuance of an order of investigation by the Director of the Division of Supervision and the Director of the Division of Compliance and Consumer Affairs when both safety and soundness and consumer compliance matters will be a subject of the investigation. The reference to "Division of Liquidation" has been changed to "Division of Depositor and Asset Services" to reflect an earlier title change for that division. The reference to the relevant FDIC regulation is updated to specify the current citation, which is subpart K of part 308.

j. *Actions pursuant to the Truth in Lending Act (§ 303.9(j))*. This section has been amended to provide delegations of authority to the Director of the Division of Compliance and Consumer Affairs

and the appropriate regional manager in that division and to eliminate existing delegations to the Director and other personnel of the Division of Supervision. The scope of the delegation to regional managers has been broadened to allow regional managers to deny any request for relief from the requirements for reimbursement under the Truth in Lending Act up to $25,000 instead of $10,000.

k. *Unilateral settlement offers (§ 303.9(k)) and acceptance of written agreements (§ 303.9(l)).* These sections have been amended to include delegations of authority to the Director and an associate director of the Division of Compliance and Consumer Affairs. Section 303.9(k) has also been amended to provide that, in cases where a proceeding was issued jointly by DOS and DCA, both Directors, or their designees, must agree to accept, deny or enter into any negotiations for unilateral settlement offers. Section 303.9(l) has also been amended to provide that in cases where both safety and soundness and consumer compliance matters are addressed, joint written agreements may be entered into. Section 303.9(l)(2) has further been amended to broaden the scope of authority delegated to both directors, and where confirmed in writing by either director, to an associate director, to accept or enter into written agreements pertaining to any safety and soundness or consumer compliance matter which may be addressed by section 8(b) of the FDI Act or any other provision of the FDI Act which addresses safety and soundness or consumer compliance matters.

l. *Modifications and terminations of enforcement actions (§ 303.9(m)).* Section 303.9(m) has been amended to provide a delegation of authority to the Director of the Division of Compliance and Consumer Affairs and, where confirmed in writing, the appropriate associate director and regional manager to terminate actions initiated and orders issued under 12 U.S.C. 1818 (b) or (c) when the depository institution has failed or merged. The delegated authority to modify or terminate other actions not specifically addressed remains unchanged, but language is added to clarify that notifications and notices are included in the types of actions that may be acted upon under this section. The concurrent certification requirement for terminations and modifications remains substantially unchanged.

m. *Enforcement of outstanding orders (§ 303.9(n)).* This section has been amended to include consultation by the General Counsel or designee with the Director, an associate director or regional manager of the Division of Compliance and Consumer Affairs prior to the initiation of any action to enforce certain outstanding orders.

3. Applications and Enforcement Matters Where Authority Is Not Delegated (§ 303.10)

Authority not specifically delegated is retained by the Board of Directors (§ 303.10(a)(2)). This section has been amended to include references to the Director, associate director and regional manager in the Division of Compliance and Consumer Affairs.

4. Confirmation, Limitations, Rescissions, and Special Cases (§ 303.11)

Action under delegated authority not mandated (§ 303.11(b)). This section has been amended to include references to the Director, associate director and regional manager in the Division of Compliance and Consumer Affairs.

B. Amendment to Part 338

Part 338 is amended by changing the address on the Equal Housing Lender Poster contained in § 338.4(b) of the FDIC's regulations, 12 CFR 338.4(b), to reflect the name of the new Division of Compliance and Consumer Affairs.

Exemption From Public Comment

Rules of agency organization, procedure or practice are exempt from public comment requirements of section 553 of the Administrative Procedure Act (5 U.S.C. 553(b)(A)). The FDIC believes that it is unnecessary to seek public comment in this case because these amendments concern rules of agency organization, procedure or practice which fall within this exemption. Therefore, the amendments are being issued as a final, rather than proposed, rule.

Effective Date of Amendments

Section 553 of the Administrative Procedure Act (5 U.S.C. 553) generally requires that a final rule be published 30 days prior to its effective date, subject to certain exceptions. One such exception is that if an agency finds good cause for making a rule immediately effective and publishes the basis for such finding, then the rule need not be published 30 days prior to its effective date. 5 U.S.C. 553(d)(3). These amendments merely concern internal delegations of authority and do not affect any substantive rights. Therefore, the FDIC Board of Directors finds good cause to waive the 30-day delayed effective date in order to quickly effectuate the corporate reorganization and to provide the new Division of Compliance and Consumer Affairs with appropriate legal authority to carry out its functions and duties.

Paperwork Reduction Act

This rulemaking does not require any collections of information pursuant to section 3504(h) of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Accordingly, no information has been submitted to the Office of Management and Budget for review.

Authority

These amendments are promulgated under the FDIC's general authority to prescribe, through its Board of Directors, such rules and regulations as it may deem necessary to carry out the provisions of the Federal Deposit Insurance Act or any other law which the FDIC has the responsibility of administering or enforcing (except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to any other regulatory agency). 12 U.S.C. 1819(a) (Tenth).

List of Subjects

12 CFR Part 303

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, banking, Insured depository institutions, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 338

Advertising, Banks, banking, Civil rights, Credit, Fair housing, Mortgages, Reporting and recordkeeping requirements, Signs and symbols.

The Board of Directors of the Federal Deposit Insurance Corporation hereby amends parts 303 and 338 of title 12 of the Code of Federal Regulations as follows:

PART 303—APPLICATIONS, REQUESTS, SUBMITTALS, DELEGATIONS OF AUTHORITY, AND NOTICES REQUIRED TO BE FILED BY STATUTE OR REGULATION

1. The authority citation for part 303 continues to read as follows:

Authority: 12 U.S.C. 378, 1813, 1815, 1816, 1817(a)(2)(b), 1817(j), 1818, 1819 ("Seventh," "Eighth" and "Tenth"), 1828, 1831e, 1831o, 1831p–1(a); 15 U.S.C. 1607.

2. Section 303.0 is revised to read as follows:

§ 303.0 Scope and definitions.

(a) *Scope.* This part prescribes:

(1) Where applications, requests, and notices required to be filed by statute or regulation (hereinafter, collectively, applications) should be filed;

(2) The contents of the application when the application is to be made by letter;

(3) The location where forms and instructions may be obtained when the application is to be made on a form. This part also prescribes procedures to be followed by both the FDIC and applicants during the process of consideration of an application; and

(4) Finally, this part sets forth delegations of authority by the FDIC's Board of Directors to the Director of the Division of Supervision and the Director of the Division of Compliance and Consumer Affairs, to their associate directors, to the regional directors and deputy regional directors of the Division of Supervision, and to the regional managers of the Division of Compliance and Consumer Affairs to act on certain applications and other matters pursuant to the conditions, where applicable, that limit such delegations.

(b) *Definitions.* For purposes of this part:

(1) *Corporation or FDIC.* The terms *Corporation or FDIC* shall mean the Federal Deposit Insurance Corporation.

(2) *Division or DOS.* The terms *division or DOS* shall mean the Division of Supervision, or in the event the Division of Supervision is reorganized, such successor division.

(3) *DCA.* The term *DCA* shall mean the Division of Compliance and Consumer Affairs, or in the event the Division of Compliance and Consumer Affairs is reorganized, such successor division.

(4) *Director (DOS).* The term *Director (DOS)* shall mean the Director of the Division of Supervision, or in the event the title of Director of the Division of Supervision becomes obsolete, any official of equivalent or higher authority.

(5) *Director (DCA).* The term *Director (DCA)* shall mean the Director of the Division of Compliance and Consumer Affairs, or in the event the title of Director of the Division of Compliance and Consumer Affairs becomes obsolete, any official of equivalent or higher authority.

(6) *Associate director.* The term *associate director* shall mean any associate director of the Division of Supervision or the Division of Compliance and Consumer Affairs, as appropriate, or in the event the title of associate director becomes obsolete, any official of equivalent authority within the respective divisions.

(7) *Regional director.* The term *regional director* shall mean any regional director of the Division of Supervision, or in the event the title of regional director becomes obsolete, any official of equivalent authority within the Division of Supervision.

(8) *Deputy regional director.* The term *deputy regional director* shall mean any deputy regional director of the Division of Supervision, or in those FDIC regions where there is no deputy regional director, an assistant regional director. In the event the title of deputy regional director or assistant regional director becomes obsolete, the term deputy regional director shall mean any official of equivalent authority within the same FDIC region of the Division of Supervision.

(9) *Regional manager.* The term *regional manager* shall mean any regional manager in the Division of Compliance and Consumer Affairs, or in the event the title of regional manager becomes obsolete, any official of equivalent authority within the Division of Compliance and Consumer Affairs.

(10) *Associate General Counsel for Compliance and Enforcement.* The term *Associate General Counsel for Compliance and Enforcement* shall mean the head of the Compliance and Enforcement Section of the Legal Division of the FDIC, or in the event the title of Associate General Counsel for Compliance and Enforcement becomes obsolete, any official of equivalent authority within the Legal Division. The authority delegated to the Associate General Counsel for Compliance and Enforcement may be exercised by the Deputy General Counsel for Supervision and Legislation or a counsel in the Compliance and Enforcement Section in the Washington, D.C. office.

(11) *Regional counsel.* The term *regional counsel* shall mean a regional counsel of the Legal Division, or in the event the title of regional counsel becomes obsolete, any official of equivalent authority within the Legal Division. The authority delegated to a regional counsel may be exercised by a deputy regional counsel, a counsel, or any official of equivalent or higher authority in the Compliance and Enforcement Section of the Legal Division.

(12) *Appropriate FDIC region, appropriate FDIC regional office, appropriate regional director, appropriate deputy regional director, appropriate regional manager, appropriate regional counsel.* The terms *appropriate FDIC region, appropriate FDIC regional office, appropriate regional director, appropriate deputy regional director, appropriate regional manager, and appropriate regional counsel* shall refer to the FDIC region, the regional director, the deputy regional director, the regional manager, and the regional counsel, respectively, of the FDIC region in which:

(i) The applicant depository institution, the proposed or newly organized nonmember bank or savings association, the insured branch of a foreign bank, the resulting or assuming depository institution, or the bank in which stock is being acquired, as appropriate, is or will be located; or

(ii) A depository institution—

(A) Which is the subject of an administrative action; or

(B) With which an individual who is the subject of an administrative action is associated, is located.

(13) *Act.* The term the Act shall mean the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*).

(14) *Institution-affiliated party.* The term *institution-affiliated party* shall have the same meaning as provided in section 3(u) of the Act (12 U.S.C. 1813(u)).

(15) *Notification to primary regulator.* The term *notification to primary regulator* shall mean a notice required under section 8(a)(2)(A) of the Act (12 U.S.C. 1818(a)(2)(A)).

(16) *Section 8(a) order.* The term *section 8(a) order* shall mean an order terminating the insured status of a depository institution under section 8(a) of the Act (12 U.S.C. 1818(a)).

(17) *Notice of charges.* The term *notice of charges* shall mean a notice of charges and of hearing setting forth the allegations of unsafe or unsound practices and/or violations and fixing the time and place of the hearing issued under section 8(b) of the Act (12 U.S.C. 1818(b)).

(18) *Section 8(b) order and cease-and-desist order.* The terms *section 8(b) order and cease-and-desist order* shall mean a final order to cease and desist issued under section 8(b) of the Act (12 U.S.C. 1818(b)).

(19) *Section 8(c) order and temporary cease-and-desist order.* The terms *section 8(c) order and temporary cease-and-desist order* shall mean a temporary order to cease and desist issued under section 8(c) of the Act (12 U.S.C. 1818(c)).

(20) *Section 8(e) order.* The term *section 8(e) order* shall mean a final order of removal or prohibition issued under section 8(e) of the Act (12 U.S.C. 1818(e)).

(21) *Section 8(e)(3) order and temporary order of suspension.* The terms *section 8(e)(3) order and temporary order of suspension* shall mean a temporary order of suspension

or prohibition issued under section 8(e)(3) of the Act (12 U.S.C. 1818(e)(3)).

(22) *Section 8(g) order.* The term *section 8(g) order* shall mean an order of suspension or prohibition issued under section 8(g) of the Act (12 U.S.C. 1818(g)).

(23) *Remote service facility.* The term *remote service facility* shall mean an automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility where deposits are received, checks paid, or money lent.

(24) *Notice of assessment of civil money penalties.* The term *notice of assessment of civil money penalties* shall mean a notice of assessment of civil penalties, findings of fact and conclusions of law, and order to pay issued pursuant to sections 7(a)(1), 7(j)(15), 8(i) or 18(j) of the Act (12 U.S.C. 1817(a)(1), 1817(j)(15), 1818(i), or 1828(j)), section 106(b) of the Bank Holding Company Act (12 U.S.C. 1972), section 910(d) of the International Lending Supervision Act of 1983 (12 U.S.C. 3909), or any other provision of law providing for the assessment of civil money penalties by the FDIC.

(25) *Amended order to pay.* The term *amended order to pay* shall mean an order to forfeit and pay civil money penalties, the amount of which has been changed from that assessed in the original notice of assessment of civil money penalties.

(26) *Book capital.* The term *book capital* shall mean total equity capital which is comprised of perpetual preferred stock, common stock, surplus, undivided profits and capital reserves, as those items are defined in the instructions of the Federal Financial Institutions Examination Council (FFIEC) for the preparation of Consolidated Reports of Condition and Income for insured banks.

(27) *Tier 1 capital.* The term *Tier 1 capital* shall have the same meaning as provided in § 325.2(m) of this chapter (12 CFR 325.2(m)).

(28) *Total assets.* The term *total assets* shall have the same meaning as provided in § 325.2(n) of this chapter (12 CFR 325.2(n)).

(29) *Adjusted Part 325 total assets.* The term *adjusted Part 325 total assets* shall mean adjusted 12 CFR part 325 total assets as calculated and reflected in the FDIC's Reports of Examination.

(30) *Protest.* The term *protest* shall include any comment from the public which raises a negative issue relative to the Community Reinvestment Act (12 U.S.C. 2901 *et seq.*), whether or not it is labeled a protest and whether or not a hearing is requested; however, the term protest shall not include any such comment which the appropriate regional manager determines to be frivolous, or to have been filed for competitive reasons by a financial institution, or to have been filed primarily as a means of delaying action on the application, or any comment which raises negative Community Reinvestment Act issues between the commenter and the applicant that have been resolved.

(31) *Standard conditions.* The term *standard conditions* refers to conditions that any delegate may include as a matter of routine in an order approving an application, whether or not the applicant has agreed to their inclusion. The following conditions, or variations thereof, are standard conditions:

(i) That the applicant has obtained all necessary and final approvals from the appropriate state authority or other applicable authority;

(ii) That if the transaction does not take effect within a specified time limit, or unless, in the meantime, a request for an extension of time has been approved, the consent granted shall expire at the end of the said time period;

(iii) That until the conditional commitment of the FDIC becomes effective, the FDIC retains the right to alter, suspend or withdraw its commitment should any interim development be deemed to warrant such action; and

(iv) In the case of a merger transaction (as defined in § 303.7(b)(1)), including a phantom merger or reorganization, that the proposed transaction not be consummated before the thirtieth calendar day after the date of the order approving the merger.

(c) *Powers.* (1) *Authority delegated to Director (DOS) and Director (DCA).* For purposes of this part, any authority delegated to the Director (DOS) or the Director (DCA) may also be exercised by the Executive Director, Divisions of Compliance, Resolutions and Supervision, or in the event the title of Executive Director, Divisions of Compliance, Resolutions and Supervision becomes obsolete, any official of equivalent authority.

(2) *Authority delegated to regional manager.* For purposes of this part, and where confirmed in writing, any authority delegated to the regional manager may also be exercised by his or her principal assistant.

(d) *Construction.* Any singular term includes the plural, and the plural includes the singular, if such use would be appropriate. Any use of the masculine, feminine, or neuter gender shall encompass all three, if such use would be appropriate.

§ 303.4 [Amended]

3. Section 303.4(b)(1) is amended by removing the words "of the Division of Supervision" after the word "Director" in the last sentence and adding in lieu thereof the word "(DOS)".

§ 303.5 [Amended]

4. Section 303.5(e) introductory text is amended by removing the words "Division of Supervision" before the words "regional director" and adding in lieu thereof the word "DOS".

5. In § 303.6, paragraph (b) is revised; by removing the word "and" at the end of paragraph (e)(1)(i), removing the period at the end of paragraph (e)(1)(ii) and adding "; and" in its place, designating the concluding text of paragraph (e)(1) as paragraph (e)(1)(iii) and revising it, and revising paragraph (e)(2); amending paragraph (i)(3) by adding the word "(DOS)" after the word "Director"; and amending footnote 7 in paragraph (k)(2) by adding the word "(DOS)" after the word "Director", to read as follows:

§ 303.6 Application procedures.

* * * * *

(b) *Investigations and examinations.* With respect to all applications, requests, or submittals, the Board of Directors, or the Director (DOS) or the Director (DCA), or their associate directors, or the appropriate regional director, or the appropriate deputy regional director, or the appropriate regional manager acting under delegated authority may require any investigation or examination, or both, to be performed as deemed appropriate. Upon receipt of the report of any investigation or examination and any recommendations based on the report, the Board of Directors, or either director, or their associate directors, or the regional director, or the deputy regional director, or the regional manager acting within the scope of delegated authority will take any action determined necessary or appropriate under the circumstances.

* * * * *

(e) * * *

(1) * * *

(iii) A petition or request relating to a safety and soundness matter should be filed with the appropriate regional director. A petition or request relating to compliance with consumer protection, fair lending, community reinvestment or civil rights laws should be filed with the appropriate regional manager. If a particular insured depository institution or insured branch of a foreign bank was not the subject of the application, petition, or request on which reconsideration is sought, the petition should be filed with the Executive

Secretary of the FDIC at the FDIC's Washington, DC office.

(2) (i) The Director (DOS) or the Director (DCA) or, where confirmed in writing by the appropriate Director, an associate director, or the appropriate regional director or deputy regional director, or the appropriate regional manager, or, in the case of a petition for reconsideration filed with the Executive Secretary, the General Counsel or his or her designee, shall determine whether the petition for reconsideration satisfies paragraphs (e)(1)(i) and (ii) of this section and shall promptly notify the petitioner of such determination.

(ii) If, pursuant to paragraph (e)(2)(i) of this section, a petition for reconsideration is determined not to satisfy paragraphs (e)(1)(i) and (ii) of this section, an applicant may appeal such decision to the appropriate Director, and where confirmed in writing by that Director, to an associate director, or, in the case of a petition for reconsideration filed with the Executive Secretary, to the Chairperson of the FDIC or his or her designee. An applicant may not submit additional information or evidence with the appeal and the determination by the appropriate Director or associate director, or the Chairperson of the FDIC or his or her designee whether the petition satisfies paragraphs (e)(1)(i) and (ii) of this section is final, and not appealable to the Board of Directors.

(iii) If a petition for reconsideration is determined to satisfy paragraphs (e)(1)(i) and (ii) of this section, then the previously denied application, petition, or request will be reconsidered:

(A) By the Board of Directors if originally denied by the Board of Directors; or

(B) By the appropriate director, or where confirmed in writing by the director, by an associate director, if originally denied by the director, associate director, regional director, deputy regional director, or regional manager.

(iv) Decisions by either director or their associate directors on petitions for reconsideration are final and not appealable to the Board of Directors.

* * * * *

§ 303.7 [Amended]

6. Section 303.7 is amended by:

a. Amending the section heading by removing the words "of the Division of Supervision" after the word "Director" and adding in lieu thereof the word "(DOS)";

b. Adding the word "(DOS)" after the word "Director" the first time it appears in the following places:

(1) 303.7(a)(1)(i), (a)(1)(ii), (a)(2)(i) and (a)(2)(ii)
(2) 303.7(b)(1), (b)(2) and (b)(9)
(3) 303.7(c)(1) and (c)(3)
(4) 303.7(d)(1)(i), (d)(2)(i) and (d)(3)
(5) 303.7(e)(1) and (e)(2)(i)
(6) 303.7(f)(1), (f)(2), (f)(3)(i), (f)(3)(ii), (f)(3)(iii), (f)(4)(i) and (f)(5)

c. Removing the word "Director" and inserting in lieu thereof the word "director" the second time it appears in the following places:

(1) 303.7(a)(1)(i), (a)(1)(ii), (a)(2)(i) and (a)(2)(ii)
(2) 303.7(b)(1), (b)(2) and (b)(9)
(3) 303.7(c)(1) and (c)(3)
(4) 303.7(d)(1)(i), (d)(2)(i) and (d)(3)
(5) 303.7(e)(1) and (e)(2)(i)
(6) 303.7(f)(1), (f)(3)(i), (f)(3)(ii), (f)(3)(iii), (f)(4)(i) and (f)(5)

d. Removing the citation "303.0(b)(26)" and adding in lieu thereof the citation "303.0(b)(31)" in the following places:

(1) 303.7(a)(1)(i), (a)(2)(i) and (a)(2)(ii)(B)
(2) 303.7(b)(8)
(3) 303.7(d)(4)(xii)
(4) 303.7(f)(6)

e. Removing the citation "303.0(b)(25)" and adding in lieu thereof the citation "303.0(b)(30)" in the following places:

(1) 303.7(a)(1)(iii)(D)
(2) 303.7(b)(5)
(3) 303.7(d)(1)(iii)(A)

§ 303.8 [Amended]

7. Section 303.8 is amended by:

a. Adding the word "(DOS)" after the word "Director" the first time it appears in the following places:

(1) 303.8(a)(1)
(2) 303.8(b)(1)
(3) 303.8(c)
(4) 303.8(e)
(5) 303.8(f)(1)
(6) 303.8(g)(1) and (g)(2)
(7) 303.8(h)
(8) 303.8(i)(1) and (i)(2)

b. Removing the word "Director" and adding in lieu thereof the word "director" the second time it appears in the following places:

(1) 303.8(a)(1)
(2) 303.8(b)(1)
(3) 303.8(c)
(4) 303.8(e)
(5) 303.8(f)(1)
(6) 303.8(g)(1)
(7) 303.8(h)
(8) 303.8(i)(1) and (i)(2)

8. Section 303.9 is revised to read as follows:

§ 303.9 Delegation of authority to act on certain enforcement matters.

(a) *Actions pursuant to section 8(a) of the Act (12 U.S.C. 1818(a)).* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to issue notifications to primary regulator when the respondent bank's book capital is less than 2% of total assets; Provided however, That authority may not be delegated to the regional director or deputy regional director whenever the respondent bank has issued any mandatory convertible debt or any form of Tier 2 capital (such as limited life preferred stock/subordinated notes and debentures).

(2) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, to issue notifications to primary regulator when the respondent bank's adjusted Tier 1 capital is less than 2% of adjusted part 325 total assets.

(3) The authority delegated under paragraphs (a)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement, or, in cases where a regional director or deputy regional director issues notifications to primary regulator, by the appropriate regional counsel, that the allegations contained in the findings of unsafe or unsound practices or conditions, if proven, constitute a basis for the issuance of a notification to primary regulator pursuant to section 8(a) of the Act (12 U.S.C. 1818(a)).

(b) *Actions pursuant to section 8(b) of the Act (12 U.S.C. 1818(b)).* (1) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, or to the appropriate regional director, deputy regional director or regional manager to issue:

(i) Notices of charges; and

(ii) Cease-and-desist orders (with or without a prior notice of charges) where the respondent bank or individual respondent consents to the issuance of the cease-and-desist order prior to the filing by an administrative law judge of proposed findings of fact, conclusions of law and recommended decision with the Executive Secretary of the FDIC.

(2) The Director (DOS) and the Director (DCA) may issue a joint notice of charges or cease-and-desist order under paragraph (b)(1) of this section, where such notice or order addresses both safety and soundness and consumer compliance matters. A joint notice or order will require the signatures of both directors or, alternatively, the signatures of the

appropriate regional director or deputy regional director and regional manager.

(3) The authority delegated under paragraphs (b)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement or, in cases where a regional director, deputy regional director or regional manager issues the notice of charges or the stipulated cease-and-desist order, by the appropriate regional counsel, that the allegations contained in the notice of charges, if proven, constitute a basis for the issuance of a section 8(b) order, or that the stipulated cease-and-desist order is authorized under section 8(b) of the Act, and, upon its effective date, shall be a cease-and-desist order which has become final for purposes of enforcement pursuant to the Act.

(c) *Actions pursuant to section 8(c) of the Act (12 U.S.C. 1818(c)).* (1) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to issue temporary cease-and-desist orders.

(2) The Director (DOS) and the Director (DCA) may issue a joint temporary cease-and-desist order where such order addresses both safety and soundness and consumer compliance matters. A joint notice or order will require the signatures of both directors or, alternatively, the signatures of the appropriate regional director or deputy regional director and regional manager.

(3) The authority delegated under paragraphs (c)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the action is not inconsistent with section 8(c) of the Act (12 U.S.C. 1818(c)) and the temporary cease-and-desist order is enforceable in a United States District Court.

(d) *Actions pursuant to section 8(e) of the Act (12 U.S.C. 1818(e)).* (1) Authority is delegated to the Director (DOS) or the Director (DCA), and where confirmed in writing by the director, to an associate director, to issue:

(i) Notices of intention to remove an institution-affiliated party from office or to prohibit an institution-affiliated party from further participation in the conduct of the affairs of an insured depository institution pursuant to sections 8(e)(1) and (2) of the Act (12 U.S.C. 1818(e)(1) and (2)), and temporary orders of suspension pursuant to section 8(e)(3) of the Act (12 U.S.C. 1818(e)(3)); and

(ii) Orders of removal, suspension or prohibition from participation in the conduct of the affairs of an insured depository institution where the institution-affiliated party consents to the issuance of such orders prior to the filing by an administrative law judge of proposed findings of fact, conclusions of law and a recommended decision with the Executive Secretary of the FDIC.

(2) The Director (DOS) and the Director (DCA) may issue joint notices and orders pursuant to paragraph (d)(1) of this section where such notice or order addresses both safety and soundness and consumer compliance matters. A joint notice or order will require the signatures of both directors or their associate directors.

(3) The authority delegated under paragraphs (d)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the allegations contained in the notice of intent, if proven, constitute a basis for the issuance of a notice of intent pursuant to section 8(e) of the Act, or that the stipulated section 8(e) order is not inconsistent with section 8(e) of the Act, and, upon issuance, shall be an order which has become final for purposes of enforcement pursuant to the Act.

(e) *Actions pursuant to section 8(g) of the Act (12 U.S.C. 1818(g)).* (1) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to issue orders of suspension or prohibition to an institution-affiliated party who is charged in any information, indictment, or complaint as set forth in section 8(g) of the Act when such institution-affiliated party consents to the suspension or prohibition.

(2) The Director (DOS) and the Director (DCA) may issue joint orders pursuant to paragraph (e)(1) of this section where such order addresses both safety and soundness and consumer compliance matters. A joint order will require the signatures of both directors or their associate directors.

(3) The authority delegated under paragraphs (e)(1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with section 8(g) of the Act (12 U.S.C. 1818(g)) and the order is enforceable in a United States District Court pursuant to sections 8(i) and 8(j) of the Act (12 U.S.C. 1818 (i) and (j)).

(f) *Actions pursuant to section 8(p) of the Act (12 U.S.C. 1818(p)).* (1) Authority is delegated to the Executive Secretary to issue consent orders terminating the insured status of insured depository institutions that have ceased to engage in the business of receiving deposits other than trust funds pursuant to section 8(p) of the Act (12 U.S.C. 1818(p)).

(2) The authority delegated under paragraph (f)(1) of this section shall be exercised only upon the recommendation and concurrence of the Director (DOS) or associate director and the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with section 8(p) of the Act.

(g) *Civil money penalties.* (1)(i) Except as provided for in paragraph (g)(3) of this section, authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to issue notices of assessment of civil money penalties.

(ii) The authority delegated under paragraph (g)(1)((i) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the allegations contained in the notice of assessment, if proven, constitute a basis for assessment of civil money penalties.

(2) The Director (DOS) and the Director (DCA) may issue joint notices pursuant to paragraph (g)(1) of this section where such notice addresses both safety and soundness and consumer compliance matters. A joint notice will require the signatures of both directors or their associate directors.

(3) Authority is delegated to the General Counsel or designee for the levying and enforcement of civil money penalties under section 7(a)(1) of the Act (12 U.S.C. 1817(a)(1)) for the late, inaccurate, false or misleading filing of Reports of Condition and Report of Income, and such other reports as the Board of Directors may require under the authority of that section. In the exercise of the delegated authority, the General Counsel or designee shall consult with the appropriate Director or associate director before imposing any penalty.

(h) *Directives and capital plans under section 38 of the Act (prompt corrective action) and part 325 of this chapter.* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to accept, to reject, to require new or revised capital restoration plans or to make any other determinations with respect to the implementation of capital restoration plans and, in accordance with subpart Q of part 308 of this chapter, to issue:

(i) Notices of intent to issue capital directives;

(ii) Directives to insured state nonmember banks that fail to maintain capital in accordance with the requirements contained in part 325 of this chapter;

(iii) Notices of intent to issue prompt corrective action directives, except directives issued pursuant to section 38(f)(2)(F)(ii) of the Act (12 U.S.C. 1831o(f)(2)(F)(ii));

(iv) Directives to insured depository institutions pursuant to section 38 of the Act (12 U.S.C. 1831o), with or without the consent of the respondent bank to the issuance of the directive, except directives issued pursuant to section 38(f)(2)(F)(ii) of the Act (12 U.S.C. 1831o(f)(2)(F)(ii));

(v) Directives to insured depository institutions requiring immediate action or imposing proscriptions pursuant to section 38 of the Act (12 U.S.C. 1831o) and part 325 of this chapter, and in accordance with the requirements contained in § 308.201(a)(2) of this chapter;

(vi) Notices of intent to reclassify insured banks pursuant to §§ 325.103(d) and 308.202 of this chapter;

(vii) Directives to reclassify insured banks pursuant to §§ 325.103(d) and 308.202 of this chapter with the consent of the respondent bank to the issuance of the directive; and

(viii) Orders on request for informal hearings to reconsider reclassifications and designate the presiding officer at the hearing pursuant to § 308.202 of this chapter.

(2) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an Associate Director, to:

(i) Issue notices of intent to issue a prompt corrective action directive ordering the dismissal from office of a director or senior executive officer pursuant to section 38(f)(2)(F)(ii) of the Act, (12 U.S.C. 1831o(f)(2)(F)(ii)), and in accordance with the requirements contained in § 308.203 of this chapter;

(ii) Issue directives ordering the dismissal from office of a director or senior executive officer pursuant to section 38(f)(2)(F)(ii) of the Act, (12 U.S.C. 1831o(f)(2)(F)(ii));

(iii) Issue orders of dismissal from office of a director or senior executive officer pursuant to section 38(f)(2)(F)(ii) of the Act, 12 U.S.C. 1831o(f)(2)(F)(ii) where the individual consents to the issuance of such order prior to the filing of a recommendation by the presiding officer with the FDIC;

(iv) Act on recommended decisions of presiding officers pursuant to a request for reconsideration of a reclassification in accordance with the requirements contained in § 308.202 of this chapter;

(v) Act on requests for rescission of a reclassification; and

(vi) Act on appeals from immediately effective directives issued pursuant to section 38 of the Act, (12 U.S.C. 1831o) and § 308.201 of this chapter.

(3) Authority is delegated to the Executive Secretary of the FDIC to issue orders for informal hearings and designate presiding officers on directives issued pursuant to section 38(f)(2)(F)(ii) of the Act, 12 U.S.C. 1831o(f)(2)(F)(ii).

(4) The authority delegated under paragraphs (h)(1)(i) and (ii) of this section shall be exercised only upon the concurrent certification by the Associate General Counsel for Compliance and Enforcement, or in cases where a regional director or deputy regional director issues the notice of intent to issue a capital directive or capital directives, by the appropriate regional counsel, that the action taken is not inconsistent with the Act and part 325 of this chapter.

(5) The authority delegated under paragraphs (h)(1) (iii), (iv), (v), (vi) and (vii) of this section shall be exercised only upon the concurrent certification by the Associate General Counsel for Compliance and Enforcement, or in cases where a regional director or deputy regional director issues the notice of intent to issue a prompt corrective action directive or prompt corrective action directives, or the notice of intent to reclassify or reclassification directive, by the appropriate regional counsel, that the allegations contained in the notice of intent, if proven, constitute a basis for the issuance of a final directive pursuant to section 38 of the Act, or that the issuance of a final directive is not inconsistent with section 38 of the Act.

(6) The authority delegated under paragraph (h)(2) of this section shall be exercised only upon the concurrent certification by the Associate General Counsel for Compliance and Enforcement that the allegations contained in the notice of intent, if proven, constitute a basis for the issuance of a final directive pursuant to section 38 of the Act or that the issuance of a final directive is not inconsistent with section 38 of the Act or that the stipulated section 38 order is not inconsistent with section 38 and is an order which has become final for purposes of enforcement pursuant to the Act.

(i) *Investigations pursuant to section 10(c) of the Act (12 U.S.C. 1820(c)).* (1) Authority is delegated to the Director (DOS), to the Director (DCA), to the Director of the Division of Depositor and Asset Services, and where confirmed in writing by the director, to an associate director, or to the appropriate regional director, deputy regional director or regional manager, to issue an order of investigation pursuant to section 10(c) of the Act (12 U.S.C. 1820(c)) and subpart K of Part 308 (12 CFR 308.144 through 308.150).

(2) Authority is delegated to the General Counsel, and where confirmed in writing by the General Counsel, to his designee, to issue an order of investigation pursuant to section 10(c) of the Act (12 U.S.C. 1820(c)) and subpart K of Part 308 (12 CFR 308.144 through 308.150).

(3) In issuing an order of investigation that pertains to an open insured depository institution or an institution making application to become an insured depository institution, the authority delegated under paragraphs (i)(1) and (2) of this section shall be exercised only upon the concurrent execution of the order of investigation by the Director (DOS) or the Director (DCA), or their associate directors, or the appropriate regional director, deputy regional director or regional manager, and the General Counsel or designee. In the case of a joint order of investigation, such authority shall be exercised only upon the concurrent execution of the order of investigation by both directors, or their associate directors, or the appropriate regional director, deputy regional director and regional manager, and the General Counsel or designee.

(j) *Truth in Lending Act.* (1) Authority is delegated to the Director (DCA), and where confirmed in writing by the director, to the associate director, or to the appropriate regional manager, to deny requests for relief from the requirements for reimbursement under section 608(a)(2) of the Truth in Lending Simplification and Reform Act (15 U.S.C. 1607(e)(2)); Provided however, that a regional manager is not authorized to deny any request where the estimated amount of reimbursement is greater than $25,000.

(2) Authority is delegated to the Director (DCA), and where confirmed in writing by the director, to an associate director:

(i) To grant request for relief from the requirements for reimbursement under section 608(a)(2) of the Truth in Lending Simplification and Reform Act (15 U.S.C. 1670(a)(2)); and

(ii) To act on applications for reconsideration of any action taken under paragraphs (j) (1) and (2) of this section.

(3) The authority delegated under paragraphs (j) (1) and (2) of this section shall be exercised only upon concurrent

certification by the Associate General Counsel for Compliance and Enforcement, or, in cases where a regional manager denies requests for relief, by the appropriate regional counsel, that the action taken is not inconsistent with the Truth in Lending Simplification and Reform Act.

(k) *Unilateral settlement offers.* (1) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to accept, deny or enter into negotiations for unilateral settlement offers with insured depository institutions, or with an institution-affiliated party, pertaining to a proceeding under 12 CFR part 308. In cases where a proceeding under 12 CFR part 308 was issued jointly by DOS and DCA, both directors, or their associate directors, must agree to accept, deny or enter into negotiations for unilateral settlement offers with insured depository institutions or with an institution-affiliated party.

(2) The authority delegated under paragraph (k)(1) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with the Act.

(l) *Acceptance of written agreements.* (1) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, to accept or enter into any written agreements with insured depository institutions, or any institution-affiliated party pertaining to any matter which may be addressed by the FDIC pursuant to section 8(a) of the Act (12 U.S.C. 1818(a)).

(2) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, to accept or enter into any written agreements with insured depository institutions, or any institution-affiliated party pertaining to any safety and soundness or consumer compliance matter which may be addressed by the FDIC pursuant to section 8(b) of the Act (12 U.S.C. 1818(b)) or any other provision of the Act which addresses safety and soundness or consumer compliance matters. In cases which would address both safety and soundness and consumer compliance matters, the Directors, or their designees, may accept or enter into joint written agreements with insured depository institutions or institution-affiliated parties.

(3) The authority delegated under paragraphs (l) (1) and (2) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement that the action taken is not inconsistent with sections 8 (a) and (b) of the Act.

(m) *Modifications and terminations of enforcement actions.* (1) *Sections 8(a), 8(b) and 8(c) (12 U.S.C. 1818 (a), (b) and (c)) actions upon failure or merger of a depository institution.* (i) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to terminate outstanding section 8(a) orders and agreements and to terminate actions and agreements which are pending pursuant to section 8(a) of the Act when the depository institution is closed by a Federal or state authority or merges into another institution.

(ii) Authority is delegated to the Director (DOS), to the Director (DCA), and where confirmed in writing by either director, to an associate director, or to the appropriate regional director, deputy regional director or regional manager, to terminate outstanding section 8(b) and section 8(c) orders and agreements and to terminate actions and agreements which are pending pursuant to sections 8(b) and 8(c) of the Act when the depository institution is closed by a Federal or state authority or merges into another institution. In cases where a joint order was issued by DOS and DCA, both directors, or their associate directors, or the appropriate regional director or deputy regional director and regional manager, must agree prior to the termination of outstanding 8(b) and 8(c) orders.

(2) *Section 8(a) (12 U.S.C. 1818(a)) actions issued by the Board of Directors.* (i) Authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to modify or terminate notifications to primary regulator issued by the Board of Directors pursuant to section 8(a) of the Act where the respondent depository institution is in material compliance with such notification or for good cause shown.

(ii) In cases where the Board of Directors has issued a notice of intent to terminate insured status pursuant to section 8(a) of the Act, authority is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director or deputy regional director, to terminate the actions pending pursuant to such notice of intent to terminate insured status where the respondent depository institution is in material compliance with the applicable notification to primary regulator or for good cause shown.

(3) *Section 8(b) (12 U.S.C. 1818(b)) orders issued by the Board of Directors.* Authority is delegated to the Director (DOS) or the Director (DCA), and where confirmed in writing by the director, to an associate director, or to the appropriate regional director, deputy regional director or regional manager, to terminate outstanding section 8(b) orders issued by the Board of Directors where either material compliance with the section 8(b) order has been achieved by the respondent depository institution or individual respondent or for good cause shown. In cases where an order issued by the Board addresses both safety and soundness and consumer compliance matters, both directors, or their designees, must agree prior to the termination of outstanding 8(b) orders.

(4) *Section 8(g) orders issued by the Board of Directors.* Authority is delegated to the Director (DOS) or the Director (DCA), and where confirmed in writing by the director, to an associate director, to approve requests for modifications or terminations of section 8(g) orders issued by the Board of Directors.

(5) *Other matters not specifically addressed.* For all other outstanding orders or pending actions not specifically addressed in paragraphs (m)(1), (m)(2), (m)(3) and (m)(4) of this section, the delegations of authority contained in paragraphs (a)(1), (a)(2), (b)(1), (c)(1), (d)(1), (e)(1), (g)(1), (g)(2), (h)(1), (h)(2), (l)(1), (l)(2), and (n) of this section shall be construed to include the authority to modify or terminate any outstanding notice, order, directive or agreement, as may be appropriate, issued pursuant to delegated authority and to terminate any pending action initiated pursuant to delegated authority.

(6) *Certification.* Any modifications or terminations pursuant to paragraphs (m)(1), (m)(2), (m)(3), (m)(4), and (m)(5) of this section shall be exercised only upon concurrent certification by the Associate General Counsel for Compliance and Enforcement, or in cases where a regional director, deputy regional director or regional manager acts under delegated authority, by the appropriate regional counsel, that the action taken is not consistent with the Act.

(n) *Enforcement of outstanding orders.* After consultation with the Director (DOS) or the Director (DCA), or an associate director, or the appropriate regional director, deputy regional director or regional manager, as may be

appropriate, the General Counsel or designee is authorized to initiate and prosecute any action to enforce any effective and outstanding order or temporary order issued under 12 U.S.C. 1817, 1818, 1820, 1828, 1829, 1831*l*, 1831o, 1972, or 3909, or any provision thereof, in the appropriate United States District Court.

§ 303.10 [Amended]

9. Section 303.10 is amended by:

a. In paragraph (a)(2), by removing the words "the Director, or to an associate director or a regional director or deputy regional director" and adding in lieu thereof the words "a Director, or to an associate director, or to a regional director, deputy regional director or regional manager";

b. In paragraph (b)(2)(i), by removing the citation "303.0(b)(26)" and adding in lieu thereof the citation "303.0(b)(31)"; and

c. In paragraph (c)(1)(i), by removing the words "Orders of correction" and adding in lieu thereof the words "Notifications to primary regulator".

10. Section 303.11(b) is revised to read as follows:

§ 303.11 Confirmation, limitations, rescissions and special cases.

* * * * *

(b) *Action under delegated authority not mandated.* (1) The Director (DOS) or the Director (DCA) may, in writing, rescind the authority of an associate director, regional director, deputy regional director or regional manager to act on an application, request, notice of acquisition of control or enforcement matter, and may himself act on the same.

(2) (i) An associate director, regional director, deputy regional director or regional manager may, in writing, recommend that the authority to act on an application, request, notice of acquisition of control or enforcement matter not be exercised by him; in such cases, the authority to act on such application, request, notice of acquisition of control or enforcement matter may be exercised by the Director (DOS) or the Director (DCA). The Director may, in writing, recommend that the authority to act on an application, request, notice of acquisition of control or enforcement matter may not be exercised by him; in such cases the Board of Directors will act on the application, request, notice of acquisition of control or enforcement matter.

(ii) A regional counsel may, in writing, recommend that the authority to act on an application made by insured depository institutions pursuant to section 19 of the Act (12 U.S.C. 1829) or an enforcement matter not be exercised by him; in such cases the authority to act in such enforcement matters may be exercised by the Associate General Counsel for Compliance and Enforcement. The Associate General Counsel for Compliance and Enforcement may, in writing, recommend that the authority to act on an application pursuant to section 19 of the Act or enforcement matter not be exercised by him; in such cases, the Board of Directors will act on the application or enforcement matter.

(iii) Upon determining not to act upon the application, request, notice of acquisition of control or enforcement matter under delegated authority, the regional manager, deputy regional director, regional director, associate director, or the Director (DOS) or the Director (DCA), and/or the regional counsel, or the Associate General Counsel for Compliance and Enforcement, as the case may be, shall forward the application, request, notice of acquisition of control or enforcement matter, together with his recommendations as to the disposition of such application, request, notice of acquisition of control or enforcement matter to the appropriate authority as determined by the rules set forth in paragraphs (b)(2) (i) and/or (ii) of this section.

* * * * *

11. Section 303.13 is amended by:

a. Removing the words "for the Division of Supervision" after the words "regional director" and adding the word "DOS" before the words "regional director" in the following places:

(1) 303.13(b)(1)

(2) 303.13 (c)(1)(i) and (c)(2)

(3) 303.13 (d)(1) and (d)(2)(i)

(4) 303.13(e)

(5) 303.13 (f)(1), (f)(3) and (f)(4)

(6) 303.13(g)

b. Revising paragraph (h) to read as follows:

§ 303.13 Applications and notices by savings associations.

* * * * *

(h) *Delegations.* The authority to act on applications and notices filed pursuant to § 303.13, and to make any and all determinations called for in regard to the same, is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the regional director or deputy regional director.

12. Section 303.14 is amended:

a. In paragraph (a)(4)(iv), by removing the words "(Division of Supervision)" after the words "regional director" and adding the word "DOS" before the words "regional director"; and

b. By revising paragraph (e) to read as follows:

§ 303.14 Change in senior executive officer or board of directors.

* * * * *

(e) *Delegations.* The authority to issue notices of disapproval or notices of intent not to disapprove under this section; to grant waivers of the prior notice requirement; to determine the informational adequacy of a notice; to designate an insured nonmember bank as a troubled institution; and to determine when the 30-day period begins to run is delegated to the Director (DOS), and where confirmed in writing by the director, to an associate director, or to the regional director or deputy regional director.

PART 338—FAIR HOUSING

1. The authority citation for part 338 continues to read as follows:

Authority: 12 U.S.C. 1817, 1818, 1819, 1820(b); 12 U.S.C. 2801 *et seq.*; 15 U.S.C. 1691 *et seq.*; 42 U.S.C. 3605, 3608; 12 CFR part 202; 12 CFR part 203; 24 CFR part 110.

2. The Equal Housing Lender Poster in § 338.4(b) is revised to read as follows:

BILLING CODE 6714-01-P

EQUAL HOUSING
LENDER

We Do Business in Accordance With Federal Fair Lending Laws

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18), TO:

- Deny a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling, or deny any loan secured by a dwelling; or
- Discriminate in fixing the amount, interest rate, duration, application procedures or other terms or conditions of such a loan, or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity
Department of Housing & Urban Development
Washington, DC 20410

For processing under the Federal Fair Housing Act

and to:

Division of Compliance and Consumer Affairs
Federal Deposit Insurance Corporation
Washington, DC 20429-9990

For processing under FDIC regulations

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

- On the basis of race, color, national origin, religion, sex, marital status, or age,
- Because income is from public assistance, or
- Because a right was exercised under the Consumer Credit Protection Act.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Division of Compliance and Consumer Affairs
Federal Deposit Insurance Corporation
Washington, DC 20429-9990

BILLING CODE 6714-01-C

* * * * *

By Order of the Board of Directors.

Dated at Washington, D.C. this 27th day of September, 1994.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Acting Executive Secretary.

[FR Doc. 94–25606 Filed 10–18–94; 8:45 am]

BILLING CODE 6714–01–P

RESOLUTION TRUST CORPORATION

12 CFR Part 1609

RIN 3205–AA03

Affordable Housing Disposition Program

AGENCY: Resolution Trust Corporation.

ACTION: Interim final rule; request for comments.

SUMMARY: The Resolution Trust Corporation (RTC) is amending the existing regulations governing its Affordable Housing Disposition Program (AHDP). The amendments set forth in this interim final rule are necessary because the Resolution Trust Corporation Refinancing, Restructuring and Improvement Act of 1991 (Refinancing Act), the Departments of Veterans Affairs, Housing and Urban Development and Independent Agencies Appropriations Act of 1992 (1992 Appropriations Act), the Housing and Community Development Act of 1992 (1992 Housing Act) and the Resolution Trust Corporation Completion Act of 1993 (Completion Act) changed the manner in which the RTC is to identify, market and sell certain affordable housing properties. This interim final rule also clarifies certain policies of the RTC regarding the disposition of assets in the AHDP and reflects certain comments received with respect to a previously published interim final rule. By implementing the statutory changes required by the Refinancing Act, the 1992 Appropriations Act, the 1992 Housing Act and the Completion Act, and clarifying certain provisions of the AHDP and making the other changes set forth herein, these regulations will enhance the availability and affordability of residential real property for very-low income, lower-income and moderate-income families and individuals.

DATES: This interim final rule is effective October 19, 1994. Comments must be received by November 18, 1994.

ADDRESSES: Written comments regarding this interim final rule should be addressed to John M. Buckley, Jr., Secretary, Resolution Trust Corporation, 801 17th Street, NW., Washington, DC 20434–0001. Comments may be hand delivered to room 314 on business days between 9 a.m. and 5 p.m. Comments may also be inspected in the Public Reading Room, 801 17th Street, NW., between 9 a.m. and 5 p.m. on business days. Phone number: 202–416–6940; FAX 202–659–1460.

FOR FURTHER INFORMATION CONTACT: Stephen S. Allen, Director, Affordable Housing Disposition Program, (202) 416–7348, or Barry Wides, Deputy Director, Affordable Housing Disposition Program, (202) 416–7138. (These are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Regulatory Procedure

On August 31, 1990 (55 FR 35564), the RTC published a final rule establishing the procedures to be followed by the RTC in connection with the sale of eligible residential properties to qualifying purchasers under the AHDP. Those procedures were established in accordance with the affordable housing provisions of section 21A(c) of the Federal Home Loan Bank Act, as amended by section 501 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 1441a).

On May 6, 1992 (57 FR 19500), the RTC published an interim final rule and request for comments (May 6, 1992 Interim Rule). That publication implemented some of the statutory changes made to the AHDP by the Refinancing Act and clarified the RTC's policies on a number of issues relating to the disposition of assets in the AHDP.

On June 12, 1992 (57 FR 24937), the RTC published an interim statement of policy. That publication provided that when more than one multifamily property is purchased from the RTC under the AHDP, the RTC will require that not less than 15 percent of the dwelling units in each separate property purchased be made available to low or very-low income individuals. The final statement of policy was published on August 19, 1992 (57 FR 37581) and reflected no significant changes from the interim statement of policy.

This interim final rule differs from the May 6, 1992 Interim Rule in several ways:

(1) It implements several statutory changes made to the AHDP by the Refinancing Act and not reflected in the May 6 1992 interim final rule;

(2) It implements a number of statutory changes made to the AHDP by the enactment of the 1992 Appropriations Act, the 1992 Housing Act and the Completion Act;

(3) It further clarifies RTC policies relating to the disposition of assets within the AHDP.

Comments

The RTC received written comments on the May 6, 1992 Interim Rule only from Public Citizen, Inc. Many of the recommendations have been incorporated in this interim final rule. Descriptions of specific comments, and several changes made in response thereto, are included in the following discussion.

Discussion of Changes

The following are the principal changes being made to the regulations:

(1) The definitions of eligible condominium property, eligible multifamily property and eligible single family property are modified to substitute specific value limits for the former references to various sections of the National Housing Act of 1934, as amended (National Housing Act). In order to implement section 12 of the Completion Act, the definitions of eligible condominium property and eligible single family property are modified to permit specific maximum values higher than those set by the National Housing Act so long as Congress has appropriated funds for such purpose. To implement section 601 of the Refinancing Act, the definition of eligible multifamily property is modified to permit the inclusion of conservatorship properties, if Congress appropriates funds for that purposes. Public Citizen, Inc. requested that the definition of eligible multifamily property be extended generally to include otherwise eligible conservatorship properties. In view of section 12 of the Completion Act, this interim final rule goes as far in that direction as the RTC believes is permissible without a Congressional appropriation.

(2) Section 14(a) of the Completion Act is implemented in this interim final rule by a requirement that the RTC send notices to clearinghouses of the availability for sale of certain properties which are "ineligible" under the AHDP program. "Ineligible properties" include (a) properties that would otherwise be eligible condominium property or eligible single family property, but have values above the applicable AHDP limits and within certain higher limits set forth in the statute (if Congress has not appropriated funds to include such properties as eligible), and (b) properties that would be eligible multifamily property but for being owned by the RTC in its capacity as conservator (if Congress has not appropriated funds to

include such properties as eligible). The clearinghouse is required to make such notice available to qualifying purchasers, as well as other purchasers, as appropriate and technical assistance advisors are permitted to perform a similar function.

(3) Consistent with the interim and final statements of policy discussed above, the definition of lower-income occupancy requirement(s) applicable to eligible multifamily properties sold in a bulk sale is revised to require that at least 15 percent of the units in each property must be made available for low- or very low-income families.

(4) The marketing period continues to be 97 days for eligible single family property, but the definition permits a longer marketing period to the extent Congress appropriates funds for such purpose.

(5) Section 14(d) of the Completion Act is being implemented to increase participation by minority-owned and women-owned businesses in the AHDP. The interim final rule requires that brokers and RTC staff provide, to a wide range of minority-owned and women-owned businesses and minority-controlled nonprofit organizations, each engaged in providing affordable housing, information concerning the availability of purchase money loans under section 21A(c)(6)(A)(ii) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(c)(6)(A)(ii)). Clearinghouses and technical assistance advisors are also authorized to provide such information to such parties. In addition to the explicit requirements, the interim final rule includes various definitions concerning this aspect of the AHDP.

(6) The definition of nonprofit organization is modified to limit the opportunity for for-profit individuals or entities to benefit from such status.

(7) The definition of public agency is clarified to include entities operating under executive, legislative or judicial authority.

(8) Consistent with current RTC directive, the interim final rule requires that the RTC send clearinghouses notices containing information concerning properties with appraised values or values determined by the RTC which exceed the applicable AHDP values. These properties (including the "ineligible" single family and condominium properties discussed in paragraph (2) above) will not be marketed or sold as a part of the AHDP, and may be sold to any purchaser if the sales price exceeds the applicable maximum AHDP value. However, if the sales price falls below the applicable maximum value, these "non-AHDP properties" may only be sold, initially, to a qualifying purchaser. This change is consistent with a suggestion made by Public Citizen, Inc.

(9) The RTC's authority to issue a second Notice of Marketing Period for unsold properties has been expanded to cover single family properties and condominium units.

(10) The provisions concerning eligible multifamily properties are being clarified to reflect that if a purchaser makes a commitment to reserve a higher proportion of properties for very low income families, that commitment must be reflected in the LURA for such property.

(11) The provisions concerning rent restrictions applicable to AHDP properties are being clarified to reflect that family size adjustments for purposes of determining rent will be based on unit size, rather than household size.

(12) The provisions describing the property listing which must accompany a Notice of Marketing Period are being revised to conform more closely to statutory requirements.

(13) In order to implement section 609 of the Refinancing Act, the RTC will be required to establish a net realizable market value for an eligible multifamily property, which value will be a minimum sales price in all cases, except for expedited sales to public agencies or nonprofit organizations.

(14) Clarification and an addition examples are provided as to the preference given, with respect to the bulk sale of eligible condominium properties, to sales that will benefit the larger number of very low- and low-income households.

(15) The provisions concerning bulk sales of eligible condomium property and eligible multifamily property are modified to permit the RTC, when a bulk package is being marketed, to sell individual properties to qualifying purchasers. Public Citizen, Inc. had suggested such a revision with respect to eligible multifamily property. This interim final rule goes a step further by making a similar revision with respect to eligible condominium property.

(16) The provision which specifies the information to be provided in reports to Congress concerning the AHDP, has been revised so that it more closely tracks the statute.

(17) The provision of § 1609.11 which addresses public agencies that acquire properties under the AHDP has been expanded to specify the particular lower-income requirements that apply.

(18) Consistent with existing RTC policy, a new subsection 1609.9(b) has been added which provides that, with respect to eligible multifamily property, the RTC will offer such property, initially, for direct sale exclusively to public agencies and nonprofit organizations for a period of 45 days. If the RTC receives no notice of serious interest, the property will be marketed pursuant to section 1609.7.

Other stylistic changes to the regulations have also been made.

Because of the length of the interim final rule and the number of changes from the May 6, 1992 Interim Rule, this interim final rule is published in its entirety.

Administrative Procedure Act

The RTC is adopting this regulation as an interim final regulation. It will be effective immediately upon publication in the **Federal Register**, without the usual notice-and-comment period or delayed effective date as provided for in the Administrative Procedure Act, 5 U.S.C. 553. These requirements may be waived for "good cause". The RTC believes that good cause exists because the amendments made to the affordable housing provisions of FIRREA by the Refinancing Act, the 1992 Appropriations Act, the 1992 Housing Act and the Completion Act took effect immediately upon their enactment. Moreover, immediate clarification of existing policies is necessary in order to avoid undue delays in the disposition of affordable housing properties.

By implementing these changes immediately, the RTC is complying with the mandate from Congress to dispose of single family, multifamily and condominium properties expeditiously and to the benefit of low and moderate income households. The immediate effective date of the regulation is also desirable in order to avoid public confusion regarding the RTC's policies and procedures in this area. Such confusion could impede the sales of affordable housing properties and result in deterioration of existing inventory and increased holding costs associated with these properties. Such costs ultimately would be borne by the taxpayer.

For these reasons, the RTC finds that the benefits to the public in adopting an interim final rule outweigh any harm from the delay in seeking public comment. The RTC solicits comments and will consider those comments in the adoption of the rule as final, which will take place within 90 days after the close of the public period.

Regulatory Flexibility Act

As required by the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., the following initial regulatory flexibility analysis is hereby provided:

1. Reasons, objectives, and legal bases underlying the interim final regulations. These elements have been discussed elsewhere in the preamble.

2. Impact of the interim final regulations on small businesses: This interim final rule is not expected to have a significant economic impact on a substantial number of small entities. The RTC expects, rather, that the interim final regulation will result in a benefit to small business entities whose service will be utilized in fulfilling the mandates of the legislation.

3. Overlapping or conflicting federal rules. There are no known federal rules which overlap, duplicate, or conflict with the interim final regulations.

List of Subjects in 12 CFR Part 1609

Low and moderate income housing, Reporting and recordkeeping requirements, Savings associations.

For the reasons set out in the preamble, title 12 chapter XVI of the Code of Federal Regulations is amended by revising part 1609 to read as follows:

PART 1609—AFFORDABLE HOUSING DISPOSITION PROGRAM

Sec.

1609.1 Authority, purpose, and scope.
1609.2 Definitions.
1609.3 Clearinghouses.
1609.4 Technical assistance advisors.
1609.5 Brokers and other marketing specialists.
1609.6 RTC staff.
1609.7 Marketing period.
1609.8 Recapture of profits from resale.
1609.9 Suspension of marketing period for sales to nonprofit organizations and public agencies.
1609.10 Reporting.
1609.11 Transfer of eligible properties to State housing finance agencies, State housing agencies and local housing agencies.
1609.12 RTC notice and sale of ineligible residential properties and non-AHDP properties.

Authority: 12 U.S.C. 1441a.

§ 1609.1 Authority, purpose, and scope.

The regulations in this part implement section 21A(c) and section 21A(b)(12) of the Federal Home Loan Bank Act, as added by section 501 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 1441a), and as amended by the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991, 12 U.S.C. 1441a(c)), the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1992, Public Law 102–139 (105 Stat. 736), the Housing and Community Development Act of 1992, Public Law 102–550 (106 Stat. 3672), and the Resolution Trust Corporation Completion Act of 1993 (12 U.S.C. 1441a). This part applies to the disposition of eligible residential properties to qualifying purchasers to provide homeownership and rental housing opportunities for very low-income, lower-income, and moderate-income families. The Affordable Housing Disposition Program will be carried out in accordance with applicable requirements of the Fair Housing Act (42 U.S.C. 3601–3619) and other applicable civil rights authorities.

§ 1609.2 Definitions.

(a) *Adjusted income and income* shall have the meanings given such terms in section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)(5)).

(b) *Adjustment for family size* means that factor based on family size applied by the RTC to median income to determine a family's adjusted income for purposes of this program. For RTC purposes, 50 percent and 65 percent of area median income numbers shall be adjusted for family size in the same manner as HUD adjusts 50 percent numbers; and 80 percent and 115 percent numbers shall be adjusted in the same manner as HUD adjusts 80 percent numbers.

(c) *Annual income* has the same meaning as such term has under 24 CFR 813.106.

(d) *Bona fide offer* means offer to purchase eligible multifamily property which meets the terms and conditions set forth in the applicable notice of readiness for sale and includes the information set forth in § 1609.7(b)(7) of this part.

(e) *Bulk purchase offer* means an offer to purchase in a single transaction two or more eligible residential properties.

(f) *Cash equivalent offer* means an offer after application of a cash equivalency calculation consisting of a discounted cash flow comparison between cash offers for a property and seller financed offers for the same property.

(g) *Clearinghouse* means:

(1) The State housing finance agency for the State in which an eligible multifamily property, eligible condominium property or eligible single family property is located;

(2) The Office of Community Investment (or other comparable division) within the Federal Housing Finance Board in the jurisdiction where the eligible multifamily property, eligible condominium property or eligible single family property is located; and

(3) Any national nonprofit organization (including any nonprofit entity under title IX of the Housing and Community Development Act of 1968) (42 U.S.C. 3931) that the RTC determines has the capacity to act as a clearinghouse for information.

(h) *Condominium project* means real estate which has five or more residential condominium units and the remaining portions of which are designated for common ownership solely by the owners of the condominium units, each owner having an undivided interest in the common elements; provided however, that such condominium units are not required to be located in the same structure, but must be part of a common condominium regime or plan.

(i) *Condominium unit* means a portion of a condominium project designated for separate ownership.

(j) *Eligible condominium property* means a condominium unit:

(1) To which the RTC acquires title in its corporate capacity, its capacity as conservator, or its capacity as receiver (including its capacity as the sole owner of a subsidiary corporation of a depository institution under conservatorship or receivership, which subsidiary has as its principal business the ownership of real property); and

(2) That has an appraised value or value determined by the RTC that does not exceed $67,500 in the case of a 1-family residence, $76,000 in the case of a 2-family residence, $92,000 in the case of a 3-family residence, and $107,000 in the case of a 4-family residence; or $101,250 in the case of a 1-family residence, $114,000 in the case of a 2-family residence, $138,000 in the case of a 3-family residence and $160,500 in the case of a 4-family residence to the extent that Congress shall have appropriated funds to cover additional costs and losses resulting from including property with such higher maximum values.

(k) *Eligible multifamily property* means a property consisting of more than four dwelling units:

(1) To which the RTC acquires title either in its corporate capacity or as receiver (including its capacity as the sole owner of a subsidiary corporation of depository institution under receivership, which subsidiary has as its principal business the ownership of real property), but not in its capacity as an operating conservator, except to the extent that Congress shall have appropriated funds to cover the additional costs and losses of including property held in such capacity; and

(2) That has an appraised value or value determined by the RTC that does not exceed, for such part of the property as may be attributable to dwelling use

(excluding exterior land improvements), $29,500 per family unit without a bedroom $33,816 per family unit with 1 bedroom $41,120 per family unit with 2 bedrooms, $53,195 per family unit with 3 bedrooms, and $58,392 per family unit with 4 or more bedrooms.

(l) *Eligible residential property* includes eligible single family property and eligible multifamily property.

(m) *Eligible single family property* means a one- to four-family residence (including a cooperative or manufactured home permanently attached to real estate):

(1) To which the RTC requires title in its corporate capacity, its capacity as conservator, or its capacity as receiver (including its capacity as the sole owner of a subsidiary corporation of a depository institution under conservatorship or receivership, which subsidiary has as its principal business the ownership of real property); and

(2) That has an appraised value or value determined by the RTC that does not exceed $67,500 in the case of a 1-family residence, $76,000 in the case of a 2-family residence, $92,000 in the case of a 3-family residence, and $107,000 in the case of a 4-family residence, or $101,250 in the case of a 1-family residence, $114,000 in the case of a 2-family residence, $138,000 in the case of a 3-family residence and $160,500 in the case of a 4-family residence to the extent that Congress shall have appropriated funds to cover additional costs and losses resulting from including property with such higher maximum values.

(n) *HUD* means the U.S. Department of Housing and Urban Development.

(o) *Ineligible condominium property* means a condominium unit:

(1) To which the RTC acquires title in its corporate capacity, its capacity as conservator, or its capacity as receiver (including its capacity as the sole owner of a subsidiary corporation of a depository institution under conservatorship or receivership, which subsidiary corporation has as its principal business the ownership of real property);

(2) That has an appraised value or value determined by the RTC that does not exceed the applicable dollar amount limitation for the property under paragraph (j)(2)(ii) of this section; and

(3) That is not an eligible condominium property.

(p) *Ineligible multifamily property* means a property consisting of more than four dwelling units:

(1) To which the RTC acquires title in its capacity as conservator (including its capacity as the sole owner of a subsidiary corporation of a depository institution under conservatorship, which subsidiary corporation has as its principal business the ownership of real property);

(2) That has an appraised value or a value determined by the RTC that does not exceed, for such part of the property as may be attributable to dwelling use (excluding exterior land improvements), the dollar amount limitations under paragraph (k)(2) of this section; and

(3) That is not an eligible multifamily property.

(q) *Ineligible residential property* includes ineligible single family property, ineligible multifamily property and ineligible condominium property.

(r) *Ineligible single family property* means a one to four family residence (including a cooperative or manufactured home permanently attached to real estate):

(1) To which the RTC acquires title in its corporate capacity, its capacity as conservator, or its capacity as receiver (including its capacity as the sole owner of a subsidiary corporation of a depository institution under conservatorship or receivership, which subsidiary has as its principal business the ownership of real property);

(2) That has an appraised value or value determined by the RTC that does not exceed the applicable dollar amount limitation for the property under paragraph (m)(2)(ii) of this section; and

(3) That is not an eligible single family property.

(s) *Lower-income families* means families and individuals whose incomes do not exceed 80 percent of area median income, as defined under 42 U.S.C. 1437a(b)(2) and as determined by the Secretary of HUD, with adjustment for family size.

(t) *Lower-income occupancy requirement(s)* means:

(1) With respect to eligible multifamily property, that not less than 35 percent of all dwelling units purchased by a qualifying multifamily purchaser in a single transaction shall be made available for occupancy by, and be maintained as affordable for, lower-income families during the remaining useful life of the property in which the units are located, provided that not less than 20 percent of all units shall be made available for occupancy by, and be maintained as affordable for, very low-income families during the remaining useful life of such property. In the event that more than one eligible multifamily property is purchased as part of a single transaction, not less than 15 percent of the dwelling units in each separate property shall be made available for occupancy by and maintained as affordable for lower-income families (including very low-income families) for the remaining useful life of the property in which the units are located.

(2) With respect to eligible single family property, that all eligible single family property purchased by public agencies or nonprofit organizations shall be made available for occupancy by, and be maintained as affordable for, lower-income families for the remaining useful life of the property, or be made available for purchase by any such family that agrees to occupy the property as a principal residence for at least 12 months and certifies in writing that the family intends to occupy the property for at least 12 months.

(3) With respect to eligible condominium property, that, unless otherwise waived by the RTC in accordance with § 1609.7(c)(4)(ii) of this part, each eligible condominium property purchased by public agencies, nonprofit organizations, or for-profit entities shall be made available for occupancy by, and be maintained as affordable for, lower-income families for the remaining useful life of the property, or be made available for purchase by any such family who agrees to occupy the property as a principal residence for at least 12 months and who certifies in writing that the family intends to occupy the property for at least 12 months.

(4) Properties shall be affordable for lower-income and very low-income families at rent levels which do not exceed those prescribed at § 1609.7(a)(6), (b)(4), or (c)(4) of this part, as applicable.

(u) *LURA* means a Land Use Restriction Agreement or other form of recordable legal agreement between the RTC and the purchaser of an eligible multifamily property, eligible condominium property or eligible single family property, which sets forth the lower-income occupancy requirements and other restrictions on the property.

(v) *Marketing period* means the period of time during which qualifying purchasers have exclusive rights to make offers to purchase eligible single family properties or eligible condominium properties and to submit expressions of serious interest in purchasing eligible multifamily properties. The marketing period begins, with respect to an eligible multifamily property, eligible condominium property or eligible single family property, on the date specified in the Notice of Marketing Period issued by the RTC for the property. The marketing period ends, with respect to an eligible single family property, three months and one week after the date so specified in the Notice of Marketing Period,

except to the extent that Congress shall have appropriated funds to cover the additional costs and losses of such longer period, the marketing period shall end 180 days after the date so specified in the Notice of Marketing Period. The marketing period ends, with respect to an eligible multifamily property, three months after the date so specified in the Notice of Marketing Period; however, if the marketing period is extended in accordance with the provisions of § 1609.7(b)(12) of this part, the marketing period will end three months after the date specified in the subsequent Notice of Marketing Period or on an earlier date, if any, specified in the subsequent Notice of Marketing Period. The marketing period ends, with respect to an eligible condominium property, 180 days after the date so specified in the Notice of Marketing Period.

(w) *Median income for the area* has the same meaning as the term has under section 3(b) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)). For RTC purposes, 65 percent of area median income numbers shall be calculated on the basis of HUD's income limits for very low-income families and 115 percent of area median income numbers, on the basis of HUD's income limits for lower-income families.

(x) *Minority* means any Black American, Native American, Hispanic American, or Asian America.

(y) *Minority-owned business* means a business—

(1) more than 50 percent of the ownership or control of which is held by 1 or more minority individuals; and

(2) more than 50 percent of the net profit or loss of which accrues to 1 or more minority individuals.

(z) *MOU* means memorandum of understanding.

(aa) *Moderate-income families* means families and individuals whose incomes exceed 80 percent but do not exceed 115 percent of area median income, as determined by the Secretary of HUD, with adjustment for family size.

(bb) *National nonprofit organization* means a nonprofit organization which has membership in more than one State or operates housing and community development programs or provides technical assistance in more than one State.

(cc) *Net realizable market value* means a price below the market value that takes into account:

(1) Any reductions in holding costs resulting from the expedited sale of a property including, but not limited to, foregone real estate taxes, insurance, maintenance costs, security costs, potential diminution of value from property being held in inventory, and loss of use of funds; and

(2) The avoidance, where applicable, of fees paid to real estate brokers, auctioneers, or other individuals of organizations involved in the sale of property owned by the RTC.

(dd) *Non-AHDP property* means a property that would constitute an eligible multifamily property, eligible condominium property or eligible single family property except that its appraised value or the value determined by the RTC exceeds the applicable maximum values set out in paragraph (j)(2) of this section with respect to condominium units, in paragraph (k)(2) of this section with respect to multifamily property, and in paragraph (m)(2) of this section with respect to single family property.

(ee)(1) *Nonprofit organization* means a private organization (including a limited equity cooperative):

(i) No part of the net earnings of which inures to the benefit of any member, shareholder, founder, contributor, lender, management company or individual and in which no equity interest or investment is held by a lender or management company, as determined by the RTC; and

(ii) That is approved by the RTC as to financial responsibility.

(2) The determination of whether an organization qualifies as a nonprofit organization for purposes of this part shall be made by RTC.

(ff) *Principal residence* means the dwelling at which a household resides for at least a majority of each year.

(gg) *Public agency* means any Federal, State, local, or other governmental entity, whether operating under executive, legislative or judicial authority, and includes any public housing agency.

(hh) *Qualifying condominium purchaser* means:

(1) A qualifying household, in the case of eligible condominium property offered for sale individually; or

(2) In the case of eligible condominium property offered for sale in bulk, a nonprofit organization, public agency or for-profit entity, which makes a commitment to satisfy the lower-income occupancy requirements for the eligible condominium property for which it makes a purchase offer.

(ii) *Qualifying household* means a household:

(1) That intends to occupy an eligible single family property or condominium property as a principal residence;

(2) That agrees to occupy the property as a principal residence for at least 12 months;

(3) That certifies in writing that it intends to occupy the property as a principal residence for at least 12 months; and

(4) Whose annual income does not exceed 115 percent of area median income, as determined by the Secretary of HUD, with adjustment for family size.

(jj) *Qualifying multifamily purchaser* means a public agency, a nonprofit organization, or a for-profit entity which makes a commitment (for itself or any related entity) to satisfy the lower-income occupancy requirements for any eligible multifamily property for which it makes a purchase offer.

(kk) *Qualifying purchaser* includes qualifying single family purchasers, qualifying multifamily purchasers, and qualifying condominium purchasers. For bulk sales transactions, qualifying purchaser excludes qualifying households.

(ll) *Qualifying single family purchaser* means:

(1) A qualifying household (including qualifying households with members who are veterans); or

(2) A public agency or nonprofit organization that agrees to either:

(i) Make an eligible single family property available for occupancy as affordable housing for lower-income families (including lower-income families with members who are veterans) during the remaining useful life of such property; or

(ii) Make the property available for purchase by any such family that agrees to occupy the property as a principal residence for at least 12 months and that certifies in writing that the family intends to occupy the property for at least 12 months.

(mm) *Recapture* means the process by which the RTC receives a percentage of the proceeds from the sale of properties which are subject to recapture, as set forth in § 1609.8 of this part.

(nn) *RTC* means the Resolution Trust Corporation.

(oo) *Secretary* means the Secretary of Housing and Urban Development.

(pp) *Single Transaction* means the purchase of more than one eligible multifamily property by the same qualifying multifamily purchaser where such purchaser is the winning bidder on each such property and the properties were listed with one or more clearinghouses such that bids could be and were submitted contemporaneously by the purchaser therefore, offered for sale by the RTC as part of a designated bulk sale transaction or identified by the purchaser and accepted by RTC as part of a bulk sale bid by the purchaser and accepted by RTC as part of a bulk sale bid by the purchaser; provided, however, that in any such event the RTC and the purchaser may elect to treat

such purchases as being made pursuant to separate and distinct transactions, rather than a single transaction.

(qq) *Subsidiary* means an entity which is a wholly-owned subsidiary of a depository institution under conservatorship or receivership, as applicable, which has as its principal business the ownership of real property, including wholly-owned subsidiaries of subsidiaries.

(rr) *Technical assistance advisor (TAA)* means a public agency or nonprofit organization that is designated by the RTC to provide assistance to potential purchasers of eligible multifamily properties, eligible condominium properties and eligible single family properties.

(ss) *Useful life* means the later of forty (40) years from the date of the LURA or fifty (50) years from the date the property was initially occupied as housing; provided, however, that in the event of an involuntary loss of use of the property caused by seizure, condemnation, foreclosure, deed in lieu of foreclosure, fire or other casualty, the useful life of the property shall terminate on the date of such loss.

(tt) *Very low-income families* means families and individuals whose incomes do not exceed 50 percent of area median income, as defined under 42 U.S.C. 1437a(b)(2) and as determined by the Secretary of HUD, with adjustment for family size.

(uu) *Veteran* means a person who served in the active military, naval, or air service, and who was discharged or release therefrom under conditions other than dishonorable.

(vv) *Women-owned business* means a business—

(1) More than 50 percent of the ownership or control of which is held by one or more women;

(2) More than 50 percent of the net profit or loss of which accrues to one or more women; and

(3) A significant percentage of senior management positions are held by women.

§ 1609.3 Clearinghouses.

(a) *Eligibility.* Clearinghouses shall include:

(1) The State housing finance agency for the State in which an eligible multifamily property, eligible condominium property or eligible single family property is located;

(2) The Office of Community Investment (or other comparable division) within the Federal Housing Finance Board in the jurisdiction where the eligible multifamily property, eligible condominium property or eligible single family property is located; and

(3) Any national nonprofit organization that the RTC determines has the capacity to act as a clearinghouse for information.

(b) *Designation.* The RTC shall designate one or more eligible clearinghouses to act in that capacity in each State.

(1) *State housing finance agencies.* The RTC may ask the Governor of each State to confirm the designation of the State housing finance agency to serve as a clearinghouse. At the Governor's discretion, the clearinghouse function may be supported, in part, by a State agency, which is not a State housing finance agency, serving as a technical assistance advisor.

(2) *Office of Community Investment.* The RTC may ask the Federal Housing Finance Board (FHFB) to designate the Office of Housing Finance Programs or other comparable division to serve as a clearinghouse. At the FHFB's discretion, the clearinghouse function may be delegated to, or supplemented in whole or in part by, its District Banks.

(3) *National nonprofit organizations.* The RTC may ask national nonprofit organizations to submit a written request for designation as a clearinghouse. The request should take the form of a written expression of interest in serving as a clearinghouse; evidence of Internal Revenue Service determination of nonprofit status pursuant to section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or other appropriate sections, where applicable; a list of cities and States in which the organization is operating; a description of experience in promoting low- and moderate-income housing; the latest annual report; and a description of means by which the organization will disseminate property information. The RTC may, in its discretion, accept or reject such a request in writing.

(c) *Functions.* (1) Under the terms of the MOU's to be entered into between the RTC and the clearinghouses, the clearinghouses shall perform the following functions:

(i) Serve as repository of property listings and Notices of Marketing Period from the RTC for public inspection;

(ii) Make information available upon request during the marketing period to qualifying purchasers concerning eligible residential properties for which the clearinghouse has received a Notice of Marketing Period; and

(iii) Following receipt of a notice required under § 1609.12 of this part concerning ineligible residential properties or non-AHDP properties, make the information contained in such notice available, upon request, to public agencies, nonprofit organizations, qualifying households, qualifying multifamily purchasers and other purchasers, as applicable.

(2) Clearinghouses are encouraged to perform the following functions:

(i) Disseminate RTC property inventories as well as listings of properties for which they have received Notices of Marketing Period for sale on a regular basis to State and local government agencies, nonprofit housing organizations, for-profit entities, organizations representing special population groups such as the homeless, and disabled, handicapped, and elderly persons, and members of minority groups;

(ii) Publicize the availability of eligible residential properties through various media, including newspapers and other media serving minority groups; and

(iii) Periodically provide to a wide range of minority-owned businesses and women-owned businesses engaged in providing affordable housing, and to nonprofit organizations more than 50 percent of the control of which is held by 1 or more minority individuals, that are engaged in providing affordable housing, information that is sufficient to inform such businesses and organizations of the availability and terms of financing under section 21A(c)(6)(A)(ii) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(c)(6)(A)(ii)) concerning purchase loans, such information to be provided directly, by notices published in periodicals and other publications that regularly provide information to such businesses or organizations, or through persons and organizations that regularly provide information or services to such businesses or organizations.

(3) A clearinghouse shall not be subject to suit for its failure to comply with the requirements of this section.

§ 1609.4 Technical assistance advisors.

(a) *Eligibility.* Technical assistance advisors (TAA) may include clearinghouses, State and local public agencies, and nonprofit organizations.

(b) *Designation.* An eligible entity may submit a written request to the RTC regional and national office for designation as a TAA. Such request shall include: evidence of Internal Revenue Service determination of nonprofit status pursuant to section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or other appropriate sections, where applicable; a description of experience in promoting low- and moderate-income

housing; and a description of the functions that the entity proposes to perform, identifying staffing capability to perform such functions. The RTC may, in its discretion, accept or reject such a request in writing.

(c) *Functions.* A TAA may assist a purchaser of an eligible multifamily property, eligible condominium property or eligible single family property. It may perform one or more of the following functions:

(1) Qualifying potential purchasers of eligible single family properties or eligible condominium properties;

(2) Assisting qualifying households to identify suitable properties and secure financing;

(3) Assisting qualifying multifamily purchasers and qualifying condominium purchasers to identify suitable properties and secure financing;

(4) Assisting sponsors of housing for special populations, such as homeless, disabled, handicapped, and elderly persons, to identify suitable properties and secure financing;

(5) Providing specialized assistance to qualifying purchasers, including, but not limited to, families with members who are members of minority groups and those with members who are veterans;

(6) Providing to minority-owned businesses and women-owned businesses engaged in providing affordable housing, and to nonprofit organizations more than 50 percent of the control of which is held by 1 or more minority individuals, that are engaged in providing affordable housing, information about the availability and terms of financing for purchase loans, as further described at § 1609.3(c)(2)(iii) of this part; and

(7) Assisting in other promotional services as needed by the RTC such as information dissemination, identification of qualifying purchasers, and other promotional activities as needed.

(d) *Compensation.* (1) The RTC shall enter into an MOU with each TAA which will specify the services that the TAA will perform.

(2) The MOU may provide that the RTC shall compensate the TAA for its services on a basis agreed upon between the RTC and TAA. Compensation arrangements may include special compensation for services which lead to the purchase of eligible residential properties by lower-income families and other groups targeted for assistance.

§ 1609.5 Brokers and other marketing specialists.

(a) *Designation.* The RTC shall involve brokers, auctioneers, and other marketing specialists in the marketing of eligible residential properties that it offers for sale.

(b) *Functions.* The broker, auctioneer, or other marketing specialists shall:

(1) Actively market the eligible residential properties on its listing, including using multi-listing services, as appropriate, and advertising in local media and media targeted to low- and moderate-income families (including families with one or more members who are members of minority groups and those with members who are veterans);

(2) Provide to minority-owned businesses and women-owned businesses engaged in providing affordable housing, and to nonprofit organizations more than 50 percent of the control of which is held by 1 or more minority individuals, that are engaged in providing affordable housing, information about the availability and terms of financing for purchase loans, as further described at § 1609.3(c)(2)(iii) of this part;

(3) Pre-qualify and counsel prospective purchasers, as prescribed by the RTC;

(4) Provide an opportunity for prospective purchasers to inspect the property and to review property records, including purchasers identified by TAA's, without regard to race, color, religion, sex, national origin, handicap, and familial status;

(5) Certify that they—

(i) Will not decline to show properties, or discriminate in the marketing or sale of properties because of race, color, religion, sex, national origin, handicap, or familial status;

(ii) Will prominently display the Fair Housing Poster in all offices where brokering and sales activities take place;

(iii) Will use the Equal Housing Opportunity logo, slogan, or statement in advertising; and

(iv) Will use any available minority media (in addition to other media that are used) when advertising properties;

(6) Present offers or contracts from qualifying purchasers to the RTC for acceptance, rejection, or counteroffer, along with certifications of eligibility from the qualifying purchasers; and

(7) Perform all other responsibilities incident to the sale and closing.

(c) *Compensation.* The RTC shall enter into a listing agreement with each broker or, at its discretion, utilize open listing agreements which specify the mutual responsibilities of the RTC and the broker and which provide for compensation as a percentage of the sales price of a property sold with the broker's services. The RTC shall compensate the auctioneers and other marketing specialists for their services on the basis of a contract which specifies the services to be provided and rate of compensation. Compensation arrangements may include incentives for the sale of properties to lower-income families and individuals (including lower-income veterans and lower-income families with members who are veterans).

§ 1609.6 RTC staff.

(a) *Designation.* The RTC shall designate affordable housing disposition specialists on the staff of field offices.

(b) *Functions.* (1) The affordable housing disposition specialists generally shall perform the following functions:

(i) Coordinate sales of eligible residential properties in each office and serve as an advocate for the program;

(ii) Review and approve written requests from eligible entities to serve as TAA's;

(iii) Negotiate an MOU with each TAA regarding the services to be performed and the method and amount of compensation;

(iv) Negotiate an MOU with the clearinghouses regarding the services to be performed;

(v) Within a reasonable time after acquisition of title to eligible residential properties, send a list of eligible residential properties to clearinghouses with a Notice of Marketing Period, and coordinate the sale of properties to nonprofit organizations or public agencies;

(vi) Monitor marketing efforts of clearinghouses, TAA's, and brokers or other marketing specialists, giving particular attention to marketing of eligible single family properties and eligible condominium properties for sale to lower-income families, and marketing of properties to special needs populations, veterans and minority groups;

(vii) Identify potential sources of financing for eligible residential properties through coordination with Federal, State, and local agencies and private lenders and investors;

(viii) Coordinate with other Federal agencies that are selling residential properties in the same market areas;

(ix) Provide to minority-owned businesses and women-owned businesses engaged in providing affordable housing, and to nonprofit organizations more than 50 percent of the control of which is held by 1 or more minority individuals, that are engaged in providing affordable housing, information about the availability and terms of financing for purchase loans, as further described at § 1609.3(c)(2)(iii) of this part; and

(x) Carry out all other necessary activities for the program.

(2) The functions performed by the affordable housing disposition specialists may be amended or expanded from time to time at the discretion of the RTC.

§ 1609.7 Marketing period.

(a) *Eligible single family property*—(1) *Notice of Marketing Period.* (i) Subject to exercise by the RTC of its authority under §§ 1609.9 and 1609.11 of this part, when an eligible single family property is ready for marketing, the RTC shall send a Notice of Marketing Period to the clearinghouse serving the area in which the property is located. The Notice shall be transmitted by certified mail or any other means of communication with date and time confirmation.

(ii) The property listing accompanying the Notice shall contain basic information about the property, including location, condition and information relating to the estimated fair market value of the property, and such other information as the RTC may determine to be useful.

(iii) The Notice shall specify a date that begins the start of the Marketing Period and state that the Marketing Period ends 3 months and one week, or such longer time period as may be applicable, after such date.

(2) *Qualifying single family purchases*—(i) *Households.* To qualify to purchase an eligible single family property, a household must certify in writing to the RTC that its annual income does not exceed 115 percent of area median income, with adjustment for family size, and that it intends to occupy the property as a principal residence for at least 12 months.

(ii) *Public agencies and nonprofit organizations.* To qualify to purchase one or more eligible single family properties, a public agency or nonprofit organization must certify to the RTC that it will make the property available for occupancy by, and maintain it as affordable for, lower-income families (including lower-income families with members who are veterans) for the remaining useful life of such property; or make the property available for purchase by any such family that agrees to occupy the property as a principal residence for at least 12 months and certifies in writing that the family intends to occupy the property for at least 12 months.

(iii) *Penalty for false certifications.* A household that provides false or incomplete information regarding its income or that falsely certifies that it intends to occupy the property as its principal residence can be fined or imprisoned pursuant to 18 U.S.C. 1001 and 31 U.S.C. 3802. A household that sells the property within 12 months of acquisition will be subject to the recapture provisions set forth in § 1609.8 of this part.

(3) *Offer and sale.* The RTC may sell eligible single family property to qualifying households, nonprofit organizations, and public agencies without regard to any minimum sale price. The RTC may, before the end of the marketing period, accept purchase offers on eligible single family property from qualifying single family purchasers.

(4) *Preference for sales that benefit lower income groups*—(i) *Purchase offers from qualifying households.* In choosing among equal purchase offers from qualifying households for eligible single family property, the RTC will give preference to bids from households in the lower or lowest income group (e.g. very low-income over lower-income);.

(ii) *Purchase offers from nonprofit organizations and public agencies.* In choosing among bulk purchase offers from nonprofit organizations and public agencies, the RTC will give preference to the offer that would reserve the highest percentage of single family properties for occupancy or purchase by very low-income families and would retain such affordability for the longest term (not exceeding the term of the applicable LURA). The preference will be calculated in accordance with the following formula:

Add to the cash equivalent offer, 0.25% of that cash equivalent offer for each 1% of the properties set aside for occupancy or purchase by very low-income families.

Example: Nonprofit organization X offers to purchase 10 eligible single family properties for $300,000 and agrees to reserve 5 of those properties for occupancy or purchase by very low-income families. Nonprofit organization Y offers to purchase the same 10 eligible single family properties for $325,000 and intends to reserve all of the properties for occupancy and purchase by lower-income families (but not very low-income families). Although Y has offered more for the properties, the properties should be sold to nonprofit organization X for $300,000.

X's offer=$300,000.

X's preference price=$300,000+ ($300,000×50×0.0025)=$300,000+ $37,500=$337,500

Y's offer=$325,000. Y does not receive a preference because Y did not set aside any of the properties for occupancy or purchase by very low-income families.

(5) *Deed restrictions*—(i) *Qualifying households.* An eligible single family property purchased by a qualifying household which is subject to recapture pursuant to § 1609.8 of this part must be so restricted by a LURA or other recorded instrument for the recapture period.

(ii) *Nonprofit organizations and public agencies.* Eligible single family properties purchased by a public agency or nonprofit organization for rental or resale to lower-income families must be so restricted by a LURA or other recorded instrument which is binding upon successors in interest, with the provision that the property may subsequently be sold to a lower-income family without further deed restrictions (except applicable recapture restrictions). The LURA or other recorded legal instrument shall also require the property owner to rent such properties at affordable rates, to cooperate with periodic compliance reviews and to pay a reasonable fee to cover the cost of the reviews. The LURA or other recorded instrument shall reflect any commitment, made in accordance with a purchase offer pursuant to paragraph (a)(4)(ii) of this section, to reserve a percentage of single family properties for occupancy or purchase by very low-income families and retain such affordability for the longest term.

(iii) Lower-income occupancy requirements shall be judicially enforceable against purchasers of eligible single family property or their successors in interest by affected very low- and lower-income families, State housing finance agencies, and any agency, corporation, or authority of the United States Government.

(6) *Restrictions on the rental of single family properties.* (i) In the event that a public agency or nonprofit organization purchases one or more eligible single family properties for rental purposes, the rents charged to very low-income families may not exceed 30 percent of the adjusted income of a family whose income equals 50 percent of area median income, with adjustment for family size; and the rents charged to lower-income families may not exceed 30 percent of the adjusted income of a family whose income equals 65 percent of area median income, with adjustment for family size. Adjustments for family size for purposes of determining the maximum rent that may be charged with respect to a particular eligible single family property shall be calculated on the basis of the size of household anticipated to occupy a unit with the particular number of bedrooms as follows:

Unit Size

0–Bedroom 1–BR 2–BR 3–BR 4–BR 5–BR

Household Size

1 Person 2 Pers. 3 Pers. 5 Pers. 7 Pers. 8 Pers.

Example. Thus, for example, rent for a 3-bedroom unit occupied by a very low-income family will be based upon the HUD-determined income for a household at 50% of area median income which has 5 members. The rent for a 2-bedroom unit occupied by a lower-income household will be based upon the HUD figure for a household at 65% of median income which has 3 members.

(ii) Where a property is occupied by a family receiving housing assistance payments, pursuant to section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), as amended, the family's contribution toward rent may not exceed 30 percent of the family's adjusted income.

(7) *Continued occupancy of current residents.* No public agency or nonprofit organization which purchases one or more eligible single family properties may terminate the occupancy of any person residing in the property on the date of purchase for purposes of meeting the lower-income occupancy requirement. The purchaser shall be in compliance with the requirement if each newly vacant dwelling unit in the property is reserved for lower-income occupancy until the lower-income occupancy requirement is met.

(8) *Property offered for resale.* If the RTC receives a purchase offer, but fails to close on an eligible single family property, the RTC may accept an alternative contract offer or notify the appropriate clearinghouses so that the property can be re-offered for sale for an appropriate interval determined by the RTC, provided, however, that the appropriate interval shall not exceed 97 days, or such other period as may be applicable pursuant to paragraph (a)(1) of this section.

(9) *Sales after the marketing period.* If the RTC does not receive a purchase offer for an eligible single family property within the applicable marketing period, the RTC may sell the property to any purchaser.

(10) *Avoidance of displacement.* Prior to or during the marketing period, the RTC may sell an eligible single family property to the household residing in the property without regard to the income of the household, provided that:

(i) The household was residing in the property at the earlier of the time of sale or the time the Notice of Marketing Period was provided to the clearinghouse;

(ii) The sale was necessary to avoid the displacement of, and unnecessary hardship to, the resident household;

(iii) The resident household intends to occupy the property as its principal residence for at least 12 months; and

(iv) The resident household certifies in writing that the household intends to occupy the property for at least 12 months and acknowledges that it is subject to the penalties described in paragraph (a)(2)(iii) of this section if the household fails to comply with the residency requirement.

(b) *Eligible multifamily property*—(1) *Notice of Marketing Period.* (i) Subject to exercise by the RTC of its authority under §§ 1609.9 and 1609.11 of this part, the RTC shall send a Notice of Marketing Period to clearinghouses when an eligible multifamily property is ready for marketing to qualifying multifamily purchasers. The RTC shall send a second Notice of Marketing Period to the clearinghouse if it determines, in accordance with paragraph (b)(12) of this section, to extend the marketing period for an eligible multifamily property. The Notice shall be transmitted by certified mail or any other means of communication with date and time confirmation.

(ii) The property listing accompanying the Notice shall contain basic information about the property, including location, number of units (identified by number of bedrooms) and information relating to the estimated fair market value of the property, and such other information as the RTC may determine to be useful.

(iii) The Notice shall specify a date that begins the start of the marketing period and state that the Marketing Period ends 3 months, or such other time period as may be applicable, after such date.

(iv) During the marketing period, the RTC shall offer an eligible multifamily property exclusively to qualifying multifamily purchasers.

(v) The RTC shall allow qualifying multifamily purchasers reasonable access to eligible properties for purposes of inspection.

(2) *Qualifying multifamily purchasers.* Prior to receiving access to an eligible multifamily property, a public agency, nonprofit organization, or for-profit entity must make a written commitment (for itself or any related entity) to the listing broker or other marketing specialist that it is a qualifying multifamily purchaser which will satisfy the lower-income occupancy requirements in any eligible multifamilly property for which it requests access, if and when it makes an offer to purchaser that property. The written commitment should acknowledge the terms and conditions governing the sale of eligible multifamily properties. This commitment will be included as a part of the bid package.

(3) *Determination of market value.* The RTC shall establish a market value and estimate a net realizable market value for each eligible multifamily property, giving consideration to the lower-income occupancy requirements and the related rent limitations. The RTC shall sell each eligible multifamily property at a price no less than the estimated net realizable market value unless sale at a lower price is necessary to facilitate an expedited sale of such property and to enable a public agency or nonprofit organization to comply with the applicable lower-income occupancy requirements. If the RTC receives an offer higher than its estimate of the net realizable market value, the amount of such offer shall be deemed to be the net realizable market value.

(4) *Lower-income occupancy requirements*—(i) *Rent limitations.* (A) To comply with lower-income occupancy requirements, the rents charged to very low-income families may not exceed 30 percent of the adjusted income of a family whose income equals 50 percent of area median income, with adjustment for family size; and the rents charged to lower-income families may not exceed 30 percent of the adjusted income of a family whose income equals 65 percent of area median income, with adjustment for family size. Adjustments for family size for purposes of determining the maximum rent that may be charged shall be made as shown at paragraph (a)(6) of this section.

(B) Where a unit is occupied by a family receiving housing assistance payments, pursuant to section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), as amended, the family's contribution toward rent may not exceed 30 percent of the family's adjusted income.

(ii) *Continued occupancy of current residents.* No purchaser of an eligible multifamily property may terminate the occupancy of any person residing in the property on the date of purchase for purposes of meeting the lower-income occupancy requirements. The purchaser shall be in compliance with the requirement if each newly vacant dwelling unit is reserved for lower-income occupancy until the lower-income occupancy requirements are met.

(iii) *Financial infeasibility.* The Secretary, the RTC or its successor, or the State housing finance agency for the State in which the property is located may temporarily reduce the lower-income occupancy requirements applicable to a property sold under this

program if the Secretary or the applicable State housing finance agency determines that an owner's compliance with such requirements is no longer financially feasible. The owner of the property shall make a good-faith effort to return lower-income occupancy to the level required by the property's LURA, and the Secretary or the agency, as appropriate, shall review the reduction annually to determine whether financial infeasibility continues to exist.

(5) *Expression of serious interest.* Before the end of the marketing period, a qualifying multifamily purchaser may express serious interest in purchasing an eligible multifamily property from the RTC. The expression of serious interest shall be submitted to the listing broker or other marketing specialist and shall provide evidence that the purchaser intends to prepare a bona fide offer and has the ability to purchase the property. At a minimum, the documentation supporting the expression of serious interest would include:

(i) Confirmation of public, nonprofit, or for-profit status;

(ii) A financial statement and evidence of a source of equity funds; and

(iii) Certification of no prior exclusion from Federal procurement or non-procurement programs.

(6) *Notice of Readiness for Sale.* At the end of the marketing period, the RTC will send a Notice of Readiness for Sale only to qualifying multifamily purchasers that submitted, during the marketing period, a written expression of serious interest in an eligible multifamily property. This Notice will outline the minimum terms and conditions for sale of the property.

(7) *Bona fide offer.* Within forty-five days, or such longer time period as RTC may determine, after receipt of a Notice of Readiness for Sale, a qualifying multifamily purchaser may submit a bona fide offer to purchase the property. The Notice of Readiness for Sale will be deemed received 5 days after it is mailed. The bona fide offer, as specified in the bid package, should include:

(i) A sales contract constituting a binding offer for a sum certain accompanied by a reasonable earnest money deposit specified by the RTC;

(ii) A conditional commitment for financing from a lender, a request for seller financing, or other evidence, acceptable to the RTC, of financial resources to consummate the transaction;

(iii) A written commitment to meet specific lower-income occupancy objectives and the process for complying with these objectives;

(iv) A written description of experience in housing ownership or management, preferably of low- and moderate-income housing;

(v) Reaffirmation or revision of the information submitted with the expression of serious interest;

(vi) A governing body resolution, where applicable, authorizing the purchase and affirming the commitment to meet the lower-income occupancy requirements.

(8) *Failed offers.* (i) If, before the expiration of the period for submission of bona fide offers, an offer to purchase a property initially accepted by the RTC is subsequently rejected or fails (for any reason), the RTC shall accept another offer to purchase the property that complies with the terms and conditions established by the RTC (if another offer was made during the period for submission of bona fide offers). This provision does not require a qualifying multifamily purchaser whose offer is accepted during the bona fide offer period to purchase the property before the expiration of that period.

(ii) If, after the expiration of the period for the submission of bona fide offers, the offer to purchase a property initially accepted by the RTC is subsequently rejected or fails (for any reason), the RTC, in its sole discretion, may negotiate with any of the parties who submitted bona fide offers on the property during the bona fide offer period to secure an offer acceptable to the RTC.

(9) *Preference for sales that benefit lower income groups.* (i) In choosing among bona fide offers for eligible multifamily property, the RTC will give preference to the offer that would reserve the highest percentage of dwelling units for occupancy by very low-income families and lower-income families and would retain such affordability for the longest term (not exceeding the term of the deed restrictions). For purposes of making calculations pursuant to this paragraph (b)(9) alone, as described in the following examples, "lower-income families" shall mean families and individuals whose incomes are greater than 50 percent of area median income but do not exceed 80 percent of area median income, as defined under 42 U.S.C. 1437a(b)(2) and as determined by the Secretary of HUD, with adjustment for family size. The preference will be calculated in accordance with the following formula:

Add to the cash equivalent offer—

0.25% of the cash equivalent offer amount for each 1% of the "very low-income" units that exceed the minimum 20% very low-income units requirement, and

0.125% of the cash equivalent offer amount for each 1% of the "lower income" units that exceed the minimum 15% lower-income units requirement.

Example: Multifamily purchaser A offers to purchase an eligible multifamily property for $1,000,000 and agrees to reserve 20% of the units for occupancy by very low-income families and 30% for lower-income families. Multifamily purchaser B offers to purchase the same eligible multifamily property for $900,000 and intends to reserve 50% of the units for occupancy by very low-income families and 50% for occupancy by lower-income families. Multifamily purchaser C offers to purchase the eligible multifamily property for $1,015,000 and agrees to reserve 20% of the units for occupancy by very low-income families and 15% for occupancy by lower-income families. Under the preference formula described above, the property should be sold to purchaser A for $1,000,000.

A's offer=$1,000,000.

A's preference price=$1,000,000+($1,000,000×15×0.00125)=$1,000,000+$18,750=$1,018,750.

B's offer=$900,000.

B's preference price=$900,000+($900,000×30×0.0025)+($900,000×35×0.00125)=$900,000+$67,500+$39,375=$1,006,875.

C's offer=$1,015,000. C does not receive a preference because C did not set aside any units above the minimum 20% for very low-income families and 15% for lower income families.

(ii) No preference will be given for the substitution of units for very low-income families for units required to be maintained for lower-income families (*e.g.*, an offer which proposes to provide 35% very low-income units and no lower-income units will be treated no differently from one meeting the basic 20% very low- and 15% lower-income unit requirement).

(10) *Deed restrictions.* (i) Lower-income occupancy requirements shall be judicially enforceable against purchasers of eligible multifamily property or their successors in interest by affected very low- and lower-income families, State housing finance agencies, and any agency, corporation, or authority of the United States Government.

(ii) Lower-income occupancy requirements shall be contained in a LURA or other recorded legal instrument which shall require the property owner to cooperate with periodic compliance reviews and to pay a reasonable fee to cover the cost of the reviews. The LURA or other recorded instrument shall reflect any commitment, made in accordance with a purchase offer pursuant to paragraph

(b)(9) of this section, to reserve a higher percentage of dwelling units for occupancy by very low-income families and lower-income families and retain such affordability for the longest term.

(11) *Offer and sale of multifamily properties in bulk*—

(i) *Expression of serious interest.* (A) The RTC may, in its discretion, list multiple eligible multifamily properties with a clearinghouse for bulk sale. During the marketing period, a qualifying multifamily purchaser may submit an expression of serious interest in a bulk sale package offered by the RTC.

(B) During the marketing period, a qualifying multifamily purchaser also may submit an expression of serious interest in a bulk package of its own choice accompanied by a list of eligible multifamily properties.

(ii) *Notice of Readiness for Sale.* At the end of the marketing period, the RTC shall send a Notice of Readiness for Sale to each qualifying multifamily purchaser who expressed serious interest in making a bulk purchase. The notice will identify the properties in the bulk sale package and will outline the minimum terms and conditions for the sale of the properties in the bulk sale package. The RTC will consider the expressions of serious interest, but reserves the right to determine the final composition of the bulk sale package.

(iii) *Bona fide offer.* Within 45 days, or such other time period as RTC may determine, of receipt of the Notice of Readiness for Sale, a qualifying multifamily purchaser may submit a bona fide purchase offer for the bulk sale package which conforms to the terms and conditions set forth in the Notice of Readiness for Sale. A qualifying multifamily purchaser, in its discretion, may submit both individual and bulk purchase offers for each multifamily property for which the RTC received an expression of serious interest from a purchaser interested in an individual sale. The offers shall be in conformance with the requirements in paragraph (b)(7) of this section.

(iv) All other restrictions on the sale of eligible multifamily property shall apply to bulk sales of eligible multifamily property. Properties purchased in a bulk sale shall be subject to the lower-income occupancy requirements applicable to properties purchased in a single transaction, as such terms are defined in § 1609.2 of this part.

(v) At any time during the marketing period for a bulk package of eligible multifamily properties, a qualifying multifamily purchaser may submit to the RTC a notice of serious interest with respect to any single eligible multifamily property within the bulk package, and the RTC may determine to sell such eligible multifamily property to a qualifying multifamily purchaser.

(12) *Sale to other purchasers.* If the RTC does not receive an expression of serious interest with respect to an eligible multifamily property during the marketing period, or does not receive a bona fide offer for such a property within the period following the date of receipt of a Notice of Readiness for Sale, the RTC may sell the property, individually or in combination with other properties, to any purchaser(s).

(c) *Eligible condominium property*—

(1) *Notice of Marketing Period.* (i) Subject to the exercise by the RTC of its authority under §§ 1609.9 and 1609.11 of this part, the RTC shall send a Notice of Marketing Period to clearinghouses when an eligible condominium property is ready for marketing to qualifying condominium purchasers. The Notice shall be transmitted by certified mail or any other means of communication with date and time confirmation.

(ii) The Notice shall specify a date that begins the marketing period and shall state that the marketing period ends 180 days, or such other time period as may be applicable, after such date.

(iii) The Notice shall state whether the eligible condominium property is offered for sale individually or in bulk.

(iv) The property listing accompanying the Notice shall contain basic information about the property and such other information as the RTC may determine to be useful.

(v) The RTC shall allow qualifying condominium purchasers reasonable access to eligible properties for purposes of inspection.

(2) *Marketing eligible condominium properties.* Prior to listing an eligible condominium property with a clearinghouse, the RTC, in its sole discretion, will determine whether to offer the property for sale individually or as part of a bulk sale package of multiple eligible condominium properties. Subject to paragraph (c)(4)(vii) of this section, the composition of a bulk sale package will be determined solely by the RTC prior to listing the properties with a clearinghouse. Properties listed for sale on an individual basis will be available for purchase by qualifying households only. Properties listed as part of a bulk sale package may be purchased by nonprofit organizations, public agencies or for-profit entities. After 90 days of marketing, properties listed for individual sales may be relisted as part of a bulk sale package for the remaining 90 days.

(3) *Individual sales*—(i) *Qualifying condominium purchasers; qualifying households.* To qualify to purchase an eligible condominium property, a household must certify in writing to the RTC that its income does not exceed 115 percent of area median income, with adjustment for family size; and that it intends to occupy the property as a principal residence for at least 12 months.

(ii) *Avoidance of displacement.* Prior to or during the marketing period, the RTC may sell an eligible condominium property to the household residing in the property without regard to the income of the household, provided that:

(A) The household was residing in the property at the earlier of the time of sale or the time the Notice of Marketing Period was provided to the clearinghouse;

(B) The sale is necessary to avoid the displacement of, and unnecessary hardship to, the resident household;

(C) The resident household intends to occupy the property as its principal residence for at least 12 months; and

(D) The resident household certifies in writing that it intends to occupy the property for at least 12 months.

(iii) *Penalty for false certifications.* A household that provides false or incomplete information regarding its income or that falsely certifies that it intends to occupy the property as its principal residence can be fined or imprisoned pursuant to 18 U.S.C. 1001 and 31 U.S.C. 3802. A household that sells the property within 12 months of acquisition will be subject to the recapture provisions set forth in § 1609.8 of this part.

(iv) *Deed restrictions.* An eligible condominium property purchased by a qualifying household or a resident household which is subject to recapture must be so restricted for the recapture period by deed or other recorded instrument.

(4) *Bulk sales to public agencies, nonprofit organizations and for-profit entities*—(i) *Lower-income occupancy requirement.* To qualify to purchase a bulk package of eligible condominium properties, a public agency, nonprofit organization, or for-profit entity must certify to the RTC that it will make 100 percent of the properties purchased available for occupancy by, and will maintain the properties as affordable for, lower-income families (including lower-income families with members who are veterans) for the remaining useful life of such properties, or make the properties available for purchase by any lower-income family that agrees to

occupy the property as a principal residence for at least 12 months and certifies in writing that the family intends to occupy the property for at least 12 months and is subject to the penalties described in paragraph (c)(3)(iii) of this section if the household fails to comply with the residency requirement.

(ii) *Waiver of 100 percent lower-income occupancy requirement.* Notwithstanding the 100 percent lower-income occupancy requirement set forth in paragraph (c)(4)(i) of this section, the RTC may, in its sole discretion, waive the 100 percent lower-income occupancy requirement and provide instead that not less than 35 percent of all eligible condominium properties purchased shall be made available for occupancy by, and be maintained as affordable for, lower-income families for the remaining useful life of the property, or be made available for purchase by any such family that agrees to occupy the property as a principal residence for at least 12 months. Any determination by the RTC to reduce the percentage of properties set aside for lower-income and very low-income families must be made prior to listing the property with a clearinghouse and the applicable percentages shall be specified in the Notice of Marketing Period.

(iii) *Rent limitations.* (A) To comply with lower-income occupancy requirements, the rents charged to very low-income families may not exceed 30 percent of the adjusted income of a family whose income equals 50 percent of area median income, with adjustment for family size; and the rents charged to lower-income families may not exceed 30 percent of the adjusted income of a family whose income equals 65 percent of area median income, with adjustment for family size. Adjustments for family size for purposes of determining the maximum rent that may be charged shall be calculated in the manner set forth in paragraph (a)(6) of this section.

(B) Where a unit is occupied by a family receiving housing assistance payments pursuant to section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), as amended, the family's contribution toward rent may not exceed 30 percent of the family's adjusted income.

(iv) *Continued occupancy of current residents.* No public agency, nonprofit organization, or for-profit entity which purchases eligible condominium property may terminate the occupancy of any person residing in the property on the date of purchase for purposes of meeting the lower-income occupancy requirement. The purchaser shall be in compliance with the lower-income occupancy requirement if each newly vacant dwelling unit is reserved for lower-income occupancy until such requirement is met.

(v) *Financial infeasibility.* The Secretary, the RTC or its successor, or the State housing finance agency for the State in which the property is located may temporarily reduce the lower-income occupancy requirements applicable to a property sold under this program if the Secretary or the applicable State housing finance agency determines that an owner's compliance with such requirements is no longer financially feasible. The owner of the property shall make a good-faith effort to return lower-income occupancy to the level required by the property's LURA, and the agency, as appropriate, shall review the reduction annually to determine whether financial infeasibility continues to exist.

(vi) *Written commitment before access.* Prior to receiving access to an eligible condominium property, a public agency, nonprofit organization, or for-profit entity must make a written commitment (for itself or any related entity) to the listing broker or other marketing specialist that it is a qualifying condominium purchaser that will satisfy the lower-income occupancy requirements in any eligible condominium property for which it requests access, if and when it makes an offer to purchase that property. The written commitment should acknowledge the terms and conditions governing the sale of eligible condominium properties.

(vii) *Location.* The RTC may not sell or offer to sell as part of the same negotiation or purchase multiple eligible condominium properties that are not located in the same condominium project. The properties need not be located in the same structure.

(viii) *Preference for sales that benefit lower income groups.* In choosing among bulk purchase offers from nonprofit organizations, public agencies and for-profit entities, the RTC will give preference to the offer that would reserve the highest percentage of dwelling units for occupancy or purchase by very low-income families and lower-income families and would retain such affordability for the longest term (not exceeding the term of the LURA). The preference will be calculated in accordance with the following formula:

Add to the cash equivalent offer—

0.25% of the cash equivalent offer for each 1% of the units set aside for occupancy or purchase by very low-income families, and

in response to bulk sale offers with respect to which the RTC has determined to waive the 100 percent lower-income occupancy requirement pursuant to paragraph (c)(4)(ii) of this section, 0.125% of the cash equivalent offer for each 1% of the units set aside for occupancy by lower-income families that exceeds the applicable lower-income unit requirement; provided, however, that very low-income units receiving a 0.25% preference for purposes of the preceding clause, shall not also receive a benefit under this clause.

Example 1: Nonprofit organization X offers to purchase 10 eligible condominium properties for $300,000 and agrees to reserve 5 of those properties for occupancy or purchase by very low-income families. For-profit entity Y offers to purchase the same 10 eligible condominium properties for $325,000 and intends to reserve all of the properties for occupancy and purchase by lower-income families (but not very low-income families). Although for-profit entity Y has offered more for the properties, the properties should be sold to nonprofit organization X for $300,000.

X's offer=$300,000.

X's preference price=$300,000+ ($300,000×50×x0.0025)=$300,000+ $37,500=$337,500

Y's offer=$325,000. Y does not receive a preference because Y did not set aside any units for occupancy or purchase by very low-income families.

Example 2: The RTC markets 20 eligible condominium properties in bulk, with a requirement that only 35% (7) of those properties be made available for occupancy by or sale to lower-income families. Nonprofit organization X and for-profit entity Y each offer to purchase all 20 eligible condominium properties for $600,000. Nonprofit organization X agrees to reserve 7 of those properties for occupancy or purchase by very low-income families. For-profit entity Y agrees to reserve 2 of the properties for occupancy and purchase by very low-income families and the remaining 18 properties for occupancy by lower-income families that are not very low-income families. Under the preference formula, the properties are sold to for-profit entity Y.

X's offer=$600,000.

X's preference price=$600,000+ ($600,000×35×0.0025)=$600,000+ $52,500=$652,500

Y's offer=$600,000.

Y's preference price=$600,000+ ($600,000×10×0.0025) (for very low-income units)+($600,000×55×00125)= $600,000+$15,000+$41,250=$656,250.

(ix) *Deed restrictions.*—(A) Eligible condominium properties purchased by a public agency, nonprofit organization, or for-profit entity for rental or resale to lower-income families must be so restricted by a LURA or other recorded

instrument which is binding upon successors in interest, with the provision that the property may subsequently be sold to a lower-income family without further deed restrictions (except for recapture restrictions). The deed or other recorded legal instrument shall also require the property owner to cooperate with periodic compliance reviews and to pay a reasonable fee to cover the cost of the review. The LURA or other recorded instrument shall reflect any commitment, made in accordance with a purchase offer pursuant to paragraph (c)(4)(viii) of this section, to reserve a higher percentage of eligible condominium properties for occupancy by or sale to very low-income families and lower-income families and retain such affordability for the longest term.

(B) Lower-income occupancy requirements shall be judicially enforceable against purchasers of eligible condominium property or their successors in interest by affected very low- and lower-income families, State housing finance agencies, and any agency, corporation, or authority of the United States Government.

(x) At any time during the marketing period for a bulk package of eligible condominium properties, a qualifying single family purchaser may submit to the RTC a notice of serious interest with respect to one eligible condominium property within the bulk package, and the RTC may determine to sell one eligible condominium property to a qualifying household.

(5) *Offer and sale.* The RTC shall establish a market value for each eligible condominium property. The RTC may sell eligible condominium property to qualifying households, nonprofit organizations, and public agencies without regard to any minimum sales price.

(6) *Sale to other purchasers.* If the RTC does not receive a purchase offer with the respect to an eligible condominium property during the marketing period the RTC may sell the property, individually or in combination with other properties, to any other purchasers.

(d) *Extended marketing period.* If it determines that an eligible multifamily property, eligible condominium property or eligible single family property has not been properly offered for the applicable marketing period in accordance with section 21A(c) of the Federal Home Loan Bank Act (12 U.S.C. 1441a(c)) and the applicable regulations, the RTC may provide a second Notice of Marketing Period and offer for sale such property. During any such extended marketing period, the provisions for marketing and selling the eligible multifamily property, eligible condominium property or the eligible single family property under this § 1609.7, including the duration of applicable time periods (unless shortened by the RTC), shall apply.

§ 1609.8 Recapture of profits from resale.

(a) *Property subject to recapture.* All eligible single family property and eligible condominium property sold to the following purchasers shall be subject to the recapture provisions of this section if resold by the purchaser within one-year after acquisition of the property:

(1) Qualifying households;

(2) Lower-income families who purchase the property from a nonprofit organization, a public agency or a for-profit entity, in accordance with §§ 1609.7(a), 1609.7(c), 1609.9, or 1609.11 of this part; and

(3) Resident households who purchase the property under the avoidance of displacement provisions in §§ 1609.7(a)(10) or 1609.7(c)(3) of this part.

(b) *Recapture formula.* The RTC shall receive 75 percent of the amount of any proceeds from resale (after any broker commissions and other expenses of sale) in excess of the sum of:

(1) The original sale price for the acquisition of the property by the purchasers listed in paragraph (a) of this section;

(2) The actual cost of any improvements to the property made after the date of the acquisition; and

(3) Any closing costs in connection with the acquisition.

(c) *Exceptions to recapture*—(1) *Relocation.* The RTC may, in its discretion, waive the applicability of the recapture requirement of this § 1609.8 to any qualifying household, lower-income family or resident household. The RTC may grant any such waiver only for good cause shown, including any necessary relocation of the affected household.

(2) *Other recapture provisions apply.* The recapture provisions shall not apply to any eligible single family property or eligible condominium property for which a portion of the sale proceeds or any subsidy provided in connection with the acquisition of the property is required to be recaptured or repaid under any other Federal, State, or local law (including section 143(m) of the Internal Revenue Code of 1986 (26 U.S.C. 143(m)) or regulation, or under any sale agreement.

(d) *Deed restrictions.* The recapture provisions shall be set forth in a LURA or other recorded legal instrument.

§ 1609.9 Suspension of marketing period for sales to nonprofit organizations and public agencies.

(a) The RTC may, for such period of time as it determines appropriate, suspend any of the rules governing the marketing or sale of eligible residential property set forth in this part, if during such period the RTC negotiates the sale of any such property to a nonprofit organization or public agency. If the property is not sold pursuant to such negotiations, the requirements of any provisions suspended shall apply upon termination of the suspension. Any time periods applicable to the disposition of eligible residential property shall be tolled for the duration of any suspension under this section.

(b) When an eligible multifamily property is ready for sale, and prior to sending the Notice of Marketing Period to clearinghouses pursuant to § 1609.7(b)(1) of this part, the RTC shall suspend such marketing period and offer such property exclusively to public agencies and nonprofit organizations serving the jurisdiction or area in which such property is located. The marketing period for direct sales to public agencies and nonprofit organizations shall be forty-five (45) days from the date on which the notice of marketing period is mailed by the RTC. If the RTC receives no notices of serious interest from public agencies or nonprofit organizations during such marketing period, then the RTC shall offer such property to all qualifying multifamily purchasers pursuant to § 1609.7(b) of this part.

(c) Upon the sale of an eligible residential property to a nonprofit organization or a public agency pursuant to this section, such property and its purchaser shall be required to meet the requirements of this part, including, with respect to sales to a public agency, the provisions of § 1609.11 of this part.

§ 1609.10 Reporting.

(a) *Reports to Congress.* The RTC shall submit to the Congress semiannual reports regarding the disposition of eligible multifamily property, eligible condominium property and eligible single family property during the most recently concluded reporting period. The first report to Congress shall be submitted not later than April 12, 1992. Subsequent reports shall be submitted not less than every 6 months thereafter.

(b) *Reporting Period.* The term "reporting period" means the six-months period for which a report under this § 1609.10 is made. The first reporting period shall be the period beginning on August 9, 1989, the date

of enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and ending on December 12, 1991, the date of the enactment of the Resolution Trust Corporation Refinancing, Restructuring, and Improvement Act of 1991. Each successive reporting period shall begin upon the conclusion of the preceding reporting period.

(c) *Information Regarding Properties Sold.* Each report under this § 1609.10 shall contain information regarding each eligible multifamily property, eligible condominium property and eligible single family property sold by the RTC during the applicable reporting period, as follows:

(1) A description of the property, the location of the property, and the number of dwelling units in the property;

(2) The appraised value of the property;

(3) The sale price of the property;

(4) For eligible single family properties—

(i) The income and race (to the extent allowed by applicable federal law) of the purchaser of the property, if the property is sold to an occupying household, or is sold for resale to an occupying household; and

(ii) Whether the property is reserved for residency by very low- or lower-income families, if the property is sold for use as rental property;

(5) For eligible multifamily properties, the number and percentage of dwelling units in the property reserved for occupancy by very low- and lower-income families;

(6) The number of eligible single family properties sold after the expiration of the applicable marketing period for each such property;

(7) The number of eligible multifamily properties sold after the expiration of the periods for submission of a notice of serious interest and a bona fide offer to purchase;

(8) The number of eligible single family properties for which the marketing period had not expired before the conclusion of the applicable reporting period (or had not yet commenced);

(9) The number of eligible multifamily properties for which the marketing period had not expired before the conclusion of the applicable reporting period (or had not yet commenced); and

(10) Summary information about the total number of eligible multifamily properties remaining subject to LURAs, the number of units set aside for lower-income families and very low-income families in such properties, the total number of units occupied by qualifying lower-income and very low-income families, and the number of eligible multifamily properties which ceased to be subject to LURAs in the reporting period.

§ 1609.11 Transfer of eligible properties to State housing finance agencies, State housing agencies and local housing agencies.

(a) *Transfers to State and local housing agencies.* The RTC may transfer any eligible multifamily property, eligible condominium property or eligible single family property to the State housing finance agency or any other State housing agency for the State in which the property is located or to any local housing agency in whose jurisdiction the property is located. The transfer may be conducted by direct sale pursuant to § 1609.9 of this part, by consignment sale, or by any other method the RTC considers appropriate. The offering, negotiation or preparation for sale of an eligible condominium property to a State housing finance agency or State or local housing agency does not relieve RTC of its obligation to provide to clearinghouses the Notice of Marketing Period required by § 1609.7(c)(1) of this part with respect to such property.

(b) *Individual or bulk transfers.* The RTC may transfer such properties individually or in bulk, as agreed to by the RTC and the State housing finance agency or State or local housing agency.

(c) *Acquisition price and discount.* The acquisition price paid by the State housing finance agency or State or local housing agency for the transferred properties shall be an amount agreed to by the RTC and the transferee agency.

(d) *Lower-income use.* Any State housing finance agency or State or local housing agency acquiring properties under this provision must agree that it will offer to sell or transfer the properties only as follows:

(1) *Eligible single family properties*—

(i) May only be sold to qualifying single family purchasers;

(ii) If sold to a qualifying single family purchaser that is a public agency or a nonprofit organization, shall be subject to the rent limitations set forth at § 1609.7(a)(6) of this part;

(iii) Shall be subject to a LURA or other recorded instrument containing the applicable rent, occupancy and resale restrictions, as prescribed in § 1609.7(a)(5) of this part; and

(iv) Shall be subject to recapture as provided in § 1609.8 of this part.

(2) *Eligible multifamily properties*—

(i) May only be sold to qualifying multifamily purchasers;

(ii) Shall be subject to the lower-income occupancy requirements applicable to all eligible multifamily property, including the rent limitations, requirements as to continued occupancy of current residents and provision for financial infeasibility, all as set forth at § 1609.7(b)(4) of this part; and

(iii) Shall be sold in accordance with procedures that would give a preference, among financially acceptable offers, to the offer that would reserve the highest percentage of dwelling units for occupancy or purchase by very low-income families and lower-income families and would retain such affordability for the longest term.

(3) *Eligible condominium properties* shall be offered by the particular State housing finance agency or State or local housing agency as either eligible single family property or eligible multifamily property and shall be subject to the requirements of paragraph (d) (1) or (2) of this section based upon such choice.

(e) *Affordability.* The State housing finance agency or State or local housing agency shall endeavor to make the properties transferred more affordable to lower-income families based upon the extent to which the acquisition price of a property is less than the market value of the property.

§ 1609.12 RTC notice and sale of ineligible residential properties and non-AHDP properties.

(a) To the extent practicable, within a reasonable period of time after acquiring title to any non-AHDP property (including an ineligible condominium property or an ineligible single family property) or to an ineligible multifamily property, the RTC shall provide written notice to the clearinghouses. For single family properties, the notice shall contain the same information about the properties that the notice required under § 1609.7(a)(1)(ii) of this part contains with respect to eligible single family properties. For multifamily properties, the notice shall contain the same information about the properties that the notice required under § 1609.7(b)(1)(ii) of this part contains with respect to eligible multifamily properties. For condominium properties, the notice shall contain the same information about such properties as the notice required under § 1609.7(c)(1)(iv) of this part contains with respect to eligible condominium properties. Each notice also shall state that the property is not being sold or marketed through the AHDP. With respect to a non-AHDP property (including an ineligible condominium property or an ineligible single family property), the notice shall state that any purchaser may purchase the property at

a sales price above the maximum value set out in §§ 1609.2(j)(2), 1609.2(k)(2) or § 1609.2(m)(2) of this part, as applicable, but only a qualifying purchaser may purchase the property at a sales price below such maximum value.

(b) Any person or entity may purchase a non-AHDP property for a sales price above the maximum value set out in §§ 1609.2(j)(2), 1609.2(k)(2) or § 1609.2(m)(2) of this part, as applicable, but only a qualifying purchaser may purchase such a property at a sales price below such maximum value. If the RTC is unable to sell a non-AHDP property in compliance with the requirements of the preceding sentence, then the RTC may dispose of the property in such manner as it determines appropriate.

By order of the Chief Executive Officer of Resolution Trust Corporation.

Dated at Washington, DC, this 5th day of October 1994.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Secretary.

[FR Doc. 94–25072 Filed 10–18–94; 8:45 am]

BILLING CODE 6714–01–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 11, 121, 125, and 135

[Docket No. 27229; Amendment No. 11–37; ref. Amendment Nos. 121–241; 125–21; 135–52]

RIN 2120–AE91

Flight Attendant Duty Period Limitations and Rest Requirements

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; notice of effective date.

SUMMARY: The notice announces the effective date for the information collection requirements of the Flight Attendant Duty Period Limitations and Rest Requirements final rule. This notice is needed because at the time of issuance of that final rule the Office of Management and Budget had not approved the burden associated with the recordkeeping requirements. That approval has now been received, and the FAA announces the effective date for the affected sections.

DATES: Effective Date: Sections 121.683(a)(1), 135.63(a)(3), 135.63(a)(4)(x), 135.63(a)(5), and 135.63(b) are effective November 18, 1994.

Compliance Date: March 1, 1995.

FOR FURTHER INFORMATION CONTACT: Donell Pollard, Air Transportation Division, AFS–203, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3735.

SUPPLEMENTARY INFORMATION: On August 15, 1994, the Federal Aviation Administration issued a final rule requiring air carriers, air taxi, and commercial operators to provide duty period scheduling limitations and rest requirements for flight attendants engaged in air transportation and air commerce [59 FR 42974; August 19, 1994]. At the time of issuance, the burden associated with the recordkeeping requirements had not been approved by the Office of Management and Budget (OMB); therefore, those sections of the final rule did not have an effective date. On August 17, 1994, OMB approved the burden associated with the recordkeeping requirements under OMB Control No. 2120–0585 through July 31, 1997. The FAA hereby gives notice of that approval and the effective date for the affected sections of the final rule. A copy of the OMB approval may be examined in Docket No. 27229 in the FAA Rules Docket, room 915G, 800 Independence Ave., SW, Washington, DC 20591.

The Amendment

For the reasons stated above, the effective date of sections 121.683(a)(1), 135.63(a)(3), 135.63(a)(4)(x), 135.63(a)(5), and 135.63(b) is November 18, 1994.

List of Subjects in 14 CFR Part 11

Administrative practice and procedure, Reporting and recordkeeping requirements.

In addition, the FAA amends part 11 of the Federal Aviation Regulations (14 CFR part 11) as follows:

PART 11—GENERAL RULEMAKING PROCEDURES

1. The authority citation for part 11 continues to read as follows:

Authority: 49 app. U.S.C. 1341(a), 1343(d), 1348, 1354(a), 1401 through 1405, 4121 through 1431, 1481, and 1502; 49 U.S.C. 106(g).

2. Section 11.101 is amended by adding new section numbers in numerical order and OMB Control Numbers to the table in paragraph (b) as follows:

§ 11.101 OMB Control numbers assigned pursuant to the Paperwork Reduction Act

* * * * *

(b) Display.

14 CFR part or section identified and described	Current OMB No.
§ 121.683	2120–0585
* * * *	*
§ 135.63	2120–0585

Issued in Washington, DC, on October 7, 1994.

David R. Harrington,

Director, Flight Standards Service.

[FR Doc. 94–25895 Filed 10–18–94; 8:45 am]

BILLING CODE 4910–13–M

14 CFR Part 25

[Docket No. NM–99; Special Conditions No. 25–ANM–89]

Special Conditions: Fokker Model F28 Mark 0070 Airplanes, High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for Fokker Model F28 Mark 0070 airplanes manufactured by Fokker Aircraft B.V. of Schiphol the Netherlands. These airplanes are equipped with electrical and electronic systems (such as the digital electronic flight instrument system (EFIS)), which perform critical functions. The applicable regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity radiated fields (HIRF). These special conditions provide the additional safety standards that the Administrator considers necessary to ensure that the critical functions performed by these systems are maintained when the airplane is exposed to HIRF.

DATES: The effective date of these special conditions is October 6, 1994; Comments must be received on or before December 5, 1994.

ADDRESSES: Comments on these final special conditions; request for comments, may be mailed in triplicate to: Federal Aviation Administration, Transport Airplane Directorate (ANM–100), Docket No. NM–99, 1601 Lind Avenue SW., Renton, Washington, 98055–4056; or delivered in triplicate to the Transport Standards Staff at the above address. Comments must be marked "Docket No. NM–99." Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4:00 p.m.

FOR FURTHER INFORMATION CONTACT:

Tim Dulin, FAA, Standardization Branch, ANM–113, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98055–4056; telephone (206) 227–2141.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA has determined that good cause exists for making these special conditions effective upon issuance; however, interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket and special conditions number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. These special conditions may be changed in light of the comments received. All comments submitted will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Persons wishing the FAA to acknowledge receipt of their comments submitted in response to this request must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. NM–99." The postcard will be date stamped and returned to the commenter.

Background

On September 17, 1993, Fokker Aircraft B.V. of Schiphol the Netherlands, applied for an amendment to Type Certificate A20EU to incorporate the Model F28 Mark 0070. This airplane is a derivative of the Fokker Model F28 Mark 0100, approved April 21, 1989. The changes include: removal of two plug sections forward and aft of the wing to decrease overall length by 182 inches; two cargo doors in lieu of three; modifications of the aft cargo door due to space constraints associated with the shorter fuselage; one pair of Type III overwing exists in lieu of two pair, and a new nose wheel tire chine. Both the Model F28 Mark 0070 and new production of the Model F28 Mark 0100 will incorporate a hydraulic stick pusher in lieu of a pneumatic stick pusher, new stabilizer control unit, and a new interior. The Model F28 Mark 0070 will have a maximum seating capacity of 79 passengers.

Amended Type Certification Basis

Under the provisions of § 21.101 of the Federal Aviation Regulations (FAR), Fokker must show that the Model F28 Mark 0070 meets the applicable provisions of the regulations incorporated by reference in Type Certificate No. A20EU, or the applicable regulations in effect on the date of application for the Model F28 Mark 0070. The regulations incorporated by reference in the type certificate are commonly referred to as the "original type certification basis."

The regulations incorporated by reference in Type Certificate No. A20EU for the Model F28 Mark 0070 are part 25 of the FAR, as amended by Amendment 25–1 through 25–60 with certain exceptions which are not relevant to these special conditions. In addition, Fokker has elected to show compliance with certain later requirements which are also not relevant to these special conditions. These special conditions will form an additional part of the certification basis.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25, as amended) do not contain adequate or appropriate safety standards for the Fokker Model F28 Mark 0070 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29, and become part of the type certification basis in accordance with § 21.101(b)(2).

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended at a later date to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101(a)(1).

Discussion

There is no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from ground-based radio transmitters, and the growing use of sensitive electrical and electronic systems to command and control airplanes, have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, special conditions are needed for the Model F28 Mark 0070 that would require that the electrical and electronic systems which perform critical functions such as the EFIS be designed and installed to preclude component damage and interruption of function due to the effects of HIRF.

High-Intensity Radiated Fields (HIRF)

With the trend toward increased power levels from ground-based transmitters, plus the advent of space and satellite communications, coupled with electronic command and control of the airplane, the immunity of critical digital avionics systems, such as the EFIS, to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection exists when compliance with the HIRF protection special condition is shown with either paragraphs 1 or 2 below:

1. A minimum threat of 100 volts per meter peak electric field strength from 10 KHz to 18GHz.

a. The threat must be applied to the system elements and their associated wiring harnesses without the benefit of airframe shielding.

b. Demonstration of this level of protection is established through system tests and analysis.

2. A threat external to the airframe of the following field strengths for the frequency ranges indicated.

Frequency	Peak (V/M)	Average (V/M)
10 KHz–100 KHz	50	50
100 KHz–500 KHz	60	60
500 KHz–2 MHz	70	70
2 MHz–30 MHz	200	200
30 MHz–100 MHz	30	30
100 MHz–200 MHz	150	33
200 MHz–400 MHz	70	70
400 MHz–700 MHz	4,020	935
700 MHz–1 GHz	1,700	170
1 GHz–2 GHz	5,000	990
2 GHz–4 GHz	6,680	840
4 GHz–6 GHz	6,850	310
6 GHz–8 GHz	3,600	670
8 GHz–12 GHz	3,500	1,270
12 GHz–18 GHz	3,500	360
18 GHz–40 GHz	2,100	750

The envelope given in paragraph 2 above is a revision to the envelope used in previously issued special conditions

in other certification projects. It is based on new data and SAE AE4R subcommittee recommendations. This revised envelope includes data from Western Europe and the U.S.

As discussed above, these special conditions are applicable to Fokker Model F28 Mark 0070 airplanes manufactured by Fokker Aircraft B.V. of the Netherlands. Should Fokker apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, these special conditions would apply to that model as well, under the provisions of § 21.101(a)(1).

Conclusion

This action affects only certain unusual or novel design features on the Fokker Model F28 Mark 0070 airplanes. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA for approval of these features on the airplane.

The substance of the special conditions for these airplanes has been subjected to the notice and comment procedure in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions immediately. Therefore, these special conditions are being made effective upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. app. 1344, 1348(c), 1352, 1354(a), 1355, 1421 through 1431, 1502, 1651(b)(2), 42 U.S.C. 1857f–10, 4321 et seq.; E.O. 11514; and 49 U.S.C. 106(g).

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Fokker Model F28 Mark 0070 airplanes:

1. *Protection from Unwanted Effects of High Intensity Radiated Fields (HIRF).* Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high-intensity radiated field external to the airplane.

2. The following definition applies with respect to this special condition: *Critical Function.* Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington, on October 6, 1994.

Neil D. Schalekamp,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–25897 Filed 10–18–94; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 773, 778, and 799

[Docket No. 941081–4281]

RIN 0694–AB05

Revisions to the Export Administration Regulations: Exports of Sample Shipments and Mixtures Containing Precursor and Intermediate Chemicals; Revision to Australia Group Members

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Interim rule.

SUMMARY: The Bureau of Export Administration (BXA) maintains the Commerce Control List (CCL), which appears in the Export Administration Regulations (EAR). This rule amends the CCL by revising Export Control Classification Number (ECCN) 1C60. This ECCN controls dual-use precursors and intermediate chemicals useful in the production of chemical warfare agents. In addition this rule makes an editorial correction by removing ECCN 1C64E for Di-isopropylcarbodiimide (C.A.S. #693–13–0) and di-cyclohexocarbodiimide (C.A.S. #538–75–0), which was inadvertently readmitted to the Commerce Control List. The changes made by this rule are based on recent discussions in the Australia Group (AG).

Finally, this rule revises the list of countries eligible to receive Australia Group (AG) benefits under U.S. regulations to include the Czech Republic and remove Turkey.

DATES: This rule is effective October 19, 1994. The reporting requirement for sample shipments will not be applicable until January 17, 1995. Comments must be received by November 18, 1994.

ADDRESSES: Written comments (six copies) should be sent to Sharron Cook, Bureau of Export Administration, Department of Commerce, P.O. Box 273, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: For questions on foreign policy controls, call Patricia Sefcik, Bureau of Export Administration, Telephone: (202) 482–0707.

For questions of a technical nature on chemical weapon precursors, biological agents, and equipment that can be used to produce chemical and biological weapons agents, call James Seevaratnam, Bureau of Export Administration, Telephone: (202) 482–2729.

SUPPLEMENTARY INFORMATION:

Background

At the December 1993 meeting of the Australia Group, the delegates discussed certain technical revisions in the Australia Group's harmonized controls on chemical weapons precursors. The changes discussed at the meeting were further modified at the May 1994 meeting, and are contained in this interim rule. These changes refine the scope of controls on exports of sample shipments and mixtures containing controlled precursor and intermediate chemicals. This rule does not address controls on biological agents.

This interim rule revises ECCN 1C60, which controls precursor and intermediate chemicals useful in the production of chemical warfare agents, as follows:

ECCN 1C60

(1) Note 1 to 1C60 is revised to modify the general license treatment for sample shipments containing controlled chemical precursors to eligible destinations (all destinations *except* Iran, Syria, Country Groups S and Z, and countries subject to an embargo administered by the Department of the Treasury). Previously, all 54 precursor chemicals were eligible for sample shipments. Under the revised rule 0-Ethyl-2-diisopropylaminoethyl methylphosphonite (QL) (C.A.S. #57856–11–8), Ethylphosphonyl difluoride (C.A.S. #753–98–0), and Methylphosphonyl difluoride (C.A.S. #676–99–3) are *not* eligible for sample shipments. General license treatment for sample shipments to eligible destinations has been available for a single sample shipment of a 55-gallon

container or less of each chemical to any one consignee per calendar year. Exporters may continue to export a *single* sample shipment of a 55-gallon container (or approximately 200 kg) or less of each chemical except the three excluded chemicals, for research or evaluation purposes to any one consignee per calendar year. The exporter is now required to submit, to BXA within 30 days of each sample shipment, a written report on company letterhead stationery that details the chemical(s), Chemical Abstract Service Registry (C.A.S.) number(s), quantity(ies), the ultimate consignee's name and address, and the date exported. Information contained in the reports is subject to applicable confidentiality provisions.

(2) Note 2 to 1C60 is revised to modify control of exports and reexports of mixtures that contain controlled chemical precursors. Previously, controls on controlled chemicals extended to any mixtures containing those chemicals, unless the chemical was merely an impurity that was not intentionally added or was a normal ingredient in consumer goods intended for retail sales. This revision adds a three tier approach to a Note regarding mixtures under ECCN 1C60. The first tier lists three chemicals that require a validated license "regardless of the concentrations in the mixture". The second tier lists twenty chemicals that require a validated license when at least one of the precursors constitutes more than 10 percent of the weight of the mixture on a solvent free basis. The third tier includes the remaining precursor chemicals, not already covered by the first two tiers, and explains that a validated license is required if at least one of the precursors constitutes more than 25 percent of the weight of the mixture on a solvent free basis. The retail product exemption is continued, regardless of percentage of the controlled chemical, provided the product is formulated as a consumer good packaged for retail sale for personal use. The exemption for unintended impurities is removed since such impurities generally fall within one of the applicable de minimis levels. This rule also provides a definition of "mixtures".

In light of the changes made by this rule, it is the Department's position that the provisions of § 776.12 of the EAR do not apply to mixtures containing controlled chemical precursors, because mixing of chemicals does not constitute incorporation within the meaning of § 776.12.

Turkey has been removed from the list of countries excepted from the requirement for a validated license under Export Control Classification Number (ECCN) 1C60C. Because the Government of Turkey has not adopted AG-comparable export controls, a validated license is required for all AG-list chemical precursors identified under ECCN 1C60C until such time as appropriate export controls are in place.

Finally, this rule adds the Czech Republic to the list of countries exempted from certain validated license requirements on the basis of its recent membership in the 26-nation Australia Group.

In addition, this rule revises § 778.8(a)(1)(i) for conformity and consistency.

Saving Clause

Shipments of items removed from general license authorizations as a result of this regulatory action that were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export pursuant to actual orders for export before October 19, 1994 may be exported under the previous general license provisions up to and including November 16, 1994. Any such items not actually exported before midnight November 16, 1994, require a validated export license in accordance with this regulation.

Rulemaking Requirements

1. This interim rule has been determined to be not significant for the purposes of Executive Order 12866.

2. This rule involves collections of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). These collections have been approved by the Office of Management and Budget under control numbers 0694–0005, 0694–0010, 0694–0023 and 0694–0067. This rule imposes a new requirement that has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act. Public burden for the collection contained within the rulemaking is estimated to average one-half hour per response. This includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of the data requirements, including suggestions for reducing this burden, to the Office of Security and Management Support, Room 4513, Bureau of Export Administration, U.S. Department of Commerce, Washington, DC 20230; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attn: Paperwork Reduction Project—0694–XXXX).

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553) or by any other law, under sections 3(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)) no initial or final Regulatory Flexibility Analysis has to be or will be prepared.

5. The provisions of the Administrative Procedure Act, (5 U.S.C. 553), requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military or foreign affairs function of the United States. No other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

However, because of the importance of the issues raised by these regulations, this rule is issued in interim form and comments will be considered in the development of final regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close November 18, 1994. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form.

Oral comments must be followed by written memoranda, which will also be a matter of public record and will be

available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, Room 4525, Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in Part 4 of Title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Edward Lingelbach, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 482–5653.

List of Subjects

15 CFR Part 773 and 799

Exports, Reporting and recordkeeping requirements.

15 CFR Part 778

Exports, Nuclear energy, Reporting and recordkeeping requirements.

Accordingly, Parts 773, 778 and 799 of the Export Administration Regulations (15 CFR Parts 730–799) are amended as follows:

1. The authority citations for 15 CFR Part 773 and 778 continue to read as follows:

Authority: Pub. L. 90–351, 82 Stat. 197 (18 U.S.C. 2510 *et seq.*), as amended; Pub. L. 95–223, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*); Pub. L. 95–242, 92 Stat. 120 (22 U.S.C. 3201 *et seq.* and 42 U.S.C. 2139a); Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. App. 2401 *et seq.*), as amended (extended by Pub. L. 103–10, 107 Stat. 40 and Pub. L. 103–277, 108 Stat. 1407); E.O. 12002 of July 7, 1977 (42 FR 35623, July 7, 1977), as amended; E.O. 12058 of May 11, 1978 (43 FR 20947, May 16, 1978); E.O. 12214 of May 2, 1980 (45 FR 29783, May 6, 1980); E.O. 12735 of November 16, 1990 (55 FR 48587, November 20, 1990), as continued by Notice of November 12, 1993 (58 FR 60361, November 15, 1993); E.O. 12851 of June 11, 1993 (58 FR 33181, June 15, 1993); E.O. 12867 of September 30, 1993 (58 FR 51747, October 4, 1993); E.O. 12930 of September 29, 1994 (59 FR 50475, October 3, 1994); E.O 12924 of August 19, 1994 (59 FR 43437 of August 23, 1994).

2. The authority citation for 15 CFR Part 799 continues to read as follows:

Authority: 50 U.S.C. App. 5, as amended; Pub. L. 264, 59 Stat. 619 (22 U.S.C. 287c), as amended; Pub. L. 90–351, 82 Stat. 197 (18 U.S.C. 2510 *et seq.*), as amended; sec. 101, Pub. L. 93–153, 87 Stat. 576 (30 U.S.C. 185), as amended; sec. 103, Pub. L. 94–163, 89 Stat. 877 (42 U.S.C. 6212), as amended; secs. 201 and 201(11)(e), Pub. L. 94–258, 90 Stat. 309 (10 U.S.C. 7420 and 7430(e)), as amended; Pub. L. 95–223, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*); Pub. L. 95–242, 92 Stat. 120 (22 U.S.C. 3201 *et seq.* and 42 U.S.C. 2139a); sec. 208, Pub. L. 95–372, 92 Stat. 668 (43 U.S.C. 1354); Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. App. 2401 *et seq.*), as amended; sec. 125, Pub. L. 99–64, 99 Stat. 156 (46 U.S.C. 466c); Pub. L. 102–484, 106 Stat. 2575 (22 U.S.C. 6004); E.O. 11912 of April 13, 1976 (41 FR 15825, April 15, 1976); E.O. 12002 of July 7, 1977 (42 FR 35623, July 7, 1977), as amended; E.O. 12058 of May 11, 1978 (43 FR 20947, May 16, 1978); E.O. 12214 of May 2, 1980 (45 FR 29783, May 6, 1980); E.O. 12735 of November 16, 1990 (55 FR 48587, November 20, 1990), as continued by Notice of November 12, 1993 (58 FR 60361, November 15, 1993); E.O. 12851 of June 11, 1993 (58 FR 33181, June 15, 1993); E.O. 12867 of September 30, 1993 (58 FR 51747, October 4, 1993); E.O. 12930 of September 29, 1994 (59 FR 50475, October 3, 1994); E.O 12918 of May 26, 1994 (59 FR 28205, May 31, 1994); and E.O. 12924 of August 19, 1994 (59 FR 43437 of August 23, 1994).

PART 773—[AMENDED]

3. Section 773.9 is amended by revising paragraph (a)(1) and the notice at the end of paragraph (l) to read as follows:

§ 773.9 Special Chemical License.

* * * * *

(a) * * *

(1) Precursor and intermediate chemicals controlled under ECCNs 1C60C; and

* * * * *

(l) * * *

These commodities were authorized for export from the United States under a Special Chemical License procedure on the condition that they may not be reexported without prior approval from the United States authorities. This prior approval is not required for reexports to Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

* * * * *

PART 778—[AMENDED]

4. Section 778.8 is amended:

a. By revising paragraph (a)(1);

b. By revising paragraph (a)(5)(i);

c. By revising paragraph (a)(5)(iv)(B);

d. By revising paragraph (a)(5)(v), to read as follows:

§ 778.8 Chemical precursors and biological agents, and associated equipment, software, and technology.

(a) * * *

(1) Chemicals identified in ECCN 1C60 require a validated license for export from the United States to all destinations except Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

(i) A validated license is required for chemical mixtures containing any chemicals identified in ECCN 1C60, except as specified in Note 2 to the ECCN.

(ii) A validated license is not required, except for Country Groups S and Z, for chemical compounds created with any chemicals identified in 1C60, unless those compounds are also identified in 1C60, or identified elsewhere in the EAR as controlled. See Note 3 to ECCN 1C60.

* * * * *

(5) * * *

(i) General License GTDU, as authorized in ECCN 1E60C, is not available for technical data for the production of chemical precursors described in paragraph (a)(1) of this section, except to Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom;

* * * * *

(iv) * * *

(B) This prohibition on use of General License GTDU, as authorized in ECCN 1E60C, does not apply to export to Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

(v) General License GTDU, as authorized in ECCN 1E60C, is available only to Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom, for software for process control that is specifically configured to

control or initiate the production of chemical weapons precursors controlled by ECCN 1C60.

* * * * *

5. Section 778.9 is amended by revising paragraph (c) to read as follows:

§ 778.9 Activities of U.S. persons.

* * * * *

(c) No U.S. person shall, without a validated license or other authorization by BXA, participate in the design, construction, or export of a whole plant to make chemical weapons precursors identified in ECCN 1C60, in countries other than Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

* * * * *

PART 799—[AMENDED]

Supplement No. 1 to § 799.1 [Amended]

6. In Category 1 (Materials), ECCN 1C64E is removed and ECCNs 1B70E, 1B71E, 1C60C, 1D60C and 1E60C are amended by revising the *Requirements* section, to read as follows:

1B70E Equipment That Can be Used in The Production of Chemical Weapons Precursors and Chemical Warfare Agents

Requirements

Validated License Required: SZ, Supplement No. 5 to part 778 of this subchapter (see *Note*)

Unit: number

Reason for Control: CB

GLV: $0

GCT: No

GFW: No

Note: Special Chemical License Available: see § 773.9 of this subchapter.

* * * * *

1B71E Equipment That Can be Used in the Production of Biological Weapons

Requirements

Validated License Required: SZ, Supplement No. 5 to part 778 of this subchapter (see *Note*)

Unit: number

Reason for Control: CB

GLV: $0

GCT: No

GFW: No

Note: Special Chemical License Available: see § 773.9 of this subchapter.

* * * * *

1C60C Precursor and Intermediate Chemicals Used in the Production of Chemical Warfare Agents

Requirements

Validated License Required: QSTVWYZ, *except* Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. (see *Note 4*)

Unit: Liters or kilograms as appropriate

Reason for Control: CB

GLV: $0

GCT: No

GFW: No

Notes: 1. *Sample Shipments:*

a. The following chemicals are *not* eligible for sample shipments: 0-Ethyl-2-diisopropylaminoethyl methylphosphonite (QL) (C.A.S. #57856–11–8), Ethylphosphonyl difluoride (C.A.S. #753–98–0), and Methylphosphonyl difluoride (C.A.S. #676–99–3).

b. The following countries are *not* eligible to receive sample shipments: Iran, Syria, Country Groups S and Z, and countries subject to an embargo administered by the Department of the Treasury.

c. Except as provided in paragraphs a and b of this note, a validated license is not required for single sample shipment of a 55-gallon container (or approximately 200 kg) or less of each chemical for research or evaluation purposes to any one consignee per calendar year. The exporter is required to submit within 30 days of each sample shipment a written report on company letterhead stationery identifying the chemical(s), Chemical Abstract Service Registry (C.A.S.) number(s), quantity(ies), the ultimate consignee's name and address, and the date exported. The report should be sent to the Bureau of Export Administration, Room 2705, Washington, DC 20230, clearly marked "Report of Sample Shipments of Chemical Precursors" at the top of the first page and on the envelope.

2. *Mixtures:* Mixtures that contain concentrations of chemicals controlled under this ECCN 1C60 are controlled as precursors, as follows:

a. A Validated License is required, regardless of the concentrations in the mixture, for the following chemicals: 0-Ethyl-2-diisopropylaminoethyl methylphosphonite (QL) (C.A.S. #57856–11–8), Ethylphosphonyl difluoride (C.A.S. #753–98–0) and Methylphosphonyl difluoride (C.A.S. #676–99–3);

b. A Validated License is required, when at least one of the following chemicals constitutes more than 10 percent of the weight of the mixture on a solvent free basis: Arsenic trichloride (C.A.S. #7784–34–1), Benzilic acid (C.A.S. #76–93–7), Diethyl ethylphosphonate (C.A.S. #78–38–6), Diethyl methylphosphonite (C.A.S. #15715–41–0), Diethyl-N,N-dimethylphosphoroamidate (C.A.S. #2404–03–7), N,N-Diisopropyl-.beta.-aminoethane thiol (C.A.S. #5842–07–9), N,N-Diisopropyl-.2.-aminoethyl chloride hydrochloride (C.A.S. #4261–68–1), N,N-Diisopropyl-.beta.-aminoethanol (C.A.S. #96–80–0), N,N-Diisopropyl-.beta.-aminoethyl chloride (C.A.S. #96–79–7), Dimethyl ethylphosphonate (C.A.S. #6163–75–3), Dimethyl methylphosphonate (C.A.S. #756–79–6), Ethylphosphonous dichloride [Ethylphosphinyl dichloride] (C.A.S. #1498–40–4), Ethylphosphonus difluoride [Ethylphosphinyl difluoride] (C.A.S. #430–78–4), Ethylphosphonyl dichloride (C.A.S. #1066–50–8), Methylphosphonous dichloride [Methylphosphinyl dicloride] (C.A.S. #676–83–5), Methylphosphonous difluoride [Methylphosphinyl difluoride] (C.A.S. #753–59–3), Methylphosphonyl dichloride (C.A.S. #676–97–1), Pinacolyl alcohol (C.A.S. #464–07–3), 3-Quinuclidinol (C.A.S. #1619–34–7), and Thiodiglycol (C.A.S. #111–48–8);

c. A Validated License is required, when at least one of all other chemicals in the List of Items Controlled constitutes more than 25 percent of the weight of the mixture on a solvent free basis; and

d. A Validated License is *not* required for mixtures when the controlled chemical is a normal ingredient in consumer goods packaged for retail sale for personal use.

3. *Compounds:* A validated license is not required, except for Country Groups S and Z, for chemical compounds created with any chemicals identified in 1C60, unless those compounds are also identified in 1C60, or identified elsewhere in the CCL as controlled.

4. *Special Chemical License Available:* see § 773.9 of this subchapter.

Technical Note: For purposes of this ECCN 1C60, a "mixture" is defined as a solid, liquid or gaseous product made up of two or more components that do not react together under normal storage conditions.

* * * * *

1D60C Software for Process Control That is Specifically Configured To Control or Initiate Production of the Chemical Precursors Controlled by ECCN 1C60

Requirements

Validated License Required: QSTVWYZ, *except* Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

Unit: $ value

Reason for Control: CB

GTDR: No

GTDU: Only to countries listed above as not subject to validated license

* * * * *

1E60C Technology for the Production and/or Disposal of Chemical Precursors Described in ECCN 1C60C, and Technology As Described in the List Below for Facilities Designed or Intended To Produce Chemicals Described in ECCN 1C60.

Requirements

Validated License Required: QSTVWYZ, *except* Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

Reason for Control: CB

GTDR: No

GTDU: Only to countries listed above as not subject to validated license

* * * * *

7. In Supplement No. 1 to § 799.2, the introductory text to Interpretation 23 is revised to read as follows:

Supplement No. 1 to § 799.2—Interpretations

* * * * *

Interpretation 23: Precursor Chemicals

Following is a list of chemicals controlled by ECCN 1C60C that includes their Chemical Abstract Service Registry (C.A.S.) number and synonyms (i.e., alternative names). These chemicals require a validated license to all countries except Argentina, Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom.

* * * * *

Dated: October 13, 1994.

Sue E. Eckert,

Assistant Secretary for Export Administration.

[FR Doc. 94-25781 Filed 10-18-94; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 229, 239, 240, 270, and 274

[Release Nos. 33-7102; 34-34832; IC-20614; S7-33-93]

RIN 3235-AA69

Amendments to Proxy Rules for Registered Investment Companies

AGENCY: Securities and Exchange Commission.

ACTION: Final amendments to rules and forms; rescission of rules.

SUMMARY: The Securities and Exchange Commission (the "Commission") is adopting rule and form amendments relating to the proxy rules applicable to registered investment companies under the Investment Company Act of 1940 and the Securities Exchange Act of 1934 to revise the information required in investment company proxy statements. The amendments are intended to improve the disclosure provided to investment company shareholders in proxy statements.

DATES: Effective Date: The new amendments to the proxy rules are effective on November 23, 1994.

Compliance Date: Only proxy statements filed on or after January 23, 1995, must comply with the new rules.

FOR FURTHER INFORMATION CONTACT: Kathleen K. Clarke, Special Counsel, or Kenneth J. Berman, Deputy Chief, Office of Disclosure and Investment Adviser Regulation, Division of Investment Management, (202) 942-0721, Securities and Exchange Commission, 450 Fifth Street, NW., Mail Stop 10-6, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission today is adopting amendments to:

(1) Schedule 14A [17 CFR 240.14a-101] under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq.*] (the "1934 Act") to add a new item 22 that includes the specific requirements applicable to the proxy statements of management investment companies ("funds") registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*] (the "1940 Act") and to modify the application of certain items to fund proxy statements. Item 22 replaces rules 20a-2, 20a-3, and 20a-4 under the 1940 Act [17 CFR 270.20a-2 through 20a-4], which are rescinded;

(2) Regulation 14A [17 CFR 240.14a-1] under section 14(a) of the 1934 Act [15 U.S.C. 78n(a)], Regulation 14C [17 CFR 240.14c-1] under section 14(c) of the 1934 Act [15 U.S.C. 78n(c)], Regulation S-K [17 CFR 229 *et seq.*], and related rules to clarify the applicability of certain disclosure requirements to funds and to exempt funds from certain proxy disclosure requirements;

(3) Rule 30d-1 [17 CFR 270.30d-1] and Forms N-1A [17 CFR 274.11A], N-2 [17 CFR 274.11a-1], and N-3 [17 CFR 274.11b] to conform certain disclosure requirements to the new proxy statement requirements, and to make certain other technical and conforming changes; and

(4) Form N-14 [17 CFR 239.23], the form used by funds to register securities issued in connection with business combination transactions, to require a comparative fee table in the disclosure documents delivered in connection with such transactions.

The amendments update fund proxy rules to reflect current matters on which fund shareholders are commonly asked to vote and are designed to improve the disclosure provided to shareholders and to simplify the preparation of fund proxy statements.

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Executive Summary

The Commission is adopting revisions to the disclosure requirements for fund proxy statements to update the proxy disclosure requirements for funds and to simplify the preparation of fund proxies. The amendments consolidate into a new item 22 in Schedule 14A disclosure requirements previously set forth in rules 20a-2, 20a-3, and 20a-4. The disclosure requirements of these rules, as modified by the amendments, are incorporated in proposed item 22, and these rules are rescinded. Item 22 includes:

(i) in paragraph (a), definitions applicable to item 22 and certain general requirements;

(ii) in paragraph (b), disclosure requirements applicable to solicitations in connection with the election of directors;

(iii) in paragraph (c), disclosure requirements applicable to solicitations in connection with approval of an investment advisory contract or an amendment thereto; and

(iv) in paragraph (d), disclosure requirements applicable to solicitations in connection with a distribution plan

pursuant to rule 12b–1 under the 1940 Act [17 CFR 270.12b–1].

Item 22 eliminates certain of the current disclosure requirements concerning matters that are not directly relevant to solicitations to elect directors or to approve an investment advisory contract. Item 22 includes provisions designed to improve the disclosure provided to shareholders, including, among other things, a table showing all compensation paid to directors. This item also specifies information required in fund proxy statements when a fund seeks approval of a distribution plan under rule 12b–1.

The Commission also is adopting other amendments to the general proxy requirements in Regulation 14A and Schedule 14A, Regulation 14C, and related requirements in Regulation S–K to accommodate item 22 and to make certain requirements more appropriate to disclosure for funds.

I. Discussion

On December 16, 1993, the Commission issued a release proposing amendments to the proxy rules applicable to funds under the 1940 Act.[1] The proposed amendments were intended to update the proxy rules to reflect current matters on which fund shareholders are typically asked to vote and changes in the fund industry since the proxy rules were adopted in 1960. The amendments also were designed to improve the disclosure provided to shareholders in fund proxy statements by placing greater emphasis on information that is directly relevant to specific matters submitted to a shareholder vote and by eliminating disclosure that may not be pertinent to the matters being voted upon and which is, in most cases, available in other disclosure documents. The Commission received twelve comment letters in response to the proposed amendments.[2] Commenters generally expressed strong support for the proposed amendments. The Commission is adopting the proposed amendments with some modifications to reflect the comments received.

A. Item 22 of Schedule 14A: Reorganization of Disclosure Rules

The Commission is consolidating into a new item 22 to Schedule 14A disclosure requirements set forth in rules 20a-2 and 20a-3.[3] Previously, funds preparing proxy statements had to refer to rules under both the 1934 Act and the 1940 Act including Regulation 14A and Schedule 14A under the 1934 Act, Regulation S-K,[4] and rules 20a-2 and 20a-3 under the 1940 Act. Commenters strongly supported the consolidation of proxy disclosure requirements in item 22.

As discussed in more detail below, the Commission has deleted or revised certain provisions currently in rules 20a-2 and 20a-3 and added new requirements, including, among other things, a table showing compensation paid to all directors.[5] In addition, item 22 specifies information required in fund proxy statements when a fund seeks approval of a distribution plan under rule 12b-1 ("Rule 12b-1 Plan").[6]

B. General Provisions: Item 22(a)

1. Proxy Statement Format; Summary Table

Item 22, as proposed, included a new requirement concerning the format for disclosure when one proxy statement solicits shareholder votes for more than one fund or multiple portfolios of series investment companies ("series funds").[7] This manner of solicitation, while more efficient and less costly, may be confusing to shareholders. Therefore, to assist shareholders in identifying proposals applicable to their fund or portfolio, the Commission proposed to require a fund to include a table at the beginning of the proxy statement that summarizes each proposal and indicates which fund or series shareholders are being requested to approve each proposal.

Some commenters opposed the proposed tabular format, asserting that funds should have the flexibility to present the information in other formats. The Commission believes that the tabular format affords ample flexibility for funds to present the information they believe is important, while providing the advantages of a uniform format. The Commission is adopting the proposed item with one change from the proposal:[8] the summary table requirement, as adopted, also applies to proxy statements for multiple class funds containing multiple proposals affecting different classes.[9]

2. Definitions

The Commission proposed in paragraph (a) of item 22 definitions for certain terms used in item 22. The definitions are adopted substantially as proposed with some modifications to reflect comments on the scope of two of the definitions.

First, the definition of "fund complex" has been modified. The proposed amendments would require disclosure of certain information if a fund director serves as director of more than one fund in a "fund complex," including, for example, the aggregate compensation paid to a director who serves on a number of boards in a fund complex.[10] As proposed, item 22(a) defined a "fund complex" as two or more funds with a common investment

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[1] Investment Company Act Rel. No. 19957 (Dec. 16, 1993) [58 FR 67729 (Dec. 22, 1993)] ("Proposing Release").

[2] The comment letters, as well as a comment summary prepared by the Commission's staff, are available for public inspection and copying at the Commission's public reference room in File No. S7–33–93.

[3] These rules are rescinded. Rule 20a-4, which requires a financial data schedule to accompany a proxy filed in connection with certain transactions if the proxy is filed electronically, is also rescinded and incorporated in subparagraph (a)(4) of Item 22. The other items in Schedule 14A continue to be applicable, as appropriate, to fund proxy statements. Schedule 14A includes provisions governing the form and content of all proxy statements. It requires, among other things, information concerning: (i) the date, time, and place of the meeting of shareholders (item 1); (ii) proposals to amend an issuer's charter, by-laws or other corporate documents (item 19); and (iii) voting tabulation procedures (item 21).

[4] 17 CFR Part 229. Regulation S-K includes the generally applicable disclosure items for filings under, among other things, the 1934 Act.

[5] The disclosure requirements in item 22 also are applicable to information statements prepared in accordance with Regulation 14C and Schedule 14C [17 CFR 240.14c-101].

[6] The Commission has adopted minor technical amendments to rule 20a-1 [17 CFR 270.20a-1], the rule that implements the Commission's authority with respect to proxies under section 20(a) of the 1940 Act [15 U.S.C. 80a-20(a)], to delete references to rules 20a-2 and 20a-3 and to add references to, among other things, Regulation 14A and Schedule 14A. In addition, the filing fee requirement in rule 20a-1(c) [17 CFR 270.20a-1(c)] has been moved to subparagraph (a)(2) of item 22.

[7] A series fund is a fund comprised of two or more portfolios, each of which has a distinct investment objective with assets specifically allocated to that portfolio; investors' interests in such a fund are limited to those portfolios in which they invest. Each portfolio operates for many purposes like a separate fund, although the portfolios are all part of the same business entity with one board of directors. Series funds are specifically permitted under section 18(f)(2) of the 1940 Act [15 U.S.C. 80a-18(f)(2)].

[8] Subparagraph (a)(3)(ii) of item 22. The table would not be required if the proxy statement solicits a vote or votes on the same proposal or proposals from all fund or series shareholders. To assure that shareholders are not confused in casting their vote, a separate proxy card is required for each fund, portfolio, or class.

[9] Multiple class funds issue more than one class of securities, with each class typically subject to a different distribution arrangement, but representing interests in the same portfolio of investments. Currently, funds must obtain exemptive orders to implement these type of arrangements. The Commission recently proposed rule and form amendments that would permit a fund to issue multiple classes of securities without the need for an exemptive order. Investment Company Act Rel. No. 19955 (Dec. 16, 1993) [58 FR 68074 (Dec. 23, 1993)].

[10] *See infra* section I.D. The term "fund complex" also is used with respect to disclosure of other directorships of a director. *See infra* note 23 and accompanying text.

adviser (or which have advisers that are affiliates) or, with respect to open-end funds, a common principal underwriter. The Proposing Release requested comment on whether the definition should include groups of funds with common administrators.

The Commission believes it is important to define fund complex in a manner that will result in disclosure of information about directors (particularly concerning compensation) serving on the boards of related funds. As some commenters pointed out, many funds may have common principal underwriters or administrators that solely provide services to the fund but are otherwise not associated with the fund, and therefore would not be commonly understood to be part of a group of related funds. Other similar definitions of "group" or "family" of investment companies address this issue by specifying that the funds hold themselves out to investors as related companies for the purposes of investment and investor services, in addition to sharing a principal underwriter.[11] The Commission has decided to define fund complex as two or more funds that hold themselves out to investors as related companies or that have a common investment adviser.[12] The Commission believes the information about directors on the boards of funds that are marketed to investors as related funds (regardless of whether they have a common principal underwriter or administrator) is important to shareholders. In addition, the Commission believes that an investment adviser typically has such an important role in a fund's activities that the definition of fund complex should include funds with common investment advisers regardless of whether the funds hold themselves out as related companies.

Second, as suggested by several commenters, the Commission has deleted the definition of "distributor."[13] This definition was intended to identify persons involved in distributing fund shares for purposes of other disclosure items that are designed to elicit disclosure about relationships between fund directors (who vote on Rule 12b–1 Plans) and persons involved in distributing fund shares that could involve conflicts of interest. Commenters argued that, because many persons or firms may provide distribution services to a fund, the definition would likely result in the disclosure of large amounts of information much of which would be immaterial because many of the persons involved have a minor role in the distribution of fund shares. The Commission has eliminated the definition and has modified the disclosure concerning Rule 12b–1 Plans to require information concerning only those persons receiving significant payments from the fund for distribution services.[14]

3. Comparative Fee Table

As proposed, item 22(a) would require fund proxy statements seeking approval of proposals that would increase fees or expenses, directly or indirectly, to include a comparative fee table showing the amount of fees and expenses currently paid by fund shareholders and the amount of fees and expenses shareholders would have paid if the matter being voted on had been in effect. Some commenters suggested that the fee table requirement be combined with a materiality limitation, either for indirect fee increases or for increases in *any* fees, direct or indirect. The Commission believes that shareholders should see the effects of any increases in fees. Moreover, limiting the requirement to material increases in fees would necessarily introduce more variability, and possibly uncertainty, into a determination of when the requirement is applicable. Therefore, the Commission is adopting the fee table requirement as proposed.[15]

4. Voting Results

As proposed, item 22(a) would include a requirement that a fund state in the proxy statement whether it intends to inform shareholders of the voting results in a shareholder report or other document transmitted to shareholders. Some commenters had reservations about the voting results statement because, among other things, their experience did not suggest that shareholders had a significant interest in the information. In addition, commenters objected to a requirement for a negative statement if the fund does not plan to provide voting results in a subsequent shareholder report. In lieu of the proposed disclosure requirement, the Commission is adopting an express requirement that funds report voting results in the fund's next annual or semi-annual report. The Commission is amending rule 30d–1 to require a report of voting results in the annual or semi-annual report to shareholders. The Commission believes that this approach will assure that voting result information is available to shareholders and eliminate any necessity for funds to make a negative statement regarding the availability of voting results in proxy statements.

C. Election of Directors

The Commission proposed a number of revisions to the proxy disclosure requirements relating to the election of directors, primarily to focus the requirements on information directly relevant to the qualifications, background, and relationships of directors and to eliminate information that is not pertinent to the election of directors. The proposed revisions included eliminating detailed disclosure concerning the investment adviser (including a certified balance sheet of the adviser),[16] the investment advisory contract,[17] and brokerage commission practices.[18] Commenters generally supported the elimination of this information on the basis that it has become "boiler plate" and is not relevant to the election of directors. The Commission is adopting its proposal with no changes and eliminating these requirements.

The proxy rules currently require disclosure of whether a director presently has any relationships with fund affiliates.[19] The Commission proposed to expand this disclosure to require information concerning whether the director previously had a material interest in, or relationship with, the investment adviser, principal underwriter, administrator, or any of their respective affiliates. The Proposing

[11] Rule 11a-3 [17 CFR 270.11a-3] under the 1940 Act ("group of investment companies") and General Instruction H to Form N-SAR [17 CFR 274.101], which is the semi-annual reporting form for funds ("family of investment companies").

[12] Subparagraph (a)(1)(v) of item 22.

[13] Proposed item 22(a)(1)(iv) defined "distributor" as any person or persons who either wholly or in part assist in the distribution of a fund's shares, including, without limitation, a fund's principal underwriter, investment adviser, manager, sponsor, administrator, and other entities performing similar functions.

[14] *See infra* section I.F.

[15] Subparagraph (a)(3)(iv) of item 22. The comparative fee table would be required if any of the fee categories in the fee table would be increased (*i.e.*, Management Fees, 12b–1 Fees, Other Expenses) regardless of whether total expenses would be increased, but would not be required if a proposal's effect on expenses is speculative. A sample fee table is attached as an appendix to this release.

The Commission also proposed to amend Form N–14, the form used by funds to register securities issued in certain investment company merger transactions, to require a comparative fee table for the combined fund. Commenters supported the addition of the comparative fee table to Form N–14, and the Commission is adopting the amendments as proposed. Paragraph (a) of item 3 of Form N–14.

[16] Rules 20a–2(a)(1)–(4) and 20a–2(a)(9) [17 CFR 270.20a–2(a)(1)–(4) and (9)].

[17] Rule 20a–2(a)(6) [17 CFR 270.20a–2(a)(6)].

[18] Rule 20a–2(a)(7)[17 CFR 270.20a–2(a)(7)].

[19] Rule 20a–2(a)(5) [17 CFR 270.20a–2(a)(5)].

Release requested comment on whether disclosure of past relationships should be limited to a specific period of time. Many of the commenters supported the proposed disclosure of past relationships. Of those commenting, most recommended limiting the disclosure of past relationships to the preceding five-year period, the same period as currently required for disclosure of business experience of directors and nominees under item 401(e) of Regulation S–K [17 CFR 229.401(e)].

The Commission is adopting the proposed disclosure of past relationships of directors and nominees with related parties and is limiting the required disclosure to past relationships that existed during the preceding five-year period.[20] The Commission believes that a five-year period will provide material information concerning past relationships.

The Commission is adopting other modifications to the disclosure requirements it proposed for directors and nominees. These modifications, incorporated in item 22(b), include a description of non-routine litigation, specifically tailored for funds, in which a director or an affiliated person is a party adverse to the fund or any of its affiliated persons.[21] Another modification affects the current requirement for a list of all boards of directors on which a director serves.[22] As noted in the Proposing Release, disclosure of this information often results in long lists of other directorships of a director in the same fund complex that do not provide useful information to shareholders concerning the qualifications and competing responsibilities of a director or a nominee. The Commission proposed that, in lieu of providing the list, the proxy statement identify the fund complex and the number of directorships. Commenters generally supported this revision to the disclosure of other directorships, and the Commission is adopting the modification as proposed.[23]

D. Management Compensation

Fund proxy statements are required to include information about the compensation of fund directors and officers in connection with the election of directors or proposals seeking shareholder approval of benefit plans in which directors or officers will participate. These requirements have been included in item 8 of Schedule 14A, which references Regulation S–K and fund registration statement forms.[24] The Commission proposed amendments to consolidate the disclosure requirements for management compensation paid by funds to directors and officers in paragraph (b) of item 22, to reformat the requirements, and to expand the information provided for directors, in particular, adding disclosure of the aggregate compensation of directors who serve on the board of more than one fund in a fund complex.[25]

Most of these changes were generally supported by the commenters. Commenters, however, were evenly divided on the proposed disclosure of aggregate fund compensation paid to directors. The aggregate compensation disclosure was proposed in recognition that directors often receive substantial annual fees for their service on a number of boards in a fund complex, and that disclosure of only the compensation they receive from a single fund does not provide a complete picture of director compensation. Commenters opposed to the disclosure asserted, among other things, that disclosure of aggregate compensation could overshadow some of the benefits associated with directors serving on a number of fund boards (such as development of expertise in fund issues and cost-savings) or ignore the necessity of paying adequate compensation to attract well-qualified directors. Several commenters noted that because directors determine their level of compensation, which is paid by the fund, the compensation received from other related funds is not indicative of a conflict of interest or lack of independence from the investment adviser. Whether or not they supported disclosure of aggregate fund complex compensation, many of the commenters specifically objected to what they considered to be implications in the Proposing Release that compensation could compromise a director's independence or that directors are not responsibly discharging their statutory and regulatory role.

The Commission believes that the nature and amount of a director's aggregate compensation from a fund complex is useful information that funds should provide to shareholders. Whether the amount of compensation affects a director's independence is only one of many possible inferences a shareholder may draw from compensation information.[26] Another inference may be that the fund is overpaying directors; another may be that the fund is not obtaining the best quality directors because they are underpaid; and still another inference may be that the amount of compensation is commensurate with the level of expertise, oversight, and effort that directors provide to the fund. The Commission believes that the possibility that unwarranted inferences may result from the disclosure of compensation information is not an appropriate basis to eliminate a requirement for information about directors that will improve shareholders' understanding of the compensation paid to directors and that is readily available to funds.[27] Therefore, the Commission is adopting the revised compensation disclosure requirements as proposed.[28]

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[20] Subparagraphs (b)(1) and (2) of item 22.

[21] Subparagraph (b)(5) of item 22.

[22] Item 7(b) of Schedule 14A requires this information by reference to item 401(e) of Regulation S–K.

[23] Instruction to item 401(e) of Regulation S–K. As adopted, a fund is required to state, if applicable, that a director serves on the board of other funds in the identified fund complex and to specify the number of the boards on which the director serves. The amendment is applicable to disclosure documents and reports by all issuers (not only funds) that are required to provide the information about fund directorships called for by item 401(e). Item 401(e) would continue to require disclosure of information concerning service of a fund director as a director of companies that are not registered investment companies.

[24] Item 8 of Schedule 14A (by reference to item 402(g) of Regulation S–K [17 CFR 229.402(g)]). Item 8 also incorporates for funds the management compensation disclosure requirements in fund registration statement forms. Forms N–1A (item 14), N–2 (item 18), and N–3 (item 20). Prior to recent revisions to the management compensation disclosure for operating companies, funds had been subject to the general compensation disclosure requirements of item 402 [17 CFR 229.402]. In the recent revisions, funds were excluded from amended item 402 and instead made subject to the registration statement form requirements. Securities Act Rel. No. 6962 (Oct. 16, 1992) [57 FR 48125 (Oct. 21, 1992)].

[25] The Commission also proposed to amend fund registration statements to require a statement in the prospectus that information about director and officer compensation and the background of fund management is available in the Statement of Additional Information ("SAI"). Upon consideration of the comments, the Commission believes the general statement in the prospectus about the availability of information in the SAI is sufficient notice for shareholders and has not included this requirement in the final rules.

[26] The Commission believes that the receipt of a substantial amount of compensation from a fund complex is not necessarily determinative of the director's independence. The amount of compensation received, however, could be one factor to be considered in evaluating the independence of a fund director from fund management.

[27] Funds can, of course, provide supplemental information about director compensation if there is concern that shareholders may draw incorrect inferences from the disclosure of aggregate compensation received by directors from a fund complex.

[28] Subparagraph (b)(6) of item 22. Paragraph (ii) of subparagraph (b)(6) has been revised to make it clear that the material terms of compensation arrangements with directors other than the typical directors' fees disclosed in the compensation table, including, for example, consulting arrangements,

E. Approval of Investment Advisory Contract

The Commission proposed to modify several of the disclosure requirements applicable to proxy statements seeking approval of an investment advisory contract to improve and to update the information provided to shareholders. These modifications included:

- eliminating the disclosure of extensive information currently required concerning brokerage allocation and commission practices;[29]
- requiring only disclosure of the amount and percentage of brokerage commissions paid to affiliates of the investment adviser;[30]
- limiting disclosure of the rate and amount of the advisory fee charged to other funds advised by the investment adviser to those funds with substantially similar investment objectives;[31] and
- eliminating the requirement that the proxy statement contain a certified balance sheet of the investment adviser.[32]

Commenters generally endorsed these modifications, and the Commission is adopting them as proposed.[33]

The Commission is eliminating some of the requirements that funds provide information about brokerage practices because the requirements have not provided investors with information that is helpful in making a decision whether to vote for or against an investment advisory contract. The Commission continues to be concerned about fund brokerage practices. Recently, the Commission proposed amendments to Form N–1A that, if adopted, would require certain expenses paid by directed brokerage to be treated as an expense in fund financial statements and the fee table, and would require average brokerage commission rates to be disclosed in the Financial Highlights Table in fund prospectuses.[34] Thus, the Commission continues to be committed to improving the transparency of fund brokerage commissions, and has directed the Division of Investment Management to develop rules designed to improve disclosure about the "soft dollar" benefits advisers obtain from the use of their client brokerage.

The Commission received several comments on other of the proposed modifications. As discussed below, the modifications, as adopted, have been revised in some respects to reflect these comments.

1. General Partners of the Investment Adviser

If the investment adviser is a partnership, the proxy rules have required disclosure of the names of all general partners in the proxy statement.[35] The Commission proposed to limit the disclosure to those general partners of the investment adviser with the five largest economic interests in the partnership and, if different, to those general partners comprising the management or executive committee of the partnership. The Commission requested comment on whether general partners that have significant management responsibilities relating to the fund also should be identified. Commenters generally supported limiting the disclosure concerning the general partners of the investment adviser but differed on the scope of the limitation. One commenter supported naming *both* the partners with the five largest economic interests, as proposed, *and* partners with significant management responsibilities relating to a fund. Upon reconsideration, the Commission believes that the names of partners with significant managerial responsibilities as well as controlling partnership interests is material to shareholders and has modified the partner disclosure requirement accordingly.[36]

2. Material Factor Discussion

The Commission proposed to require a discussion of material factors considered by the board of directors in recommending that fund shareholders approve an investment advisory contract. As proposed, the item enumerated certain material factors that might be included in the discussion. Several commenters objected to enumerated material factors arguing that such a requirement would lead to formalistic and "boiler plate" disclosure and may tend to oversimplify the board's evaluation process. The Commission believes that the material factors discussion should reflect the board of directors' evaluation of the investment advisory contract and shares commenters' concern that enumeration of factors might lead to "boiler plate" disclosure.[37] Therefore, the Commission has decided not to include a list of material factors in the requirement for a discussion of the recommended investment advisory contract.[38]

F. Approval of Distribution Plan

The Commission proposed to amend the proxy rules to set forth certain disclosure requirements for proxy statements seeking approval of a Rule 12b–1 Plan and plan amendments.[39] These proposed requirements reflected, in many respects, disclosure currently made in proxy statements. Commenters

must be described. Such arrangements, however, could raise the issue of whether a director has a material business or professional relationship with the fund and could be found to be an "interested" director under section 2(a)(19)(A)(vi) of the 1940 Act [15 U.S.C. 80a–2(a)(19)(A)(vi)]. See Lexington Research Fund, Inc. (pub. avail. Dec. 3, 1977); Variable Stock Fund of Richmond (pub. avail. Feb. 17, 1972).

The compensation disclosure required for fund officers would remain the same under the proposed amendments except for minor revisions. Because most funds are externally managed, fund executive officers generally do not have formal management roles and receive no compensation from the fund. As currently required, however, compensation received by the three highest paid executive officers having aggregate compensation from a fund (but not the fund complex) exceeding $60,000 would have to be disclosed in the compensation table. To make the disclosure of management compensation uniform, the compensation disclosure required to appear in the SAI portion of a fund's registration statement is amended to be consistent with item 22. Forms N–1A (item 14), N–2 (item 18), and N–3 (item 20).

[29] Current rule 20a–2(a)(7) requires extensive information concerning brokerage allocation and commission practices. A discussion of soft dollar arrangements benefitting the investment adviser would be required in the proposed discussion of material factors considered by the board of directors in approving the investment advisory contract in item 22(c)(11).

[30] Subparagraph (c)(13) of item 22.

[31] Subparagraph (c)(10) of item 22. Current rule 20a–2(b)(4) [17 CFR 270.20a–2(b)(4)] requires disclosure of fee information for all funds advised by the same adviser.

[32] In lieu of the balance sheet, item 22 requires that funds disclose in their proxy statements any financial condition of the adviser that is reasonably likely to impair its ability to fulfill its commitment to the fund under the investment advisory contract.

[33] The Commission also is adopting, as proposed, an additional disclosure requirement concerning investment advisory fees. If a change in the investment advisory fee is sought, subparagraph (c)(9) of item 22 requires disclosure of the aggregate amount of the investment adviser's fee for the last year, the amount the adviser would have received had the proposed fee been in effect, and the percentage amount of the proposed increase.

[34] Investment Company Act Rel. No. 20472 (Aug. 11, 1994) [59 FR 42187 (Aug. 17, 1994)].

[35] Rule 20a–2(b)(1) [17 CFR 270.20a–2(b)(1)] incorporating rule 20a–2(a)(2).

[36] Subparagraph (c)(2) of item 22.

[37] Section 15(c) of the 1940 Act [15 U.S.C. 80a–15(c)] requires fund directors to request and to assess such information as may be necessary to evaluate the terms of an investment advisory contract.

[38] The Commission is retaining, as proposed, the requirement to include a discussion of soft dollar arrangements benefitting the investment adviser in the discussion of material factors considered by the board of directors. Under section 15(c) of the 1940 Act, the responsibilities of directors in approving an investment advisory contract extend to monitoring of soft dollar arrangements of the investment adviser. *See* Securities Exchange Act Rel. No. 23170 (Apr. 23, 1986) [51 FR 16004 (Apr. 30, 1986)] at § IV.B.3.

[39] Rule 12b–1 under the 1940 Act permits the use of fund assets to finance the distribution of shares under certain conditions, one of which is shareholder approval of a Rule 12b–1 Plan or amendments to a Rule 12b–1 Plan that would materially increase the amount spent for distribution.

generally supported the proposed express disclosure requirements for Rule 12b–1 Plans, and the Commission is adopting item 22(d) substantially as proposed.[40] Item 22(d) requires: (i) a description of the proposed action and the reasons shareholders are being requested to vote on adoption (or amendment) of a Rule 12b–1 Plan; (ii) disclosure of material differences between the proposed and the current Rule 12b–1 Plan; (iii) disclosure about distribution expenses under the plan paid by the fund during the last fiscal year to the fund's investment adviser, principal underwriter, administrator, or any of their affiliated persons, and to persons receiving 10% or more of the fund's aggregate distribution fees; and (iv) disclosure about the factors the board of directors considered in recommending adoption of (or amendment to) the Rule 12b–1 Plan.[41]

G. Annual Report Delivery Requirements

Rule 14a–3(b) [17 CFR 240.14a–3(b)] under the 1934 Act requires that, when directors are to be elected at an annual or special shareholder meeting, registrants, including funds, furnish each person solicited with a proxy statement that is accompanied or preceded by an annual report to shareholders. Most non-investment company registrants hold annual meetings to elect directors, and, in many cases, the annual report delivery requirement under rule 14a–3(b) is the only requirement that shareholders receive an annual report. Funds, on the other hand, are subject to express annual (and semi-annual) shareholder reporting requirements under section 30(d) of the 1940 Act [15 U.S.C. 80a–29(d)] and rule 30d–1, regardless of whether they hold annual meetings, and fund shareholder meetings may not coincide with the mailing of the annual shareholder report.[42] To clarify the annual report delivery requirements for funds, the Commission proposed to amend rule 14a–3(b) to set forth the conditions under which a fund's annual report previously transmitted to shareholders as required under rule 30d–1 would satisfy the rule.[43] The Commission requested comment on other alternatives for the annual report delivery requirement, including whether it might be appropriate to eliminate the proxy annual report requirement for funds in light of the reports required to be transmitted to shareholders semi-annually under rule 30d–1.

Several commenters supported the proposed clarification of the annual report delivery requirement. Other commenters, however, urged the Commission to eliminate the requirement and to substitute a requirement that the proxy statement include a legend advising shareholders that an annual report is available upon request. These commenters argued that the shareholder reporting requirements of the 1940 Act make the proxy annual report requirement superfluous. Commenters also noted that the primary effect of the annual report requirement is to impose restrictions on holding shareholder meetings because meetings can not be scheduled when the annual report for the preceding fiscal year is not yet available after the end of the fiscal year. In some cases, a fund complex may wish to make a combined proxy mailing for several funds to reduce the expense of the proxy solicitation; however, a joint proxy statement may be precluded if some of the funds have different fiscal years for which the annual report is not available.[44] These commenters argued that the cost of mailing an annual report with the proxy statement to new shareholders who have not received an annual report can be substantial, and these expenses are borne by the fund's shareholders.

The Commission agrees that the costs imposed on funds and their shareholders outweigh the benefits of requiring that annual reports accompany a proxy statement. At the time of a proxy solicitation, shareholders who have recently invested in a fund will have received a current prospectus and other shareholders will have received either an annual or semi-annual report within six months of receiving the proxy statement. In addition, most funds transmit to shareholders quarterly account statements providing information about fund performance. In contrast with the timeliness of information provided under the 1940 Act's reporting regime, rule 14a–3(b) requires delivery of a fund annual report that may be, in some cases, almost twelve months old. Thus, this requirement has the unintended and anomalous effect of requiring delivery of an annual report the information in which may have been superseded by information in a more recent semi-annual report. Moreover, as applied, the current requirements impose significant restraints on the timing of shareholder meetings and may add substantial costs to holding meetings when, for example, accountants must perform an audit on an expedited basis. Therefore, the Commission is revising rule 14a–3(b) to eliminate the annual report delivery requirement for funds.[45]

Item 22(a) requires, in lieu of the annual report, inclusion in the proxy statement of a statement that the fund's most recent annual and semi-annual reports are available upon request.[46] Those shareholders in need of information contained in the annual report will, therefore, continue to have access to it.

H. Other Matters

The Commission is adopting two other amendments to the general proxy provisions. First, the Commission is amending rule 14a–3(e)(2) [17 CFR

[40] *See supra* note 9 and accompanying text for a discussion of proxy statement disclosure concerning approval of Rule 12b–1 Plans for multiple class funds. *See supra* note 13 and accompanying text for a discussion of the term "distributor" and related modifications to item 22(d).

[41] In addition, when the effect of the action would be to increase fund expenses, item 22(a) requires inclusion of a comparative fee table showing the level of fees before and after adoption of the recommended Rule 12b–1 Plan. Subparagraph (a)(3)(iv) of item 22.

[42] Funds generally are not required under state law or the 1940 Act to hold annual shareholder meetings. Funds schedule shareholder meetings as necessary to elect directors, to approve investment advisory contracts or Rule 12b–1 Plans, or to vote on other matters requiring shareholder approval.

[43] As proposed, an annual report transmitted to shareholders two months before the date of the proxy statement would satisfy the delivery requirements of rule 14a–3(b). Where more than two months has elapsed, the rule 14a–3(b) annual report delivery requirement would be satisfied if: (i) the fund mails the proxy statement at least 30 days prior to the meeting; (ii) the proxy statement includes a prominent statement that the most recent annual report and any subsequent semi-annual report will be delivered to shareholders, upon written or oral request, without charge; and (iii) if requested by a shareholder, the annual report and, if available, the semi-annual report is transmitted within two business days of the request.

[44] In the past, funds have sought relief from the rule 14a–3 annual report delivery requirement when a shareholder vote is necessary before the annual report is available after the end of the fund's fiscal year. *See* Dreyfus California Tax Exempt Bond Fund, Inc., *et al.* (pub. avail. June 18, 1994); Dean Witter American Value Fund, *et al.* (pub. avail. Nov. 18, 1992).

[45] Paragraph (4) of rule 14a–3(b) requires the annual report to include information concerning changes in and disagreements with accountants on accounting and financial disclosure required by item 304 of Regulation S–K [17 CFR 229.304]. The Commission is preserving this requirement for funds by amending the shareholder report financial statement requirements set forth in rule 30d–1 by reference to the applicable item in the registration statement forms (new instruction 4(iv) of item 23 of Form N–1A; new instruction 4(c) of item 23 of Form N–2; and new instruction 4(iv) to paragraph (a) of item 27 of Form N–3).

[46] Paragraph (a)(3)(iii) of item 22. This provision also is applicable to information statements. Rule 14c–3 [17 CFR 240.14c–3], which requires an annual report to accompany an information statement concerning the election of directors, also is revised to eliminate the annual report requirement.

240.14a–3(e)(2)], which relieves funds of the obligation to deliver proxy and other soliciting materials to shareholders whose dividend payments are returned as undeliverable, to relieve funds (and other registrants) of the delivery obligation when dividend reinvestment confirmations are returned as undeliverable. Second, the Commission is amending Item 3 of Schedule 14A, which requires a description of appraisal or similar rights under state law applicable to any matter being acted upon (*i.e.*, mergers and other fundamental corporate transactions), to make it expressly inapplicable to open-end funds.[47] The 1940 Act, which requires open-end funds to redeem their securities at net asset value,[48] supersedes state law appraisal rights.[49]

I. Date of Effectiveness

The new amendments to the proxy rules are effective on November 23, 1994. Funds may file, at their option, proxy statements prepared in accordance with the new rules on or after the effective date. Funds must comply with the new rules for all proxy statements filed on or after January 23, 1995. During the transition period between the effective date and the compliance date, funds should state in the cover letter submitting the proxy statement whether the proxy statement is prepared using the new rules.

II. Cost/Benefit of the Proposals

The amendments to the proxy rules, as adopted, are intended to improve the disclosure provided to fund shareholders in proxy statements. The amendments are not expected to impose additional burdens on funds. The amendments eliminate a substantial amount of "boiler plate" disclosure regarding matters that may not be relevant to shareholders. The additional information required by the amendments is readily available, and the elimination of the annual report requirement in connection with the proxy statement should provide funds with greater flexibility in scheduling shareholder meetings and reduce related expenses.

[47] Instruction 2 to item 3 of Schedule 14A. Closed-end funds (including closed-end funds that make periodic repurchases of their shares under rule 22c–3 of the 1940 Act [17 CFR 270.22c–3]), which do not issue redeemable securities, would continue to be subject to item 3.

[48] Rule 22c–1 [17 CFR 270.22c–1] (providing that redeemable securities must be redeemed at a price based on the current net asset value next computed after tender of the security for redemption).

[49] Investment Company Act Rel. No. 8752 (Apr. 10, 1975) [40 FR 17986 (Apr. 24, 1975)].

III. Regulatory Flexibility Act Analysis

A summary of the Initial Regulatory Flexibility Analysis, which was prepared in accordance with 5 U.S.C. 603, was published in the Proposing Release. No comments were received on this analysis. The Commission has prepared a Final Regulatory Flexibility Analysis, a copy of which may be obtained by contacting Kathleen K. Clarke, Office of Disclosure and Adviser Regulation, 450 Fifth Street, N.W., Washington, D.C. 20549.

IV. Statutory Authority

The Commission is amending the proxy rules under sections 14 [15 U.S.C. 78n] and 23(a) [15 U.S.C. 78(w)] of the 1934 Act and sections 20(a) and 38(a) [15 U.S.C. 39(a)] of the 1940 Act. The authority citations for the amendments to the rules precede the text of the amendments.

V. Text of Rule Amendments

List of Subjects in 17 CFR Parts 200, 229, 239, 240, 270, and 274

Authority delegation (Government agencies), Investment companies, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Commission is amending title 17, chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The authority citation for Part 200 is amended by adding the following citation:

Authority: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 78*ll*(d), 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

* * * * *

Section 200.30–5 also is issued under 15 U.S.C. 77f, 77g, 77h, 77j, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a-8, 80a-20, 80a-24, 80a-29, 80b-3, 80b-4.

§ 200.30–5 [Amended]

2. The authority citation following § 200.30–5 is removed.

3. By amending § 200.30–5 to remove and to reserve paragraph (a)(5).

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

4. The authority citation for Part 229 continues to read, in part, as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

§ 229.401 [Amended]

5. The authority citation following § 229.401 is removed.

6. By amending § 229.401 to add an instruction following paragraph (e) to read as follows:

§ 229.401 (Item 401) Directors, executive officers, promoters and control persons.

* * * * *

(e) * * *

Instruction to Paragraph (e) of Item 401.

For the purposes of paragraph (e)(2), where the other directorships of each director or person nominated or chosen to become a director include directorships of two or more registered investment companies that are part of a "fund complex" as that term is defined in Item 22(a) of Schedule 14A under the Exchange Act (§ 240.14a–101 of this chapter), the registrant may, rather than listing each such investment company, identify the fund complex and provide the number of investment company directorships held by the director or nominee in such fund complex.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

7. The authority citation for Part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

* * * * *

8. By amending Item 3 of Form N–14 (referenced in § 239.23) to revise the title, to redesignate paragraphs (a) and (b) as paragraphs (b) and (c), to add paragraph (a), and to revise the third sentence of redesignated paragraph (b) to read as follows:

Note: The text of Form N–14 does not and these amendments will not appear in the Code of Federal Regulations.

Form N–14

* * * * *

Item 3. Fee Table, Synopsis Information, and Risk Factors

(a) Include a table showing the current fees for the registrant and the company being acquired and pro forma fees, if different, for the registrant after giving effect to the transaction using the format prescribed in the appropriate registration statement form under the 1940 Act (for open-end management investment companies, Item 2 of Form N–1A; for closed-end management investment companies, Item 3 of Form N–2; and for separate accounts that offer variable annuity contracts, Item 3 of Form N–3).

(b) * * * As to the registrant and company being acquired, compare. (1) investment

objectives and policies; (2) distribution and purchase procedures and exchange rights; (3) redemption procedures; and (4) any other significant considerations. * * *

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

9. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

10. By amending § 240.14a–3 to revise the introductory text of paragraph (b), to remove the third sentence of paragraph (b)(1), to remove the phrase ", other than a registered investment company," after the word "registrant" in Note 2 to paragraph (b)(1); to remove and reserve paragraph (b)(12), and to revise paragraph (e)(2) to read as follows:

§ 240.14a–3 Information to be furnished to security holders.

* * * * *

(b) If the solicitation is made on behalf of the registrant, other than an investment company registered under the Investment Company Act of 1940, and relates to an annual (or special meeting in lieu of the annual) meeting of security holders, or written consent in lieu of such meeting, at which directors are to be elected, each proxy statement furnished pursuant to paragraph (a) of this section shall be accompanied or preceded by an annual report to security holders as follows:

* * * * *

(12) [Reserved]

* * * * *

(e) * * *

(1) * * *

(2) Unless state law requires otherwise, a registrant is not required to send an annual report or proxy statement to a security holder if:

(i) An annual report and a proxy statement for two consecutive annual meetings; or

(ii) All, and at least two, payments (if sent by first class mail) of dividends or interest on securities, or dividend reinvestment confirmations, during a twelve month period, have been mailed to such security holder's address and have been returned as undeliverable. If any such security holder delivers or causes to be delivered to the registrant written notice setting forth his then current address for security holder communications purposes, the registrant's obligation to deliver an annual report or a proxy statement under this section is reinstated.

11. By amending § 240.14a–6 to revise the introductory text of paragraph (i) to read as follows:

§ 240.14a–6 Filing requirements.

* * * * *

(i) Fees. At the time of filing the proxy solicitation material, the persons upon whose behalf the solicitation is made, other than investment companies registered under the Investment Company Act of 1940, which shall refer to Item 22(a)(2) of Schedule 14A, shall pay to the Commission the following applicable fee:

* * * * *

12. By amending § 240.14a–101 to add an "s" at the end of the word "Instruction" in Item 3, to designate the instruction to Item 3 as 1. and to add an instruction 2., to revise paragraphs (c) and (d) of Item 7, to revise the last sentence of Item 8 prior to the instruction, to add an instruction at the end of paragraph (a)(2)(ii)(A) and after paragraph (b)(1)(ii) of Item 10, and to revise Item 20 to read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 3. Dissenters' right of appraisal.

* * * * *

Instructions. 1. * * *

2. Open-end investment companies registered under the Investment Company Act of 1940 are not required to respond to this item.

* * * * *

Item 7. Directors and executive officers.

* * * * *

(c) The information required by Item 404(b) of Regulation S–K (§ 229.404 of this chapter).

(d) In lieu of paragraphs (a) through (c) of this Item, investment companies registered under the Investment Company Act of 1940 shall furnish the information required by paragraphs (1) through (5) of Item 22(b) of this Schedule 14A.

* * * * *

Item 8. Compensation of directors and executive officers.

* * * In the case of investment companies registered under the Investment Company Act of 1940 and registrants that have elected to be regulated as business development companies, furnish the information required by Item 22(b)(6) of this Schedule.

* * * * *

Item 10. Compensation Plans.

* * * * *

(a) * * *

(2) * * *

(ii) * * *

(A) * * *

Instruction: In the case of investment companies registered under the Investment Company Act of 1940, furnish the information for Compensated Persons as defined in Item 22(b)(6) of this Schedule in lieu of the persons specified in paragraph (a)(3) of Item 402 of Regulation S–K (§ 229.402(a)(3) of this chapter).

* * * * *

(b) * * *

(1) * * *

(ii) * * *

Instruction. In the case of investment companies registered under the Investment Company Act of 1940, refer to instruction 4 in Item 22(b)(6)(ii) of this Schedule in lieu of paragraph (f)(1) of Item 402 of Regulation S–K (§ 229.402(f)(1) of this chapter).

* * * * *

Item 20. Other proposed action. If action is to be taken on any matter not specifically referred to in this Schedule 14A, describe briefly the substance of each such matter in substantially the same degree of detail as is required by Items 5 to 19, inclusive, of this Schedule, and, with respect to investment companies registered under the Investment Company Act of 1940, Item 22 of this Schedule.

* * * * *

13. By amending § 240.14a–101 to add Item 22 to read as follows:

§ 240.14A–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 22. Information required in investment company proxy statement.

(a) *General.*

(1) *Definitions.* Unless the context otherwise requires, terms used in this Item that are defined in § 240.14a–1 (with respect to proxy soliciting material), in § 240.14c–1 (with respect to information statements), and in the Investment Company Act of 1940 shall have the same meanings provided therein and the following terms shall also apply:

(i) *Administrator.* The term "Administrator" shall mean any person or persons who provide significant administrative or business management services to the Fund and shall include any person that has been or would be identified in response to Item 5 of Form N–1A (§ 274.11A of this chapter), Item 9 of Form N–2 (§ 274.11a–1 of this chapter), or Item 6 of Form N–3 (§ 274.11b of this chapter).

(ii) *Affiliated broker.* The term "Affiliated Broker" shall mean any broker:

(A) That is an affiliated person of the Fund;

(B) That is an affiliated person of such person; or

(C) An affiliated person of which is an affiliated person of the Fund, its investment adviser, principal underwriter, or Administrator.

(iii) *Distribution plan.* The term "Distribution Plan" shall mean a plan adopted pursuant to Rule 12b–1 under the Investment Company Act of 1940 (§ 270.12b–1 of this chapter).

(iv) *Fund.* The term "Fund" shall mean a Registrant or, where the Registrant is a series company, a separate portfolio of the Registrant.

(v) *Fund complex.* The term "Fund Complex" shall mean two or more Funds that:

(A) Hold themselves out to investors as related companies for purposes of investment and investor services; or

(B) Have a common investment adviser or have an investment adviser that is an affiliated person of the investment adviser of any of the other Funds.

(vi) *Parent.* The term "Parent" shall mean the affiliated person of a specified person who controls the specified person directly or indirectly through one or more intermediaries.

(vii) *Registrant.* The term "Registrant" shall mean an investment company registered under the Investment Company Act of 1940.

(viii) *Subsidiary.* The term "Subsidiary" shall mean an affiliated person of a specified person who is controlled by the specified person directly, or indirectly through one or more intermediaries.

(2) *Filing fees.* In lieu of the fees specified in § 240.14a-6, at the time of filing the preliminary proxy solicitation material, or, if no preliminary solicitation material is filed, at the time of filing the definitive proxy solicitation material, the person upon whose behalf the solicitation is made shall pay to the Commission a fee of $125, no part of which shall be refunded.

(3) *General disclosure.* Furnish the following information in the proxy statement of a Fund or Funds:

(i) State the name and address of the Fund's investment adviser, principal underwriter, and Administrator.

(ii) When a Fund proxy statement solicits a vote on proposals affecting more than one Fund or class of securities of a Fund (unless the proposal or proposals are the same and affect all Fund or class shareholders), present a summary of all of the proposals in tabular form on one of the first three pages of the proxy statement and indicate which Fund or class shareholders are solicited with respect to each proposal.

(iii) Unless the proxy statement is accompanied by a copy of the Fund's most recent annual report, state prominently in the proxy statement that the Fund will furnish, without charge, a copy of the annual report and the most recent semi-annual report succeeding the annual report, if any, to a shareholder upon request, providing the name, address, and toll-free telephone number of the person to whom such request shall be directed (or, if no toll-free telephone number is provided, a self-addressed postage paid card for requesting the annual report). The Fund should provide a copy of the annual report and the most recent semi-annual report succeeding the annual report, if any, to the requesting shareholder by first class mail, or other means designed to assure prompt delivery, within three business days of the request.

(iv) If the action to be taken would, directly or indirectly, establish a new fee or expense or increase any existing fee or expense to be paid by the Fund or its shareholders, provide a table showing the current and pro forma fees (with the required examples) using the format prescribed in the appropriate registration statement form under the Investment Company Act of 1940 (for open-end management investment companies, Item 2 of Form N–1A (§ 239.15A); for closed-end management investment companies, Item 3 of Form N–2 (§ 239.14); and for separate accounts that offer variable annuity contracts, Item 3 of Form N–3 (§ 239.17a)).

Instructions. 1. Where approval is sought only for a change in asset breakpoints for a pre-existing fee that would not have increased the fee for the previous year (or have the effect of increasing fees or expenses, but for any other reason would not be reflected in a pro forma fee table), describe the likely effect of the change in lieu of providing pro forma fee information.

2. An action would indirectly establish or increase a fee or expense where, for example, the approval of a new investment advisory contract would result in higher custodial or transfer agency fees.

3. The tables should be prepared in a manner designed to facilitate understanding of the impact of any change in fees or expenses.

4. A Fund that offers its shares exclusively to one or more separate accounts and thus is not required to include a fee table in its prospectus (see Item 2(a)(ii) of Form N–1A (§ 239.15A)) should nonetheless prepare a table showing current and pro forma expenses and disclose that the table does not reflect separate account expenses, including sales load.

(v) If action is to be taken with respect to the election of directors or the approval of an advisory contract, describe any purchases or sales of securities of the investment adviser or its Parents, or Subsidiaries of either, since the beginning of the most recently completed fiscal year by any director or any nominee for election as a director of the Fund.

Instructions. 1. Identify the parties, state the consideration, the terms of payment and describe any arrangement or understanding with respect to the composition of the board of directors of the Fund or of the investment adviser, or with respect to the selection of appointment of any person to any office with either such company.

2. Transactions involving securities in an amount not exceeding one percent of the outstanding securities of any class of the investment adviser or any of its Parents or Subsidiaries may be omitted.

(4) *Electronic filings.* If action is to be taken with respect to any transaction described in Items 11, 12, or 14 of this Schedule 14A and the Fund proxy or information statement is filed electronically, file after the cover page of the proxy statement a Financial Data Schedule in accordance with rule 483 of Regulation C (§ 230.483 of this chapter).

(b) *Election of directors.* If action is to be taken with respect to the election of directors of the Fund and the solicitation is made by or on behalf of the Fund or by or on behalf of an investment adviser, furnish the following information in the proxy statement in addition to the information (and in the format) required by paragraphs (e) through (g) of Item 7 of Schedule 14A.

Instructions. 1. Furnish information with respect to a prospective investment adviser to the extent applicable.

2. If the solicitation is made other than by or on behalf of the Fund or by or on behalf of an investment adviser, provide only information as to nominees of the person making the solicitation.

(1) Identify each director or nominee for election as director who is, or was during the past five years, an officer, employee, director, general partner, or shareholder of the investment adviser. As to any director or nominee who is not a director or general partner of the investment adviser and owns any securities or has, or had during the past five years, any other material direct or indirect interest in the investment adviser or any person controlling, controlled by, or under common control with the investment adviser, describe the nature of such interest.

(2) Identify each director or nominee who has or had during the past five years any material direct or indirect interest in the Fund's principal underwriter or Administrator and describe the nature of such interest.

(3) Describe briefly, and where practicable, state the approximate dollar amount, of any material interest, direct or indirect, of any director or nominee

for election as a director of the Fund in any material transactions since the beginning of the most recently completed fiscal year, or in any proposed material transactions, to which the investment adviser, the principal underwriter, the Administrator, any Parent or Subsidiary of such entities (other than another Fund), or any Subsidiary of the Parent of such entities was or is to be a party.

Instructions. 1. Include the name of each person whose interest in any transaction is described and the nature of the relationship by reason of which such interest is required to be described. Where it is not practicable to state the approximate dollar amount of the interest, indicate the approximate dollar amount involved in the transaction.

2. As to any transaction involving the purchase or sale of assets by or to the investment adviser, or the Administrator, state the cost of the assets to the purchaser and the cost thereof to the seller if acquired by the seller within two years prior to the transaction.

3. If the interest of any person arises from the position of the person as a partner in a partnership, the proportionate interest of such person in transactions to which the partnership is a party need not be set forth, but state the amount involved in the transaction with the partnership.

4. No information need be given in response to this paragraph with respect to any transaction that is not related to the business or operations of the Fund and to which neither the Fund nor any of its Parents or Subsidiaries is a party.

(4) Provide in tabular form, to the extent practicable, the information required by Items 401, 404 (a) and (c), and 405 of Regulation S–K (§§ 229.401, 229.404, and 229.405 of this chapter).

Instructions. 1. Indicate by an asterisk any nominee or director who is or would be an "interested person" within the meaning of section 2(a)(19) of the Investment Company Act of 1940 and describe the relationships, events, or transactions by reason of which such person is deemed an "interested person."

2. Separate accounts registered as management investment companies need not provide any information concerning the officers of the sponsoring insurance company who are not directly or indirectly engaged in activities related to the separate account in response to Item 401 of Regulation S–K.

(5) Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the Fund's business, to which any director or nominee for director or affiliated person of such director or nominee is a party adverse to the Fund or any of its affiliated persons or has a material interest adverse to the Fund or any of its affiliated persons. Include the name of the court where the case is pending, the date instituted, the principal parties, a description of the factual basis alleged to underlie the proceeding, and the relief sought.

(6) For all directors, and for each of the three highest-paid executive officers that have aggregate compensation from the Fund for the most recently completed fiscal year in excess of $60,000 ("Compensated Persons"):

(i) Furnish the information required by the following table for the last fiscal year:

COMPENSATION TABLE

(1) Name of person, position	(2) Aggregate compensation from fund	(3) Pension or retirement benefits accrued as part of fund expenses	(4) Estimated annual benefits upon retirement	(5) Total compensation from fund and fund complex paid to directors

Instructions. 1. For column (1), indicate, if necessary, the capacity in which the remuneration is received. For Compensated Persons that are directors of the Fund, compensation is amounts received for service as a director.

2. If the Fund has not completed its first full year since its organization, furnish the information for the current fiscal year, estimating future payments that would be made pursuant to an existing agreement or understanding. Disclose in a footnote to the Compensation Table the period for which the information is furnished.

3. Include in column (2) amounts deferred at the election of the Compensated Person, whether pursuant to a plan established under Section 401(k) of the Internal Revenue Code [26 U.S.C. 401(k)] or otherwise, for the fiscal year in which earned. Disclose in a footnote to the Compensation Table the total amount of deferred compensation (including interest) payable to or accrued for any Compensated Person.

4. Include in columns (3) and (4) all pension or retirement benefits proposed to be paid under any existing plan in the event of retirement at normal retirement date, directly or indirectly, by the Fund or any of its Subsidiaries, or by other companies in the Fund Complex. Omit column (4) where retirement benefits are not determinable.

5. For any defined benefit or actuarial plan under which benefits are determined primarily by final compensation (or average final compensation) and years of service, provide the information required in column (4) in a separate table showing estimated annual benefits payable upon retirement (including amounts attributable to any defined benefit supplementary or excess pension award plans) in specified compensation and years of service classifications. Also provide the estimated credited years of service for each Compensated Person.

6. Include in column (5) only aggregate compensation paid to a director for service on the board and other boards of investment companies in a Fund Complex specifying the number of such other investment companies.

(ii) Describe briefly the material provisions of any pension, retirement, or other plan or any arrangement other than fee arrangements disclosed in paragraph (i) pursuant to which Compensated Persons are or may be compensated for any services provided, including amounts paid, if any, to the Compensated Person under any such arrangements during the most recently completed fiscal year. Specifically include the criteria used to determine amounts payable under any plan, the length of service or vesting period required by the plan, the retirement age or other event which gives rise to payments under the plan, and whether the payment of benefits is secured or funded by the Fund.

(iii) With respect to each Compensated Person, business development companies shall include the information required by Items 402(b)(2)(iv) and 402(c) of Regulation S–K (§§ 229.402(b)(2)(iv) and 229.402(c) of this chapter).

(c) *Approval of investment advisory contract.* If action is to be taken with respect to an investment advisory contract, include the following information in the proxy statement.

Instruction. Furnish information with respect to a prospective investment adviser to the extent applicable (including the name and address of the prospective investment adviser).

(1) With respect to the existing investment advisory contract:

(i) State the date of the contract and the date on which it was last submitted to a vote of security holders of the Fund, including the purpose of such submission;

(ii) Briefly describe the terms of the contract, including the rate of compensation of the investment adviser;

(iii) State the aggregate amount of the investment adviser's fee and the amount and purpose of any other material

payments by the Fund to the investment adviser, or any affiliated person of the investment adviser, during the last fiscal year of the Fund;

(iv) If any person is acting as an investment adviser of the Fund other than pursuant to a written contract that has been approved by the security holders of the company, identify the person and describe the nature of the services and arrangements;

(v) Describe any action taken with respect to the investment advisory contract since the beginning of the Fund's last fiscal year by the board of directors of the Fund (unless described in response to paragraph (c)(1)(vi)) of this Item 22); and

(vi) If an investment advisory contract was terminated or not renewed for any reason, state the date of such termination or non-renewal, identify the parties involved, and describe the circumstances of such termination or non-renewal.

(2) State the name, address and principal occupation of the principal executive officer and each director or general partner of the investment adviser.

Instruction. If the investment adviser is a partnership with more than ten general partners, name:

(i) The general partners with the five largest economic interests in the partnership, and, if different, those general partners comprising the management or executive committee of the partnership or exercising similar authority;

(ii) The general partners with significant management responsibilities relating to the fund.

(3) State the names and addresses of all Parents of the investment adviser and show the basis of control of the investment adviser and each Parent by its immediate Parent.

Instructions. 1. If any person named is a corporation, include the percentage of its voting securities owned by its immediate Parent.

2. If any person named is a partnership, name the general partners having the three largest partnership interests (computed by whatever method is appropriate in the particular case).

(4) If the investment adviser is a corporation and if, to the knowledge of the persons making the solicitation or the persons on whose behalf the solicitation is made, any person not named in answer to paragraph (c)(3) of this Item 22 owns, of record or beneficially, ten percent or more of the outstanding voting securities of the investment adviser, indicate that fact and state the name and address of each such person.

(5) Name each officer or director of the Fund who is an officer, employee, director, general partner or shareholder of the investment adviser. As to any officer or director who is not a director or general partner of the investment adviser and who owns securities or has any other material direct or indirect interest in the investment adviser or any other person controlling, controlled by or under common control with the investment adviser, describe the nature of such interest.

(6) Describe briefly and state the approximate amount of, where practicable, any material interest, direct or indirect, of any director of the Fund in any material transactions since the beginning of the most recently completed fiscal year, or in any material proposed transactions, to which the investment adviser of the Fund, any Parent or Subsidiary of the investment adviser (other than another Fund), or any Subsidiary of the Parent of such entities was or is to be a party.

Instructions. 1. Include the name of each person whose interest in any transaction is described and the nature of the relationship by reason of which such interest is required to be described. Where it is not practicable to state the approximate amount of the interest, indicate the approximate amount involved in the transaction.

2. As to any transaction involving the purchase or sale of assets by or to the investment adviser, state the cost of the assets to the purchaser and the cost thereof to the seller if acquired by the seller within two years prior to the transaction.

3. If the interest of any person arises from the position of the person as a partner in a partnership, the proportionate interest of such person in transactions to which the partnership is a party need not be set forth, but state the amount involved in the transaction with the partnership.

4. No information need be given in response to this paragraph (c)(6) of Item 22 with respect to any transaction that is not related to the business or operations of the Fund and to which neither the Fund nor any of its Parents or Subsidiaries is a party.

(7) Disclose any financial condition of the investment adviser that is reasonably likely to impair the financial ability of the adviser to fulfil its commitment to the fund under the proposed investment advisory contract.

(8) Describe the nature of the action to be taken on the investment advisory contract and the reasons therefor, the terms of the contract to be acted upon, and, if the action is an amendment to, or a replacement of, an investment advisory contract, the material differences between the current and proposed contract.

(9) If a change in the investment advisory fee is sought, state:

(i) The aggregate amount of the investment adviser's fee during the last year;

(ii) The amount that the adviser would have received had the proposed fee been in effect; and

(iii) The difference between the aggregate amounts stated in response to paragraphs (i) and (ii) of this item (c)(9) as a percentage of the amount stated in response to paragraph (i) of this item (c)(9).

(10) If the investment adviser acts as such with respect to any other Fund having a similar investment objective, identify and state the size of such other Fund and the rate of the investment adviser's compensation. Also indicate for any Fund identified whether the investment adviser has waived, reduced, or otherwise agreed to reduce its compensation under any applicable contract.

Instruction. Furnish the information in response to this paragraph (c)(10) of Item 22 in tabular form.

(11) Discuss in reasonable detail the material factors and the conclusions with respect thereto which form the basis for the recommendation of the board of directors that the shareholders approve an investment advisory contract. If applicable, include a discussion of any benefits derived or to be derived by the investment adviser from the relationship with the Fund such as soft dollar arrangements by which brokers provide research to the Fund or its investment adviser in return for allocating fund brokerage.

Instruction. Conclusory statements or a list of factors will not be considered sufficient disclosure. The discussion should relate the factors to the specific circumstances of the fund and the investment advisory contract for which approval is sought.

(12) Describe any arrangement or understanding made in connection with the proposed investment advisory contract with respect to the composition of the board of directors of the Fund or the investment adviser or with respect to the selection or appointment of any person to any office with either such company.

(13) For the most recently completed fiscal year, state:

(i) The aggregate amount of commissions paid to any Affiliated Broker; and

(ii) The percentage of the Fund's aggregate brokerage commissions paid to any such Affiliated Broker.

Instruction. Identify each Affiliated Broker and the relationships that cause the broker to be an Affiliated Broker.

(14) Disclose the amount of any fees paid by the Fund to the investment adviser, its affiliated persons or any affiliated person of such person during

the most recent fiscal year for services provided to the Fund (other than under the investment advisory contract or for brokerage commissions). State whether these services will continue to be provided after the investment advisory contract is approved.

(d) *Approval of distribution plan.* If action is to be taken with respect to a Distribution Plan, include the following information in the proxy statement.

Instruction. Furnish information on a prospective basis to the extent applicable.

(1) Describe the nature of the action to be taken on the Distribution Plan and the reason therefor, the terms of the Distribution Plan to be acted upon, and, if the action is an amendment to, or a replacement of, a Distribution Plan, the material differences between the current and proposed Distribution Plan.

(2) If the Fund has a Distribution Plan in effect:

(i) Provide the date that the Distribution Plan was adopted and the date of the last amendment, if any;

(ii) Disclose the persons to whom payments may be made under the Distribution Plan, the rate of the distribution fee and the purposes for which such fee may be used;

(iii) Disclose the amount of distribution fees paid by the Fund pursuant to the plan during its most recent fiscal year, both in the aggregate and as a percentage of the Fund's average net assets during the period;

(iv) Disclose the name of, and the amount of any payments made under the Distribution Plan by the Fund during its most recent fiscal year to, any person who is an affiliated person of the Fund, its investment adviser, principal underwriter, or Administrator, an affiliated person of such person, or a person that during the most recent fiscal year received 10% or more of the aggregate amount paid under the Distribution Plan by the Fund;

(v) Describe any action taken with respect to the Distribution Plan since the beginning of the Fund's most recent fiscal year by the board of directors of the Fund; and

(vi) If a Distribution Plan was or is to be terminated or not renewed for any reason, state the date or prospective date of such termination or non-renewal, identify the parties involved, and describe the circumstances of such termination or non-renewal.

(3) Describe briefly and state the approximate amount of, where practicable, any material interest, direct or indirect, of any director or nominee for election as a director of the Fund in any material transactions since the beginning of the most recently completed fiscal year, or in any material proposed transactions, to which any person identified in response to Item 22(d)(2)(iv) was or is to be a party.

Instructions. 1. Include the name of each person whose interest in any transaction is described and the nature of the relationship by reason of which such interest is required to be described. Where it is not practicable to state the approximate amount of the interest, indicate the approximate amount involved in the transaction.

2. As to any transaction involving the purchase or sale of assets, state the cost of the assets to the purchaser and the cost thereof to the seller if acquired by the seller within two years prior to the transaction.

3. If the interest of any person arises from the position of the person as a partner in a partnership, the proportionate interest of such person in transactions to which the partnership is a party need not be set forth but state the amount involved in the transaction with the partnership.

4. No information need be given in response to this paragraph (d)(3) of Item 22 with respect to any transaction that is not related to the business or operations of the Fund and to which neither the Fund nor any of its Parents or Subsidiaries is a party.

(4) Discuss in reasonable detail the material factors and the conclusions with respect thereto which form the basis for the conclusion of the board of directors that there is a reasonable likelihood that the proposed Distribution Plan (or amendment thereto) will benefit the Fund and its shareholders.

Instruction. Conclusory statements or a list of factors will not be considered sufficient disclosure.

14. By amending § 240.14c–3 to revise the introductory text of paragraph (a) and to remove and to reserve paragraph (a)(2) (the Note remains unchanged) to read as follows:

§ 240.14c–3 Annual report to be furnished security holders.

(a) If the information statement relates to an annual (or special meeting in lieu of the annual) meeting, or written consent in lieu of such meeting, of security holders at which directors of the registrant, other than an investment company registered under the Investment Company Act of 1940, are to be elected, it shall be accompanied or preceded by an annual report to security holders:

* * * * *

PART 270—GENERAL RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

15. The authority citation for Part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–37, 80a–39 unless otherwise noted;

* * * * *

16. By amending § 270.20a–1 to revise the first sentence of paragraph (a) and to remove paragraph (c) (the instruction remains unchanged) to read as follows:

§ 270.20a–1 Solicitation of proxies, consents, and authorizations.

(a) No person shall solicit or permit the use of his or her name to solicit any proxy, consent, or authorization with respect to any security issued by a registered Fund, except upon compliance with Regulation 14A (§ 240.14a–1 of this chapter), Schedule 14A (§ 240.14a–101 of this chapter), and all other rules and regulations adopted pursuant to Section 14(a) of the Securities Exchange Act of 1934 that would be applicable to such solicitation if it were made in respect of a security registered pursuant to Section 12 of the Securities Exchange Act of 1934. * * *

* * * * *

17. By removing and reserving § 270.20a–2, § 270.20a–3, and § 270.20a–4.

18. By amending § 270.30d–1 to redesignate paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e) and to add paragraph (b) to read as follows:

§ 270.30d–1 Reports to stockholders of management companies.

* * * * *

(b) If any matter was submitted during the period covered by the shareholder report to a vote of shareholders, through the solicitation of proxies or otherwise, furnish the following information:

(1) The date of the meeting and whether it was an annual or special meeting.

(2) If the meeting involved the election of directors, the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting.

(3) A brief description of each matter voted upon at the meeting and the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each matter or nominee for office.

Instruction. The solicitation of any authorization or consent (other than a proxy to vote at a shareholders' meeting) with respect to any matter shall be deemed a submission of such matter to a vote of shareholders within the meaning of this paragraph (b).

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

19. The authority citations following §§ 239.14 and 239.15A are removed.

20. The authority citation for Part 274 is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a–8, 80a–24, and 80a–29, unless otherwise noted.

21. The authority citations following §§ 274.11, 274.11A, 274.11a–1, 274.51, and 274.101 are removed.

22. By amending Item 14 of Form N–1A (referenced in §§ 239.15A and 274.11A) to revise the caption for Column (1) in the table in paragraph (a) to read "Name, Address, and Age", to add an instruction following paragraph (b), and to revise paragraph (c) to read as follows:

Note: The text of Form N–1A does not and these amendments will not appear in the Code of Federal Regulations.

Form N–1A

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Item 14. Management of the Fund

* * * * *

(b) * * *

Instruction: Where the positions held are the same positions with two or more registered investment companies that are part of a "Fund Complex" as that term is defined in Item 22(a) of Schedule 14A under the Exchange Act, the Registrant may, rather than listing each Registrant, identify the Fund Complex and provide the number of such positions held by the identified persons.

(c) Provide the following information for all directors of the Registrant, all members of the advisory board of the Registrant, and for each of the three highest paid executive officers or any affiliated person of the Registrant with aggregate compensation from the Registrant for the most recently completed fiscal year in excess of $60,000 ("Compensated Persons").

(1) Furnish the information required by the following table:

COMPENSATION TABLE

(1) Name of person, position	(2) Aggregate compensation from registrant	(3) Pension or retirement benefits accrued as part of fund expenses	(4) Estimated annual benefits upon retirement	(5) Total compensation from registrant and fund complex paid to directors

Instructions. 1. For column (1), indicate, if necessary, the capacity in which the remuneration is received. For Compensated Persons that are directors of the Registrant, compensation is amounts received for service as a director.

2. If the Registrant has not completed its first full year since its organization, furnish the information for the current fiscal year, estimating future payments that would be made pursuant to an existing agreement or understanding. Disclose in a footnote to the Compensation Table the period for which the information is furnished.

3. Include in column (2) amounts deferred at the election of the Compensated Person, whether pursuant to a plan established under Section 401(k) of the Internal Revenue Code [26 U.S.C. 401(k)] or otherwise, for the fiscal year in which earned. Disclose in a footnote to the Compensation Table the total amount of deferred compensation (including interest) payable to or accrued for any Compensated Person.

4. Include in columns (3) and (4) all pension or retirement benefits proposed to be paid under any existing plan in the event of retirement at normal retirement date, directly or indirectly, by the Registrant, any of its subsidiaries, or other investment companies in the Fund Complex. Omit column (4) where retirement benefits are not determinable.

5. For any defined benefit or actuarial plan under which benefits are determined primarily by final compensation (or average final compensation) and years of service, provide the information required in column (4) in a separate table showing estimated annual benefits payable upon retirement (including amounts attributable to any defined benefit supplementary or excess pension award plans) in specified compensation and years of service classifications. Also provide the estimated credited years of service for each Compensated Person.

6. Include in column (5) only aggregate compensation paid to a director for service on the board and all other boards of investment companies in a Fund Complex specifying the number of such other investment companies.

(2) Describe briefly the material provisions of any pension, retirement, or other plan or any arrangement other than fee arrangements disclosed in paragraph (1) pursuant to which the Compensated Persons are or may be compensated for any services provided, including amounts paid, if any, to the Compensated Person under any such arrangements during the most recently completed fiscal year. Specifically include the criteria used to determine amounts payable under the plan, the length of service or vesting period required by the plan, the retirement age or other event which gives rise to payments under the plan, and whether the payment of benefits is secured or funded by the Registrant.

* * * * *

23. By amending Item 23 of Form N–1A (referenced in §§ 239.15A and 274.11A) to remove the "and" at the end of Instructions (4)(ii) and (5)(ii), to remove the period at the end of Instructions 4(iii) and 5(iii) and to add in its place "; and", and to add Instructions 4(iv) and 5(iv) to read as follows:

Form N–1A

* * * * *

Item 23. Financial Statements

* * * * *

Instructions

* * * * *

4. * * *

(iv) the information concerning changes in and disagreements with accountants and on accounting and financial disclosure required by Item 304 of Regulation S–K (§ 229.304 of this chapter).

5. * * *

(v) the information concerning changes in and disagreements with accountants and on accounting and financial disclosure required by Item 304 of Regulation S–K (§ 229.304 of this chapter).

24. By amending Item 18 of Form N–2 (referenced in §§ 239.14 and 274.11a–1) to revise the caption for Column (1) in the table in paragraph 1 to read "Name, Address, and Age", to add an instruction following paragraph 2, and to revise paragraph 4 to read as follows:

Note: The text of Form N–2 does not and these amendments will not appear in the Code of Federal Regulations.

Form N–2

* * * * *

Item 18. Management

* * * * *

2. * * *

Instruction: Where the positions held are the same positions with two or more registered investment companies that are part of a "Fund Complex" as that term is defined in Item 22(a) of Schedule 14A under the Exchange Act, the Registrant may, rather than

listing each fund, identify the Fund Complex and provide the number of positions held by the identified persons.

3. * * *

4. Provide the following for all directors of the Registrant, all members of the advisory board of the Registrant, and for each of the three highest paid executive officers or any affiliated person of the Registrant with aggregate compensation from the Registrant for the most recently completed fiscal year in excess of $60,000 ("Compensated Persons").

(a) Furnish the information required by the following table:

COMPENSATION TABLE

(1) Name of person, position	(2) Aggregate compensation from fund	(3) Pension or retirement benefits accrued as part of fund expenses	(4) Estimated annual benefits upon retirement	(5) Total compensation from fund and fund complex paid to directors

Instructions. 1. For column (1), indicate, if necessary, the capacity in which the remuneration is received. For Compensated Persons that are directors of the Registrant, compensation is amounts received for service as a director.

2. If the Registrant has not completed its first full year since its organization, furnish the information for the current fiscal year, estimating future payments that would be made pursuant to an existing agreement or understanding. Disclose in a footnote to the Compensation Table the period for which the information is furnished.

3. Include in column (2) amounts deferred at the election of the Compensated Person, whether pursuant to a plan established under Section 401(k) of the Internal Revenue Code [26 U.S.C. 401(k)] or otherwise for the fiscal year in which earned. Disclose in a footnote to the Compensation Table the total amount of deferred compensation (including interest) payable to or accrued for any Compensated Person.

4. Include in columns (3) and (4) all pension or retirement benefits proposed to be paid under any existing plan in the event of retirement at normal retirement date, directly or indirectly, by the Registrant, any of its subsidiaries, or other companies in the Fund Complex. Omit column (4) where retirement benefits are not determinable.

5. For any defined benefit or actuarial plan under which benefits are determined primarily by final compensation (or average final compensation) and years of service, provide the information required in column (4) in a separate table showing estimated annual benefits payable upon retirement (including amounts attributable to any defined benefit supplementary or excess pension award plans) in specified compensation and years of service classifications. Also provide the estimated credited years of service for each Compensated Person.

6. Include in column (5) only aggregate compensation paid to a director for service on the board and all other boards of investment companies in a Fund Complex specifying the number of such other investment companies.

(b) Describe briefly the material provisions of any pension, retirement, or other plan or any arrangement other than fee arrangements disclosed in paragraph (a) pursuant to which Compensated Persons are or may be compensated for any services provided, including amounts paid, if any, to the Compensated Person under any such arrangements during the most recently completed fiscal year. Specifically include the criteria used to determine amounts payable under the plan, the length of service or vesting period required by the plan, the retirement age or other event which gives rise to payments under the plan, and whether the payment of benefits is secured or funded by the Registrant.

(c) With respect to each Compensated Person, business development companies shall include the information required by Items 402(b)(2)(iv) and 402(c) of Regulation S–K (§§ 229.402(b)(2)(iv) and 229.402(c)).

* * * * *

25. By amending Item 23 of Form N–2 (referenced in §§ 239.14 and 274.11a–1) to remove the "and" at the end of Instructions (4)(b) and (5)(b), to remove the period at the end of Instructions 4(c) and 5(c) and to add in its place "; and", and to add Instructions 4(d) and 5(d) to read as follows:

Form N–2

* * * * *

Item 23. Financial Statements

* * * * *

Instructions

* * * * *

4. * * *

(d) the information concerning changes in and disagreements with accountants and on accounting and financial disclosure required by Item 304 of Regulation S–K (§ 229.304 of this chapter).

5. * * *

(d) the information concerning changes in and disagreements with accountant and on accounting and financial disclosure required by Item 304 of Regulation S–K (§ 239.304 of this chapter).

26. By amending Item 20 of Form N–3 (referenced in §§ 239.17a and 274.11b) to revise the caption for Column (1) in the table in paragraph (a) to read "Name, Address, and Age", to add an instruction following paragraph (b), and to revise paragraph (c) to read as follows:

Note: The text of Form N–3 does not and these amendments will not appear in the Code of Federal Regulations.

Form N–3

* * * * *

Item 20. Management

* * * * *

(b) * * *

Instruction: Where the positions held are the same positions with two or more registered investment companies that are part of a "Fund Complex" as that term is defined in Item 22(a) of Schedule 14A under the Exchange Act, the Registrant may, rather than listing each investment company, identify the Fund Complex and provide the number of positions held by the identified persons.

(c) Provide the following information for all directors of the Registrant, all members of the advisory board of the Registrant, and for each of the three highest paid executive officers or any affiliated person of the Registrant with aggregate compensation from the Registrant for the most recently completed fiscal year in excess of $60,000 ("Compensated Persons").

(1) Furnish the information required by the following table:

COMPENSATION TABLE

(1) Name of person, position	(2) Aggregate compensation from registrant	(3) Pension or retirement benefits accrued as part of fund expenses	(4) Estimated annual benefits upon retirement	(5) Total compensation from registrant and fund complex paid to directors

Instructions. 1. For column (1), indicate, if necessary, the capacity in which the remuneration is received. For Compensated Persons that are directors of the Registrant, compensation is amounts received for service as a director.

2. If the Registrant has not completed its first full year since its organization, furnish the information for the current fiscal year, estimating future payments that would be made pursuant to an existing agreement or understanding. Disclose in a footnote to the Compensation Table the period for which the information is furnished.

3. Include in column (2) amounts deferred at the election of the Compensated Person, whether pursuant to a plan established under Section 401(k) of the Internal Revenue Code [26 U.S.C. 401(k)] or otherwise for the fiscal year in which earned. Disclose in a footnote to the Compensation Table the total amount of deferred compensation (including interest) payable to or accrued for any Compensated Person.

4. Include in columns (3) and (4) all pension or retirement benefits proposed to be paid under any existing plan in the event of retirement at normal retirement date, directly or indirectly, by the Registrant, any of its subsidiaries, or any other companies in the Fund Complex. Omit column (4) where retirement benefits are not determinable.

5. For any defined benefit or actuarial plan under which benefits are determined primarily by final compensation (or average final compensation) and years of service, provide the information required in column (4) in a separate table showing estimated annual benefits payable upon retirement (including amounts attributable to any defined benefit supplementary or excess pension award plans) in specified compensation and years of service classifications. Also provide the estimated credited years of service for each Compensated Person.

6. Include in column (5) only aggregate compensation paid to a director for service on the board and all other boards of related Funds in a Fund Complex specifying the number of such other Funds.

7. No information is required to be provided concerning the officers of the sponsoring insurance company who are not directly or indirectly engaged in activities related to the separate account.

(2) Describe briefly the material provisions of any pension, retirement, or other plan or any arrangement other than fee arrangements disclosed in paragraph (1) pursuant to which Compensated Persons are or may be compensated for any services provided, including amounts paid, if any, to the Compensated Person under any such arrangements during the most recently completed fiscal year. Specifically include the criteria used to determine amounts payable under the plan, the length of service or vesting period required by the plan, the retirement age or other event which gives rise to payments under the plan, and whether the payment of benefits is secured or funded by the Registrant.

* * * * *

27. By amending Item 27 of Form N–3 (referenced in §§ 239.17a and 274.11b) to remove the "and" at the end of Instructions 4(ii) and 5(ii) to paragraph (a), to remove the period at the end of Instructions 4(iii) and 5(iii) to paragraph (a) and to add at the end of the Instructions "; and", and to add Instructions 4(iv) and 5(iv) to read as follows:

Form N–3

* * * * *

Item 27. Financial Statements

* * * * *

Instructions

* * * * *

4. * * *

(iv) the information concerning changes in and disagreements with accountants and on accounting and financial disclosure required by Item 304 of Regulation S–K (§ 229.304 of this chapter).

5. * * *

(iv) the information concerning changes in and disagreements with accountants and on accounting and financial disclosure required by Item 304 of Regulation S–K (§ 229.304 of this chapter).

* * * * *

Dated: October 13, 1994.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

Note: This appendix to the preamble will not appear in the Code of Federal Regulations.

APPENDIX.—COMPARATIVE FEE TABLE

Annual fund operating expenses (as a percentage of average net assets)	Existing fee (percent)	Proposed fee (percent)
Management fee	0.52	0.75
12b–1 fees	None	None
Other expenses	0.20	0.20
Total fund operating expenses	0.72	0.95

Example

The following illustrates the expenses on a $1,000 investment under the existing and proposed fees and the expenses stated above, assuming (1) a 5% annual return and (2) redemption at the end of each time period:

	1 year	3 years	5 years	10 years
Existing fee	$8	$24	$42	$95
Proposed fee	10	31	55	125

The purpose of this example and the table is to assist investors in understanding the various costs and expenses of investing in shares of the Fund. The example above should not be considered a representation of past or future expenses of the Fund. Actual expenses may vary from year to year and may be higher or lower than those shown above.

[FR Doc. 94–25813 Filed 10–18–94; 8:45 am]

BILLING CODE 8010–01–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1601

706 Agencies; Durham (NC) Human Relations Commission

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: The Equal Employment Opportunity Commission amends its regulations designating certain State and local fair employment practices agencies (706 Agencies) so that they may handle employment discrimination charges within their jurisdictions. Publication of this amendment effectuates the designation of the Durham (NC) Human Relations Commission.

EFFECTIVE DATE: October 19, 1994.

FOR FURTHER INFORMATION CONTACT: Boyce Nolan, Equal Employment Opportunity Commission, Office of Program Operations, Charge Resolution Review Program, 1801 L Street NW., Washington, DC 20507, Telephone (202) 663–4856.

SUPPLEMENTARY INFORMATION:

List of Subjects in 29 CFR Part 1601

Administrative practice and procedure, Equal employment opportunity, Intergovernmental relations.

Accordingly, title 29, chapter XIV, part 1601 of the Code of Federal Regulations is amended as follows:

PART 1601—PROCEDURAL REGULATIONS

1. The authority citation for part 1601 continues to read as follows:

Authority: 42 U.S.C. 2000e to 2000e–17; 42 U.S.C. 12111 to 12117.

2. Section 1601.74(a) is amended by adding in alphabetical order the following agency: § 1601.74 Designated and notice agencies.

(a) * * *

Durham (NC) Human Relations Commission

* * * * *

Signed at Washington, DC, this 14th day of October 1994.

For the Commission.

James H. Troy,

Director, Office of Program Operations.

[FR Doc. 94–25878 Filed 10–18–94; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF EDUCATION

34 CFR Part 685

RIN 1840–AC11

Federal Direct Student Loan Program

AGENCY: Department of Education.

ACTION: Final Standards, Criteria, and Procedures, compliance with information collection requirements.

SUMMARY: The Secretary amends the final Standards, Criteria, and Procedures under the Federal Direct Student Loan (Direct Loan) Program to add the Office of Management and Budget (OMB) control numbers to certain sections of the Standards, Criteria, and Procedures. Those sections contain information collection requirements approved by OMB. The Secretary takes this action to inform the public that these requirements have been approved, and therefore affected parties must comply with them.

EFFECTIVE DATE: October 19, 1994.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, U.S. Department of Education, 600 Independence Avenue, S.W., Room 3012, ROB–3, Washington, D.C. 20202. Telephone (202) 708–9406. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m., and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: On July 1, 1994, final Standards, Criteria, and Procedures were published in the **Federal Register** governing the repayment and consolidation of loans under the Federal Direct Student Loan (Direct Loan) Program in the academic year beginning July 1, 1994 (59 FR 34278). Compliance with information collection requirements in 34 CFR 685.209, 685.213, 685.214, and 685.215 was delayed until those requirements were approved by OMB under the Paperwork Reduction Act of 1980. On September 23, 1994 OMB approved those information collection requirements under that Act; therefore affected parties must now comply with those requirements.

Waiver of Proposed Rulemaking

In accordance with section 431(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1232(b)(2)(A)) and the Administrative Procedure Act (5 U.S.C. 553), it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. However, the publication of OMB control numbers is purely technical and does not establish substantive policy. Therefore, the Secretary has determined under 5 U.S.C. 553(b)(B) that proposed rulemaking is unnecessary and contrary to the public interest and that a delayed effective date is not required under 5 U.S.C 553(d)(3).

List of Subjects in 34 CFR Part 685

Administrative practice and procedure, Colleges and universities, Education, Loan programs—education, Student Aid, Vocational education.

(Catalog of Federal Domestic Assistance Number 84.268, Federal Direct Student Loan).

Dated: October 12, 1994.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

PART 685—STANDARDS, CRITERIA, AND PROCEDURES FOR THE DIRECT LOAN PROGRAM

1. The authority citation for part 685 continues to read as follows:

Authority: 20 U.S.C. 1087a et seq.

§§ 685.209, 685.213, 685.214 and 685.215 [Amended]

2. Sections 685.209, 685.213, 685.214, and 685.215 are amended by adding the OMB control number at the end of these sections to read as follows:

"(Approved by the Office of Management and Budget under control number 1840–0693)"

[FR Doc. 94–25827 Filed 10–18–94; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[VA20–2–6407; FRL–5082–9]

Approval and Promulgation of Air Quality Implementation Plans; Virginia: Definition of VOC and Emission Control Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. This revision consists of amendments to Virginia's definition of the term volatile organic compound (VOC) and administrative changes to Virginia's lists of emission control areas. The effect of this action is to approve these administrative changes as a revision to the Virginia SIP. This action is being taken under the Clean Air Act (the Act).

DATES: This final rule will become effective December 19, 1994 unless notice is received on or before November 18, 1994, that adverse or critical comments will be submitted. If the effective date is delayed, timely notice will be published in the **Federal Register**.

ADDRESSES: Comments may be mailed to Thomas J. Maslany, Director, Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; the Air and Radiation Docket and Information Center, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Kathleen Stager, (215) 597–0545, at the EPA Regional office listed.

SUPPLEMENTARY INFORMATION: On November 4, 1992, the Commonwealth of Virginia submitted a formal revision to its State Implementation Plan (SIP). The SIP revision consists of amendments to Virginia's definition of the term volatile organic compound (VOC), administrative changes to Virginia's lists of emission control areas, and the addition of a new emission statement regulation. The portion of Virginia's November 4, 1992 SIP revision submittal pertaining to emission statements is the subject of a separate rulemaking action.

I. Background

On November 15, 1990, amendments to the 1977 Clean Air Act were enacted. Under the amended Act, EPA and the States were required to review the designation of areas and to redesignate areas as nonattainment for ozone if the air quality data from 1987, 1988, and 1989, indicated that the area was violating the ozone standard. On November 6, 1991, and November 30, 1992, EPA promulgated designations pursuant to the amended Act, which expanded the boundaries of the Washington, DC, Richmond, and Hampton Roads nonattainment areas. 56 FR 56694 and 57 FR 56762. The Washington, DC nonattainment area was extended to include Stafford County; the Richmond nonattainment area was expanded to include Charles City County, Colonial Heights County, Hanover County, and Hopewell County; and the Hampton Roads nonattainment area was expanded to include James City County, York County, Poquoson County, and Williamsburg City.

To fully comply with the provisions of the Act relative to Federal requirements to control VOC and NO_X emissions in ozone nonattainment areas, Virginia is required to expand the geographic applicability of its VOC and NO_x control regulations to conform to EPA's ozone nonattainment designations. On November 4, 1992, the Commonwealth of Virginia submitted a SIP revision that defined the VOC and NO_X emission control areas to make them consistent with EPA's designated nonattainment areas in 40 CFR part 81 as promulgated on November 6, 1991, and November 30, 1992.

II. EPA Evaluation and Action

The following is EPA's evaluation of the SIP revisions submitted by the Commonwealth of Virginia. Detailed descriptions of the amendments addressed in this document, and EPA's evaluation of the amendments, are contained in the technical support document (TSD) prepared for this revision. Copies of the TSD are available from the EPA Regional office listed in the **Addresses** section of this document.

Commonwealth's Submittal

(1) Section 120–01–02 has been amended to revise the definition of the term volatile organic compound (VOC) to be consistent with EPA's definition.

(2) Appendix P, which contained a list of VOC emission control areas, has been amended to include a list of emission control areas for oxides of nitrogen (NO_X). The NO_X emission control areas correspond to the ozone nonattainment designations which EPA issued in the **Federal Register** on November 6, 1991, and November 30, 1992. 56 FR 56694 and 57 FR 56762.

(3) The list of VOC emission control areas in appendix P was revised to correspond to the ozone nonattainment area designations which EPA issued in the **Federal Register** on November 6, 1991, and November 30, 1992. 56 FR 56694 and 57 FR 56762.

EPA's Evaluation

These amendments are administrative in nature, and will have no adverse effect on air quality. These amendments are consistent with EPA requirements, and consequently serve to strengthen the Virginia SIP. Therefore, they are approvable as a revision to the Virginia SIP.

EPA is approving this SIP revision without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this **Federal Register** publication, EPA is proposing to approve the SIP revision should adverse or critical comments be filed. This action will become effective December 19, 1994 unless, by November 18, 1994, adverse or critical comments are received.

If EPA receives such comments, this action will be withdrawn before the effective date by publishing a subsequent notice that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on this action serving as a proposed rule. 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 such comments are received, the public is advised that this action will be effective on December 19, 1994.

Final Action

EPA is approving amendments to Virginia's definition for the term VOC and lists of VOC and NO_X emission control areas, section 120–01–02 and appendix P, respectively, as a revision to the Virginia SIP. The Commonwealth of Virginia submitted these amendments to EPA as a SIP revision on November 4, 1992.

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

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant

impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the Clean Air Act 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, the Administrator certifies 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 flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

This action has been classified as a Table 2 action for signature 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 2 and Table 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of two years. The EPA has submitted a request for a permanent waiver for Table 2 and 3 SIP revisions. The OMB has agreed to continue the waiver until such time as it rules on EPA's request. This request continues in effect under Executive Order 12866, which superseded Executive Order 12291 on September 30, 1993.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 19, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone.

Dated: August 4, 1994.

Peter H. Kostmayer,

Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart VV—Virginia

2. Section 52.2420 is amended by adding paragraph (c)(102) to read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

(102) Revisions to the Virginia State Implementation Plan submitted on November 4, 1992 by the Virginia Department of Air Pollution Control.

(i) Incorporation by reference.

(A) Letter of November 4, 1992 from the Virginia Department of Air Pollution Control transmitting amendments to the Virginia State Implementation Plan pertaining to Virginia's air quality regulations, Virginia State Air Pollution Control Board Regulations for the Control and Abatement or Air Pollution.

(B) The following revisions to Virginia's air quality regulations, adopted by the Virginia State Air Pollution Control Board on October 30, 1992, effective January 1, 1993:

(*1*) Amendments to section 120–01–02, the definition for the term volatile organic compound.

(*2*) Amendments to appendix P, pertaining to emission control areas.

(ii) Additional material.

(A) Remainder of Virginia's November 4, 1992 State submittal pertaining to section 120–01–02 and appendix P.

[FR Doc. 94–25683 Filed 10–18–94; 8:45 am]

BILLING CODE 6560–50–F

Proposed Rules

Federal Register
Vol. 59, No. 201
Wednesday, October 19, 1994

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

RIN 3150–AE97

Shutdown and Low-Power Operations for Nuclear Power Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to require power reactor licensees to: Assure that uncontrolled changes in reactivity, reactor coolant inventory, and loss of subcooled state in the reactor coolant system when subcooled conditions are normally being maintained, will not occur when the plant is in either a shutdown or low power condition; assure that containment integrity is maintained or can be reestablished in a timely manner as needed to prevent releases in excess of the current limits in the regulations when the plant is in either a shutdown or low power condition; establish controls in technical specifications limiting conditions for operation and surveillance requirements or plant procedures required by technical specifications administrative controls for equipment which the licensee identifies as necessary to perform their safety function when the plant is in a shutdown or low power condition; evaluate realistically the effect of fires stemming from activities conducted during cold shutdown or refueling conditions, determine whether such fires could realistically prevent accomplishment of the normal decay heat removal capability, and if so, either provide measures to prevent loss of normal decay heat removal or establish a contingency plan that would ensure that an alternate decay heat removal capability exists; and for licensees of PWRs only, provide instrumentation for monitoring water level in the RCS during midloop operation. The proposed amendments would provide substantial additional protection to public health and safety from the risk of a core-melt accident.

DATES: The comment period expires January 3, 1995. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Docketing and Service Branch.

Deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:45 am and 4:15 pm Federal workdays.

Copies of comments received may be examined and copied for a fee at the NRC Public Document Room, 2120 L Street, NW (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Gary M. Holahan, Director, Division of Systems Safety and Analysis, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: (301) 504–2884.

SUPPLEMENTARY INFORMATION:

Background

Over the past several years, the Nuclear Regulatory Commission (NRC) staff has become increasingly concerned about the safety of operations during the shutdown of nuclear power reactors. The loss of decay heat removal (DHR) during shutdown and refueling has been a continuing problem. In 1980, DHR was lost at the Davis-Besse plant when one residual heat removal (RHR) pump failed and the second pump was out of service. After reviewing the Davis-Besse event and studying the operating requirements that existed at the time of the event, the NRC issued Bulletin 80–42 and Generic Letter (GL) 80–43 calling for new technical specifications to ensure that one RHR system is operating and a second is available (i.e., operable) for most shutdown conditions. The Diablo Canyon event of April 10, 1987, highlighted the fact that midloop operation was a particularly sensitive condition with respect to operability of the residual heat removal pumps. In this event, the reactor coolant system was overdrained during midloop operation. The resulting low water level in the reactor vessel caused vortexing and air entrainment and loss of both residual heat removal pumps. After reviewing the event, the staff issued GL 88–17, recommending that licensees address numerous generic deficiencies to improve the reliability of the DHR capability. More recently, the incident investigation team's report on the loss of AC power at the Vogtle plant (NUREG–1410) emphasized the need for risk management of shutdown operations. Furthermore, discussions with foreign regulatory organizations (i.e., French and Swedish authorities) about their evaluations regarding shutdown risk have reinforced previous NRC staff findings that the core-damage probability (CDP) for shutdown operation can be a fairly substantial fraction of the total CDP. Because of these concerns regarding operational safety during shutdown, the NRC conducted a careful, detailed evaluation of safety during shutdown and low-power operations which is documented in NUREG–1449.

Objective

The NRC staff's comprehensive evaluation of shutdown and low-power operations, documented in NUREG–1449, included observations and inspections at a number of plants, analysis of operating experience, deterministic safety analysis, and insights from probabilistic risk assessments. It was observed that shutdown risks have been reduced at many plants through improvements to outage programs. However, the improvements have been unevenly and inconsistently applied across the industry. From this evaluation, the NRC has concluded that public health and safety have been adequately protected during the period that plants have been in shutdown and low power conditions; but that substantial safety improvements are possible and NRC requirements are warranted for the following reasons:

(1) A regulatory requirement would set minimum standards for all plants and would ensure that safety improvements already made by industry will be applied consistently throughout the industry and will not be eroded in the future.

(2) A regulatory requirement would further reduce risk by improving safety in the areas of fire protection for all plants and midloop operation for PWRs.

(3) Significant precursor events involving loss of DHR capability continue to occur despite efforts to resolve the problem.

(4) Some controls, including regulatory controls, have been significantly lacking and have in the past allowed plants to enter circumstances that would likely challenge safety functions with minimal mitigation equipment available and containment integrity not established.

The NRC has identified possible regulatory actions to address these problems and subjected them to a regulatory analysis which also addresses the requirements for a backfit analysis under 10 CFR 50.109.[1] These actions have been evaluated within the framework of the Commission's Safety Goal Policy, (51 FR 30028; August 21, 1986) to determine whether or not they would result in a substantial increase in the overall protection of the public health and safety.

The NRC has observed that many shutdown operations may take place with the containment partially open. Therefore, cost-effective regulatory actions are appropriate to ensure substantial reduction in core-damage probability, and an improvement in the likelihood of containment isolation, when necessary. These actions would substantially increase the overall protection of public health and safety.

Operating Experience

The NRC staff reviewed operating experience at nuclear power plants to ensure that its evaluation encompassed the range of events encountered during shutdown and low-power operations including: licensee event reports (LERs), studies performed by the Office for Analysis and Evaluation of Operational Data (AEOD), and various inspection reports to determine the types of events that take place during refueling, cold and hot shutdown, and low-power operations.

The NRC staff also reviewed events that occurred at foreign nuclear power plants using information found in the foreign events file maintained for AEOD at the Oak Ridge National Laboratory (ORNL). The AEOD compilation included the types of events that applied to U.S. nuclear plants and those not found in a review of U.S. experience.

In performing this review, the NRC staff found that the more significant events for pressurized-water reactors (PWRs) were the loss of residual heat removal, potential pressurization, and boron dilution events. The more important events for boiling-water reactors (BWRs) were the loss of coolant, the loss of cooling, and potential pressurization. Generally, the majority of important events involved human error and procedural errors. The NRC staff documented this review in NUREG–1449. In addition, the NRC staff selected 10 events from the AEOD review for further assessment as precursors to potential severe core-damage accidents. This assessment is fully documented in NUREG–1449.

Further, undesirable events continue to occur during shutdown operations. Recent operating experiences during shutdown include (1) entry into midloop operation with a degraded RHR pump at a PWR on December 11, 1993, (2) the discovery of a large, undetected nitrogen gas bubble in the RCS during extended cold shutdown at a PWR on December 17, 1993, (3) a hydrogen burn in an empty pressurizer caused by welding activities during cold shutdown at a PWR on February 3, 1994, and (4) the loss of one train of RHR 2 days after shutdown due to outage activities at a BWR on March 17, 1994. These recent events reinforce the previous assessment of shutdown operations documented in NUREG–1449.

Industry Work

The industry has addressed outage planning and control with programs that include workshops, Institute of Nuclear Power Operations (INPO) inspections, Electric Power Research Institute (EPRI) support, as well as enhanced training and procedures. One activity (a formal initiative proposed by the Nuclear Management and Resources Council (NUMARC)) has produced for the utilities a set of guidelines to use for self-assessment of shutdown operations (NUMARC 91–06).[2] This high-level guidance addresses many, but not all, of the areas in outage planning that need improvement. Detailed guidance on developing an outage planning program is outside the scope of the NUMARC effort. The NRC staff believes that NUMARC 91–06 represents a significant and constructive step, effects of which have already been realized by many utilities using the draft guidance in recent outages.[3] For example, on the basis of its review of operating experience and pilot team inspections, the staff observed that industry efforts and improvements have been made which should reduce risk in the shutdown and low-power operations area. Some licensees were observed to have in-depth contingency planning for backup cooling; other licensees were found to have well-planned and tightly conducted outages run by outage-experienced, operationally oriented personnel; and other licensees had developed well-defined strategies and procedures for plant and hardware configurations, including fuel offload, midloop operation in PWRs, use of nozzle dams in PWRs, venting in PWRs, electrical equipment, onsite sources of ac power, containment status and control, and such key instrumentation as RCS temperature, reactor water level, and RCS pressure. Further, industrys defense-in-depth concept for safety functions and outage strategy contained in NUMARC 91–06 have been recognized as excellent self-improvements in the shutdown and low-power operations area. However, implementation of these efforts and improvements has been unevenly and inconsistently applied, as observed at several site inspections conducted by the staff.

Safety Importance

The NRC's staff's rationale for proposing the requirements described previously is that they will provide substantial safety improvements, and the costs of implementation are justified in view of the benefits to be provided. This judgment is based on a qualitative assessment supplemented by a quantitative analysis. The considerations that principally support the proposed action are as follows:

(1) The improvements reflect the NRC safety philosophy of "defense in depth" in that they address: (a) Prevention of credible challenges to safety functions

[1] The current regulatory analysis only addresses the LCO and SR option for controls for specific equipment relied upon during shutdown and low-power operations, whereas the proposed rule allows for incorporation of controls included in technical specifications limiting conditions for operation and surveillance requirements in accordance with 10 CFR 50.36(c)(2) and (3), or plant procedures required by technical specifications administrative controls pursuant to 10 CFR 50.36(c)(5). The staff plans to revise the regulatory analysis to incorporate consideration of other alternatives as appropriate for equipment controls during shutdown and low-power operations. In addition, the staff will consider the following in the revised regulatory analysis: (1) insights gained from the recent NRC PRAs for shutdown and low-power operations at Surry and Grand Gulf; (2) industry improvements made in outages; (3) comments received from ACRS, CRGR and the Commission; (4) specific industry comments on the draft regulatory analysis documented in a letter from NUMARC dated January 11, 1994, in a letter from NEI dated March 28, 1994 and in a letter from GEOG dated April 8, 1994.

[2] These guidelines serve as the basis for an industry-wide program that has been implemented at all plants.

[3] NUMARC 91–06 is available from Nuclear Energy Institute, 1776 Eye Street NW., Suite 400, Washington, DC 20006–3708.

through improvements in operations and fire protection; and (b) mitigation of challenges to redundant protection systems, through improved procedures, training, improved controls on plant equipment and contingency plans.

(2) Accident sequences during shutdown which are as rapid and severe as those that might occur during power operation should be addressed with commensurate requirements. This is supported by the staff's engineering analysis of accidents during shutdown conditions documented in NUREG–1449.

(3) The improvements being proposed are aimed directly at problems that have been repeatedly observed in operating experience, e.g., loss of decay heat removal, loss of ac power, loss of RCS inventory, fires, personnel errors, poor procedures and poor planning, and lack of training.

Only a very limited number of probabilistic risk assessment (PRA) studies covering shutdown conditions have been performed and those studies contain considerable uncertainty. The uncertainty is due largely to the predominant role played by operators and other licensee staff in shutdown events and recovery from them. Human reliability is difficult to quantify, especially under unfamiliar conditions which are often not covered in training or procedures. The collection of PRA studies discussed in NUREG–1449 gives some insight into the likely range of shutdown risks for the spectrum of current plants. The mean CDP for shutdown events appears to be in the range of 6E- 05 to 7E–06 per reactor-year. Although detailed uncertainty analysis is not available for most of the PRAs covering shutdown conditions, some insight can be gained by examining the uncertainty analysis in NUREG–1150 where the CDP uncertainty ranges (5th and 95th percentiles) are approximately one order of magnitude. From this limited information, the staff concludes that a reasonable estimate of the range of CDP is 1E–04 to 1E–06 per reactor-year.

On the basis of the analysis of operating experience in NUREG–1449, including the accident sequence precursor analysis, the NRC staff identified the following as dominant event sequences during shutdown: loss of all ac power, loss of RCS inventory, and loss of reactor vessel level control in PWRs. These sequences have been modeled as part of the regulatory analysis of proposed improvements in shutdown and low-power operations. Core-damage probabilities for these sequences are point estimates built from best estimates of each step in the sequence. No uncertainty analysis was performed because of the lack of reliable statistical data for shutdown conditions. However, a sensitivity study has been performed to assess the effect of uncertain assumptions on the overall results of the analysis. The results of the sensitivity study show that despite sensitivity to changes in PRA assumptions, the estimated changes in risk associated with the proposed improvements remain significant even when inputs are changed significantly.

The results of the analysis of the dominant event sequences indicate potential reductions in core-damage probability of greater than 5E–05 per reactor-year for each PWR's improvement, and approximately 1E–05 per reactor-year for improvement to BWRs. As previously stated, the staff recognizes that significant improvement in core-damage probability has already been achieved through recent industry actions, however, the proposed rule would place a regulatory "footprint" on outage safety and codify improvements made by industry to ensure that (1) reductions in risk already achieved are not eroded in the future and (2) consistency and uniform achievement of the safety improvements is realized throughout the industry. The proposed rule would also set minimum standards for all plants and further reduce risk by improving safety in the areas of fire protection for shutdown decay heat removal and effective reactor vessel water level instrumentation for PWRs in midloop operation.

Containment capability and releases of radioactivity for accident sequences during shutdown are also evaluated as part of the regulatory analysis. From that work, the NRC has concluded that an intact containment will effectively prevent early releases from shutdown accidents. Large, dry PWR containments should remain intact if closed before being challenged. Severe core-damage accidents in open containments or in containments that fail are expected to have offsite consequences similar to severe core-damage accidents initiating from power operations. Onsite consequences within a few hundred meters of open or failed containments may be more severe at shutdown than at power. The potential dose to the public for a severe core-damage accident without an effective containment was estimated to be 2E+06 person-rem (2E+04 person-Sv).

Basis for Commission Position

The NRC proposes to resolve concerns regarding shutdown and low-power operations by rulemaking that would require power reactor licensees to:

(1) Assure that uncontrolled changes in reactivity, reactor coolant inventory, and loss of subcooled state in the reactor coolant system when subcooled conditions are normally being maintained, will not occur when the plant is in either a shutdown or low-power condition;

(2) Assure that containment integrity is maintained or can be reestablished in a timely manner as needed to prevent releases in excess of the guidelines of 10 CFR Part 100 when the plant is in either a shutdown or low-power condition;

(3) Identify that equipment necessary to make the reactor subcritical or critical in a controlled manner and maintain it subcritical in a shutdown condition, and establish controls in either technical specifications limiting conditions for operation and surveillance requirements in accordance with the requirements of 10 CFR 50.36(c)(2) and (3) or plant procedures required by technical specifications administrative controls pursuant to 10 CFR 50.36(c)(5) for that equipment such that they will ensure each safety function when the plant is in a shutdown or low power condition;

(4) Prior to (and throughout the shutdown refueling outage as necessary to accommodate unforeseen contingencies) entering cold shutdown or a refueling condition, evaluate realistically available fire-protection features and the outage plan for possible fires stemming from activities conducted during cold shutdown or refueling conditions, determine whether such fires could realistically prevent accomplishment of the normal decay heat removal capability during cold shutdown or refueling conditions, and if so, either take measures to prevent loss of normal decay heat removal by such fires during cold shutdown or a refueling condition, or have a contingency plan in place that will ensure an alternate decay heat removal capability exists and that will describe the general steps to connect the alternate decay heat removal system to the reactor coolant system (RCS); and

(5) For licensees of PWRs only, provide instrumentation for monitoring water level in the RCS during midloop operation.

The technical basis for the NRC's staff's position is derived from the NRC staff's comprehensive evaluation of shutdown and low-power issues in NUREG–1449, "Shutdown and Low-Power Operations at Nuclear Power Plants in the United States." NUREG–1449 was published as a draft report for comment in February 1992. The comment period on the draft NUREG–1449 ended on April 30, 1992, and a

large number of comments were received from utilities and industry organizations. The NRC staff addressed the comments in the final report (NUREG–1449) which was issued in September 1993. The principal findings from NUREG–1449 that support the NRC regulatory position in this proposed rule are the following:

(1) Accident sequences during shutdown can be as rapid and severe as those during power operations.

(2) All PWR containments and BWR (boiling-water reactor) Mark III primary containments are capable of offering significant protection if the containment is closed or can be closed quickly. However, analyses show that the steam and radiation environment in the containment, which can result from an extended loss of DHR or LOCA, would make it difficult to close the containment in many cases. BWR Mark I and II secondary containments offer less protection against an accident, but this is offset by a significantly lower likelihood of core damage in BWRs than in PWRs.

(3) Outage planning is crucial to safety during shutdown conditions since it establishes (a) if and when a licensee will enter circumstances likely to challenge safety functions and (b) the level of mitigation equipment available.

(4) Using technical specifications to control the availability of safety-related equipment is appropriate because (i) operators are trained and accustomed to operating the facility in accordance with approved procedures within the clear limits set by technical specifications and (ii) technical specifications establish clear and enforceable regulatory requirements.[4]

(5) Although maintenance activities that can increase the potential for fire are performed during shutdown, current NRC requirements in the area of fire protection do not apply to shutdown conditions.

(6) Operating experience continues to show that the ability to maintain control of RCS level in PWRs during draindown and steady-state operation has been a problem. The principal contributor to events during some shutdown configurations has been identified as poor quality and reliability of reactor vessel level instrumentation. This problem is most significant during midloop operation, where a small variation in level can lead to a loss of DHR. PRAs have consistently found a higher risk associated with midloop operation than with other operational states.

The requirements being proposed by the NRC are aimed directly at problems that have been repeatedly observed in operating experience, such as loss of decay heat removal, loss of ac power, loss of RCS inventory, fires, personnel errors, poor procedures, poor planning, and poor training. The proposed requirements reflect the NRC safety philosophy of defense in depth, in that they address: (1) prevention of credible challenges to safety functions through improvements in operations, fire protection and water level instrumentation in PWRs and (2) mitigation of challenges to redundant protection systems, through improved equipment controls.

Equipment controls must be included in either technical specifications limiting conditions for operation and surveillance requirements in accordance with the requirements of 10 CFR 50.36(c)(2) and (3), or plant procedures required by technical specifications administrative controls pursuant to 10 CFR 50.36(c)(5). Requirements for specific equipment availability using plant procedures would be established by the licensee in a way that provides maximum flexibility by: (1) permitting the use of non-safety as well as safety equipment to provide safety functions; (2) permitting reduced decay heat levels to be a factor in developing such mitigating strategies as the selection of protective features and determination of when to put such protective features into service; and (3) allowing changes regarding the availability of equipment during the outage to be made without prior NRC review and approval. This particular resolution path has not been evaluated explicitly in the regulatory analysis; but the NRC believes that this approach to controlling mitigative equipment can produce a safety benefit comparable to that for the LCO approach.

Relationship to Existing Requirements

Technical Specifications

Section 50.67(c)(3)(iii) of the proposed rule may result in changes to plant-specific technical specifications as well as to the standard technical specifications documented in NUREG–1430, NUREG–1431, NUREG–1432, NUREG–1433, and NUREG–1434 (STS for Babcock & Wilcox plants, Westinghouse plants, Combustion Engineering plants, General Electric BWR/4 plants, and General Electric BWR/6 plants, respectively). Section 50.67(c)(3)(iii) of the proposed rule requires identified equipment controls during shutdown or low-power conditions to be established in technical specifications or plant procedures required by technical specifications administrative controls in support of specific safety functions, including such support functions as electric power. Section 50.67(c)(3)(ii) states that the controls must reflect sufficient redundancy in systems, subsystems, components, and features to ensure that, for the onsite electric power system in operation (assuming offsite power is not available), safety functions can be accomplished, assuming a single failure. LCOs currently used at some plants do not cover all of the safety functions recommended in the proposed rule. For some systems, under some conditions, standard technical specifications, as well as current plant-specific technical specifications, lack the redundancy called for in the proposed rule.

Fire Protection

The principal regulation covering fire protection is 10 CFR 50.48. It requires all plants to have a fire protection plan that satisfies General Design Criterion (GDC) 3 of Appendix A to 10 CFR Part 50. Appendix R to 10 CFR Part 50 gives specific requirements to be satisfied in complying with the regulation for plants licensed before 1979. Additionally, guidance for satisfying the regulation is found in the branch technical positions referenced in the regulation. However, this guidance was developed to ensure that the plant could be brought to a hot shutdown condition from power operation during a fire and does not address the condition of being in a shutdown or refueling mode at the time of a fire. Further, fire-protection criteria established by the regulations only require that at least one train of those systems important for ensuring an adequate level of DHR during cold shutdown and refueling be capable of being restored to service within 72 hours of a fire. In addition, NRC guidelines for performing a fire hazards analysis do not address shutdown and refueling conditions, or the potential impact a fire may have on the capability to maintain shutdown cooling.

With the proposed requirements in the area of fire protection during cold shutdown or refueling conditions, it is the Commission's intent to supplement current requirements for fire protection with additional requirements to ensure that decay heat removal capability is not lost because of a fire during cold

[4] The NUREG–1449 analysis only addressed the use of technical specifications for control of specific equipment relied upon during shutdown and low-power operations. The proposed rule allows for incorporation of controls using either technical specifications limiting conditions for operation and surveillance requirements in accordance with the requirements of 10 CFR 50.36(c) (2) and (3), or plant procedures required by technical specifications administrative controls pursuant to 10 CFR 50.36(c)(5).

shutdown or refueling conditions. If the evaluation required by the proposed rule shows that fires would prevent accomplishment of normal decay heat removal capability, the licensee must either take measures to prevent the loss of normal decay heat removal by such fires or have a contingency plan in place that will ensure that an alternate decay heat removal capability exists during cold shutdown or a refueling condition. The contingency plan should describe the general steps to connect the alternate decay heat removal system to the RCS. The NRC staff recognizes that this could be done by revising existing regulations to include detailed supplemental requirements. However, the proposed requirements state that realistic fires during cold shutdown and refueling conditions should be evaluated rather than the more conservative fires that are analyzed under Appendix R. This realistic evaluation of available fire-protection features and the outage plan for possible fires should serve as the basis for further appropriate action. Permanent hardware fixes need not be employed as an option to reduce the risk of fire during cold shutdown and refueling conditions. On the contrary, if the evaluation results in the conclusion that some changes must be made, the licensee should consider less onerous options to reduce the risk of fire such as: (a) modifying or relocating the activities that might cause the fire; (b) constructing temporary fire barriers; or (c) revising plant procedures.

Instrumentation

The NRC believes the proposed action regarding installation in a PWR of new reactor vessel water level instrumentation, including an alarm, is a cost-justified substantial safety enhancement and the costs of implementation are justified in the view of the substantial benefit that is provided.[5] This action stems from a desire to eliminate losses of the RHR system due to air ingestion caused by operator error when lowering water level to achieve a midloop condition. The additional level instrumentation would supplement the improved level instrumentation adopted voluntarily by all affected licensees in response to GL 88–17, "Loss of Decay Heat Removal."

Expected Achievement

The NRC notes that, based on the available evidence, no undue public risk exists without the promulgation of the rule for shutdown and low-power operations. The proposed rule would strengthen safety by preventing accidents and mitigating accidents, and thereby reduce the likelihood of a core-damage accident and the offsite releases due to loss of a key safety function during shutdown or low-power operations. Significant improvements have already been achieved in this regard through the implementation of the NUMARC guidelines; however, the proposed rule would place a regulatory "footprint" on outage safety and codify improvements made by industry to ensure that (1) reductions in risk already achieved are not eroded in the future and (2) consistency and uniform achievement of the safety improvements is realized throughout the industry. The proposed rule would also set minimum standards for all plants and further reduce risk by improving safety in the areas of fire protection for shutdown decay heat removal and effective reactor vessel water level instrumentation for PWRs in midloop operation. Moreover, the overall risk may also be reduced by additional improvements in severe accident management, given the assumption that core damage occurs, whether from an event during an outage or during power operations. Therefore, the proposed rule should be viewed as being in the same accident prevention context as the ATWS rule (10 CFR 50.62) and the station blackout rule (10 CFR 50.63) in that it recognizes, as the other two rules recognize, multiple failure possibilities resulting from common cause effects that should be addressed.

Comments Requested

Section 50.67(c)(3)(i) of the proposed rule calls for the identification of equipment necessary to (a) make the reactor subcritical or critical in a controlled manner and maintain the reactor subcritical in a shutdown condition, (b) maintain RCS inventory and capability to add makeup water to the reactor vessel, (c) remove decay heat from the reactor, (d) monitor water level in the reactor vessel, and (e) maintain or reestablish containment integrity when the plant is in a shutdown or low-power condition. Further, Section 50.67(c)(3)(ii) of the proposed rule requires licensees to establish controls for the equipment identified such that they will perform their safety function when the plant is in a shutdown or low power condition. The controls must reflect sufficient redundancy in systems, subsystems, components, and features to ensure that, for the onsite electric power system in operation (assuming offsite power is not available), safety functions can be accomplished, assuming a single failure, for all conditions except refueling operations (with water level above the reactor in excess of a lower limit established in applicable technical specifications or plant procedures). Section 50.67(c)(3)(iii) of the proposed rule specifies that the controls required by paragraph (c)(3)(ii) be included in technical specifications limiting conditions for operation and surveillance requirements in accordance with the requirements of 10 CFR 50.36(c)(2) and (3), or plant procedures required by technical specifications administrative controls pursuant to 10 CFR 50.36(c)(5). The NRC would like to receive comments describing the possible alternate methods for equipment controls. Additionally, the current regulatory analysis only addresses LCO and SR changes within the technical specifications, and does not reflect the risk reduction already achieved by industry through voluntary actions. The Commission requests information as to steps that licensees have already taken to reduce risk during shutdown and low-power operations. Finally, the NRC would like to receive comments on the use of probabilistic risk assessment (PRA) information and the calculation of the value of offsite dose (accident consequence) in the cost/benefit analysis.

Availability of Documents

Copies of all NRC documents, including generic issue (GI) notices are available for public inspection and copying for a fee at the NRC Public Document Room (PDR) at 2120 L Street, N.W. (Lower Level) Washington, DC 20555–0001.

Copies of NUREGs-1150, 1410, 1430, 1431, 1432, 1433, 1434, and 1449 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, by calling (202) 275–2060 or by writing to the Superintendent of Documents, U.S. Government Printing Office, Mail Stop SSOP, Washington, DC 20402–9328. Copies are also available from the National Technical Information Service, 5825 Port Royal Road, Springfield, VA 22161.

[5] The staff's regulatory analysis includes the assumption that BWR water level instrumentation will be operable during cold shutdown and refueling operations in accordance with current standard technical specifications. The results of the analysis support the conclusion that improvements in BWR water level instrumentation used during shutdown operations are not warranted. Recent concerns with the accuracy of BWR water level instrumentation are being addressed by utilities with actions in response to NRC Bulletin 93–03, dated May 28, 1993. Those actions will ensure that BWR water level instrumentation will function as assumed in the regulatory analysis.

Criminal Penalties

For purposes of section 223 of the Atomic Energy Act of 1954, as amended (AEA), the Commission proposes to issue the proposed rule under one or more of sections 161b, 161i, or 161o of the AEA. Willful violations of the rule are subject to criminal enforcement.

Finding of No Significant Environmental Impact: Availability

The Commission has determined under the National Environmental Policy Act of 1969, as amended, and the Commission's regulations in Subpart A of 10 CFR Part 51, that this rule, if adopted, does not degrade the environment in any way. The actions resulting from this rule, if adopted, would reduce the core damage frequency and risks during shutdown and low-power operations. Therefore, the Commission concludes that there will be no significant impact on the environment from this proposed rule. This discussion constitutes the environmental assessment and finding of no significant impact for this proposed rule; a separate assessment has not been prepared.

Paperwork Reduction Act Statement

This proposed rule amends information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). The rule has been submitted to the Office of Management and Budget for review and approval of the information collection requirements.

The public reporting burden for this collection of information is estimated to average 3160 hours per respondent, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information and Records Management Branch (T–6 F 33), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB–10202, (3150–0011), Office of Management and Budget, Washington, DC 20503.

Regulatory Analysis

The Commission has prepared a draft regulatory analysis[6] for this proposed rule that examines the costs and benefits of the alternatives considered. This analysis is documented in a report entitled, "Regulatory Analysis in Accordance with 10 CFR 50.109: Requirements for Shutdown and Low-Power Operations at Nuclear Power Plants," and is available for inspection in the NRC Public Document Room, 2120 L Street, N.W. (Lower Level), Washington, DC. Single copies of the analysis may be obtained from Kulin Desai, Division of Systems Safety and Analysis, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: (301) 504–2835.

The Commission requests public comments on the proposed rule, draft Regulatory Guide, "Shutdown and Low-Power Operations at Nuclear Power Plants," and the draft report documenting the regulatory analysis, entitled, "Regulatory Analysis in Accordance with 10 CFR 50.109: Requirements for Shutdown and Low-Power Operations at Nuclear Power Plants."

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, (5 U.S.C. 605(b)), the Commission certifies that, if promulgated, this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of "small entities" as given in the Regulatory Flexibility Act or the Small Business Size Standards in regulations issued by the Small Business Administration at 13 CFR Part 121.

Backfit Analysis

As required by 10 CFR 50.109, a backfit analysis has been performed for the proposed rule. The backfit analysis on which this determination is based is included in the report entitled, "Regulatory Analysis in Accordance with 10 CFR 50.109: Requirements for Shutdown and Low-Power Operations at Nuclear Power Plants," dated December 1993. The backfit analysis approach emphasized a qualitative estimation supplemented by a quantitative analysis for bounding conditions as reflected in the regulatory analysis. The backfit analysis and the regulatory analysis will be revised based on comments received from the public. The Commission has determined, based on this analysis, that backfitting to comply with the requirements of this proposed rule will provide a substantial increase in protection to public health and safety because it would: (1) reduce the frequency of events caused by poor planning and control of activities during outages; (2) ensure availability of key safety functions during shutdown and low-power operations at all plants; (3) ensure that a method of decay heat removal remains viable in the event of a fire in any plant area during cold shutdown or refueling conditions; and (4) provide accurate instrumentation for PWRs to use when draining the reactor coolant system to a midloop configuration to avoid air binding and eventual loss of residual heat removal pumps. The Commission has further determined the cost of implementing the new requirements is justified for PWRs in view of the increase in protection attributable to the proposed backfits but plans to specifically reassess BWRs following consideration of comments on this proposed rulemaking.

List of Subjects

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

For the reasons given in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 50.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec.

[6] The current regulatory analysis only addresses the LCO and SR Option for controls for specific equipment relied upon during shutdown and low-power operations, whereas the proposed rule allows for incorporation of controls including technical specifications limiting conditions for operation and surveillance requirements in accordance with 10 CFR 50.36(c)(2) and (3), or plant procedures required by technical specifications administrative controls pursuant to 10 CFR 50.36(c)(5). The staff plans to revise the regulatory analysis to incorporate consideration of other alternatives as appropriate for equipment controls during shutdown and low-power operations. In addition, the staff will consider the following in the revised regulatory analysis: (1) insights gained from the recent NRC PRAs for shutdown and low-power operations at Surry and Grand Gulf; (2) industry improvements made in outages; (3) comments received from ACRS, CRGR and the Commission; and (4) specific industry comments on the draft regulatory analysis documented in a letter from NUMARC dated January 11, 1994, in a letter from NEI dated March 28, 1994 and in a letter from CEOG dated April 8, 1994.

234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, Sec. 2902, 106 Stat 3123 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23. 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

2. In § 50.8 paragraph (b) is revised to read as follows:

§ 50.8 Information collection requirements: OMB approval.

* * * * *

(b) The approved information collection requirements contained in this part appear in §§ 50.30, 50.33, 50.33a, 50.34, 50.34a, 50.35, 50.36, 50.36a, 50.48, 50.49, 50.54, 50.55, 50.55a, 50.59, 50.60, 50.61, 50.63, 50.64, 50.65, 50.67, 50.71, 50.72, 50.75, 50.80, 50.82, 50.90, 50.91, and appendices A, B, E, G, H, I, J, K, M, N, O, Q, and R to this part.

3. A new § 50.67 is added to read as follows:

§ 50.67 Shutdown and low-power operations.

(a) *Applicability.* This section applies to all holders of operating licenses for commercial nuclear power plants.

(b) *Definitions.* For the purposes of this section:

Cold Shutdown means that plant state in which the reactor is subcritical, $K_{Effective}$ is less than .99, the reactor coolant system temperature is less than or equal to 200 °F, and all reactor vessel head closure bolts are fully tensioned.

Low Power Condition means that the plant is operating with the reactor critical and the main generator isolated from the grid because the output breaker connecting the unit to the utility power grid is open.

Midloop Operation means that plant operational state in which the plant is in a shutdown condition, fissionable fuel assemblies are present within the reactor vessel, and the reactor coolant system (RCS) water level is below the top of the flow area of the hot legs at the junction with the reactor vessel.

Outage Plan means that written plan of activities to be conducted during a shutdown or low power condition.

Refueling Condition means that plant state in which the reactor is subcritical with fissionable fuel assemblies present within the reactor vessel, and one or more reactor vessel head closure bolts are less than fully tensioned.

Shutdown Condition means that plant state in which the reactor is subcritical with fissionable fuel assemblies present within the reactor vessel.

Technical Specifications, Administrative Controls, Limiting Conditions for Operation, and Surveillance Requirements are as defined in 10 CFR 50.36.

(c) *General Requirements.* All licensees must:

(1) Provide reasonable assurance that uncontrolled changes in reactivity, uncontrolled changes in reactor coolant inventory, and loss of subcooled state in the reactor coolant system when subcooled conditions are normally being maintained will not occur when the plant is in either a shutdown or low power condition.

(2) Assure that containment integrity is maintained or can be reestablished in a timely manner as needed to prevent releases in excess of the guidelines of 10 CFR part 100 when the plant is in a shutdown or low power condition.

(3)(i) Identify that equipment (including electric power and compressed air) necessary to:

(A) Make the reactor subcritical or critical in a controlled manner and maintain it subcritical in a shutdown condition;

(B) Maintain reactor coolant system inventory and capability to add makeup water to the reactor vessel;

(C) Remove decay heat from the reactor;

(D) Monitor water level in the reactor vessel; and

(E) Maintain or reestablish containment integrity when the plant is in a shutdown or low power condition;

(ii) Establish controls for the equipment identified in paragraph (c)(3)(i) of this section such that they will perform their safety function when the plant is in a shutdown or low power condition. The controls must reflect sufficient redundancy in systems, subsystems, components, and features to ensure that, for the onsite electric power system in operation (assuming offsite power is not available), safety functions can be accomplished, assuming a single failure, for all conditions except refueling operations (with water level above the reactor in excess of a lower limit established in applicable technical specifications or plant procedures); and

(iii) The controls required by paragraph (c)(3)(ii) of this section must be included in either:

(A) Technical specifications limiting conditions for operation and surveillance requirements in accordance with the requirements of 10 CFR 50.36(c) (2) and (3), or

(B) Plant procedures required by technical specifications administrative controls pursuant to 10 CFR 50.36(c)(5).

(4)(i) Prior to (and throughout the shutdown refueling outage as necessary to accommodate unforeseen contingencies) entering cold shutdown or a refueling condition, evaluate realistically available fire protection features and the outage plan for possible fires stemming from activities conducted during cold shutdown or refueling conditions, and determine realistically whether such fires could prevent accomplishment of normal decay heat removal capability during cold shutdown or refueling conditions. If the evaluation shows that such fires would prevent accomplishment of normal decay heat removal capability, the licensee must either:

(A) Take measures to prevent the loss of normal decay heat removal by such fires during cold shutdown or a refueling condition; or

(B) Have a contingency plan in place that will ensure an alternate decay heat removal capability exists and that will describe the general steps to connect the alternate decay heat removal system to the RCS. Plant staff must be trained in the implementation of the contingency plan.

(ii) Any departures from the outage plan during the shutdown or refueling outage shall be evaluated in the manner also described above and appropriate measures implemented.

(d) *Requirements for licensees of PWRs.* All licensees of pressurized-water reactors must provide instrumentation for monitoring water level in the RCS during midloop operation. The accuracy of the instrumentation shall not be affected by changes in pressure in the RCS or connected systems. The installed instrumentation shall include visible and audible indications in the control room to alert operators before water level falls below a prescribed limit.

(e) *Implementation.* (1) All licensees must comply with paragraph (c) of this section by no less than 6 months before the first refueling outage that starts either 12 months or more after the effective date of this section or 12

months or more after issuance of the Commission's regulatory guide giving details and examples of approaches to satisfy these requirements (whichever is later).

(2) If the licensee chooses to install or modify systems, structures, or components to comply with the requirements of paragraph (c) of this section, such hardware installation and/or modification must be completed by the end of the first refueling outage that starts either 12 months or more after the effective date of this section or 12 months or more after issuance of the Commission's regulatory guide giving details and examples of approaches to satisfy these requirements (whichever is later).

(3) All licensees must submit technical specifications required by paragraph (c)(3)(iii) within 6 months after issuance of the final regulatory guide providing guidance on compliance with the requirements of this section.

(4) All licensees of PWRs, except as noted in paragraph (e)(5) of this section, must comply with paragraph (d) of this section by the end of the first refueling outage that starts either 12 months or more after the effective date of this section or 12 months or more after issuance of the Commission regulatory guide giving details and examples of approaches to satisfy this requirement (whichever is later).

(5) The requirement in paragraph (e)(4) of this section does not apply to those plants that have completely defueled for final shutdown but still retain an operating license (i.e., those plants that are preparing for decommissioning).

Dated at Rockville, Maryland, this 14th day of October, 1994.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Acting Secretary of the Commission.

[FR Doc. 94–25916 Filed 10–18–94; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064–AB43

Capital; Capital Adequacy Guidelines

AGENCY: Federal Deposit Insurance Corporation (FDIC or Corporation).

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is proposing to amend its risk-based capital guidelines for state nonmember banks. The proposal would revise and expand the set of conversion factors used to calculate the potential future exposure of derivative contracts and recognize effects of netting arrangements in the calculation of potential future exposure for derivative contracts subject to qualifying bilateral netting arrangements.

The FDIC is proposing these amendments on the basis of proposed revisions to the Basle Accord announced on July 15, 1994. The effect of the proposed amendments would be twofold. First, long-dated interest rate and exchange rate contracts would be subject to new higher conversion factors and new conversion factors would be set forth that specifically apply to derivative contracts related to equities, precious metals, and other commodities. Second, institutions would be permitted to recognize a reduction in potential future exposure for transactions subject to qualifying bilateral netting arrangements.

DATES: Comments must be received on or before December 5, 1994.

ADDRESSES: Send comments to Robert E. Feldman, Acting Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand delivered to room F–402, 1776 F Street, N.W., Washington, D.C., on business days between 8:30 a.m. and 5:00 p.m. [Fax number: (202) 898–3838.] Comments may be inspected at the FDIC's Reading Room, room 7118, 550 17th Street, N.W., Washington, D.C. between 9:00 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: William A. Stark, Assistant Director, (202) 898–6972, Division of Supervision, FDIC; Sharon K. Lee, Chief, Capital Markets Policy and Training, (202) 898–6789, Division of Supervision, FDIC; Jeffrey M. Kopchik, Counsel, (202) 898–3872, Legal Division, FDIC, 550 17th Street, N.W., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

I. Background

The international risk-based capital standards (the Basle Accord or Accord)[1] set forth a framework for measuring capital adequacy under which risk-weighted assets are calculated by assigning assets and off-balance-sheet items to broad categories based primarily on their credit risk, that is, the risk that a loss will be incurred due to an obligor or counterparty default on a transaction.[2] Off-balance-sheet transactions are incorporated into risk-weighted assets by converting each item into a credit equivalent amount which is then assigned to the appropriate credit risk category according to the identity of the obligor or counterparty, or if relevant, the guarantor or the nature of the collateral.

The credit equivalent amount of an interest rate or exchange rate contract (rate contract) is determined by adding together the current replacement cost (current exposure) and an estimate of the possible increases in future replacement cost, in view of the volatility of the current exposure over the remaining life of the contract (potential future exposure, also referred to as the add-on). Each credit equivalent amount is then assigned to the appropriate risk category generally based on identity of the counterparty. The maximum risk weight applied to interest rate or exchange rate contracts is 50 percent.[3]

A. Current Exposure

A state nonmember bank that has a rate contract with a positive mark-to-market value has a current exposure or a possible loss equal to the mark-to-market value.[4] For risk-based capital purposes, if the mark-to-market value is zero or negative, then there is no replacement cost associated with the contract and the current exposure is zero. The sum of current exposures for a defined set of contracts is sometimes referred to as the gross current exposure for that set of contracts.

The Accord, as endorsed in 1988, provided that current exposure would be determined individually for every rate contract entered into by a banking organization. Generally, institutions were not permitted to offset, that is, net,

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[1] The Basle Accord was proposed by the Basle Committee on Banking Supervision (Basle Supervisors' Committee, BSC) and endorsed by the central bank governors of the Group of Ten (G–10) countries in July 1988. The Basle Supervisors' Committee is comprised of representatives of the central banks and supervisory authorities from the G–10 countries (Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, the United Kingdom, and the United States) and Luxembourg.

In January 1989 the FDIC Board adopted a similar framework to be used by state nonmember banks.

[2] Other types of risks, such as market risks, generally are not addressed by the risk-based framework.

[3] Exchange rate contracts with an original maturity of 14 calendar days or less and instruments traded on exchanges that require daily payment of variation margin are excluded from the risk-based capital ratio calculations.

[4] The loss to a bank from a counterparty's default on a rate contract is the cost of replacing the cash flows specified by the contract. The mark-to-market value is the present value of the net cash flows specified by the contract, calculated on the basis of current market interest and exchange rates.

positive and negative mark-to-market values of multiple rate contracts with a single counterparty[5] to determine one current exposure relative to that counterparty. In April 1993 the BSC proposed a revision to the Accord, endorsed by the G–10 Governors in July 1994, that permits institutions to net positive and negative mark-to-market values of rate contracts subject to a qualifying, legally enforceable, bilateral netting arrangement. Under the revision to the Accord, institutions with qualifying netting arrangements could replace the gross current exposure of a set of contracts included in such an arrangement with a single net current exposure for purposes of calculating the credit equivalent amount for the included contracts. If the net market value is positive, then that market value equals the current exposure for the netting contract. If the net market value is zero or negative, then the current exposure is zero.

On July 25, 1994, the FDIC issued a notice of proposed rulemaking to amend its risk-based capital guidelines in accordance with the BSC April 1993 proposal. 59 FR 37726, July 25, 1994.[6] Generally, under the proposal, a bilateral netting arrangement would be recognized for risk-based capital purposes only if the netting arrangement is legally enforceable. The bank would have to have a legal opinion(s) to this effect. That proposal is consistent with the final July 1994 change to the Accord.

B. Potential Future Exposure

The second part of the credit equivalent amount, potential future exposure, is an estimate of the additional exposure that may arise over the remaining life of the contract as a result of fluctuations in prices or rates. Such changes may increase the market value of the contract in the future and, therefore, increase the cost of replacing it if the counterparty subsequently defaults.

The add-on for potential future exposure is estimated by multiplying the notional principal amount[7] of the underlying contract by a credit conversion factor that is determined by the remaining maturity of the contract and the type of contract. The existing set of conversion factors used to calculate potential future exposure, referred to as the add-on matrix, is as follows:

Remaining maturity	Interest rate contracts (percent)	Exchange rate contracts (percent)
One year or less	0	1.0
Over one year	0.5	5.0

The conversion factors were determined through simulation studies that estimated the potential volatility of interest and exchange rates and analyzed the implications of movements in those rates for the replacement costs of various types of interest rate and exchange rate contracts. The simulation studies were conducted only on rate contracts, because at the time the Accord was being developed activity in the derivatives market was for the most part limited to these types of transactions. The analysis produced probability distributions of potential replacement costs over the remaining life of matched pairs of rate contracts.[8] Potential future exposure was then defined in terms of confidence limits for these distributions. The conversion factors were intended to be a compromise between precision, on the one hand, and complexity and burden, on the other.[9]

The add-on for potential future exposure is calculated for all contracts, regardless of whether the market value is zero, positive, or negative, or whether the current exposure is calculated on a gross or net basis. The add-on will always be either a positive number or zero. The recent revision to the Accord to recognize netting for the calculation of current exposure does not affect the calculation of potential future exposure, which generally continues to be calculated on a gross basis. This means that an add-on for potential future exposure is calculated separately for each individual contract subject to the netting arrangement and then these individual future exposures are added together to arrive at a gross add-on for potential future exposure. For contracts subject to a qualifying bilateral netting arrangement in accordance with the newly adopted Accord changes, the gross add-on for potential future exposure would be added to the net current exposure to arrive at one credit equivalent amount for the contracts subject to the netting arrangement.

The original Basle Accord noted that the credit conversion factors in the add-on matrix were provisional and would be subject to revision if volatility levels or market conditions changed.

II. Basle Proposals for the Treatment of Potential Future Exposure

Since the original Accord was adopted, the derivatives market has grown and broadened. The use of certain types of derivative instruments not specifically addressed in the Accord—notably commodity, precious metal, and equity-linked transactions[10]—has become much more widespread. As a result of continued review of the method for calculating the add-on for potential future exposure, in July 1994 the BSC issued two proposals for public consultation.[11] The first proposal would expand the matrix of add-on factors used to calculate potential future exposure to take into account innovations in the derivatives market. The second proposal would recognize reductions in the potential future exposure of derivative contracts that result from entering into bilateral netting arrangements. The second proposal is an extension of the recent revision to the Accord recognizing bilateral netting arrangements for purposes of calculating current exposure and would formally extend the recognition of netting arrangements to equity, precious metals and other commodity derivative contracts. The consultation period for these BSC proposals is scheduled to end on October 10, 1994.

[5] Netting by novation however, was recognized. Netting by novation is accomplished under a written bilateral contract providing that any obligation to deliver a given currency on a given date is automatically amalgamated with all other obligations for the same currency and value date. The previously existing contracts are extinguished and a new contract, for the single net amount, is legally substituted for the amalgamated gross obligations.

[6] The Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency issued a similar joint netting proposal on May 20, 1994 and the OTS issued its netting proposal on June 14, 1994.

[7] The notional principal amount, or value, is a reference amount of money used to calculate payment streams between the counterparties. Principal amounts generally are not exchanged in single-currency interest rate swaps, but generally are exchanged in foreign exchange contacts (including cross-currency interest rate swaps).

[8] A matched pair is a pair of contracts with identical terms, with the bank the buyer of one of the contracts and the seller of the other.

[9] The methodology upon which the statistical analyses were based is described in detail in a technical working paper entitled "Potential Credit Exposure on Interest Rate and Foreign Exchange Rate Related Instruments." This paper is available upon request from the FDIC's Reading Room by calling (202) 898–8785.

[10] In general terms, these are off-balance sheet transactions that have a return, or a portion of their return, linked to the price of a particular commodity, precious metal, or equity or to an index of commodity, precious metal or equity prices.

[11] The proposals are contained in a paper from the BSC entitled "The Capital Adequancy Treatment of the Credit Risk Associated with Certain Off-Balance Sheet Items" that is available upon request from FDIC's Reading Room by calling (202) 898—8785.

A. Expansion of Add-On Matrix

A recently concluded BSC review of the add-on for potential future exposure indicated that the current add-on factors used to calculate the potential future exposure amount may produce insufficient capital for certain types of derivative instruments, in particular, long-dated interest rate contracts, commodity contracts, and equity-index contracts. The BSC review indicated that the current add-on factors do not adequately address the full range of contract structures and the timing of cash flows. The review also showed that the conversion factors many institutions are using to calculate potential future exposure for commodity, precious metal, and equity contracts could result in insufficient capital coverage in view of the volatility of the indices or prices on the underlying assets from which these contracts derive their value.[12]

The BSC concluded that it was not appropriate to address these problems with a significant departure from the existing methodology used in the Accord. The BSC decided that it would be appropriate to preserve the conversion factors existing in the Accord and add new conversion factors. Consequently, the revision proposed by the BSC retains the existing conversion factors for rate contracts but applies new higher conversion factors to such contracts with remaining maturities of five years and over.[13] The proposal also introduces conversion factors specifically applicable to commodity, precious metal, and equity contracts. The new conversion factors were determined on the basis of simulation studies that used the same general approach that generated the original add-on conversion factors.[14]

The proposed matrix is set forth below:

CONVERSION FACTOR MATRIX*

[Numbers in percent]

Residual maturity	Interest rate	Foreign exchange and gold	Equity**	Precious metals, except gold	Other commododities
Less than one year	0.0	1.0	6.0	7.0	12.0
One to five years	0.5	5.0	8.0	7.0	12.0
Five years or more	1.5	7.5	10.0	8.0	15.0

* For contracts with multiple exchanges of principal, the factors are to be multiplied by the number of remaining payments in the contract.
** For contracts that automatically reset to zero value following a payment, the remaining maturity is set equal to the time remaining until the next payment.

Gold is included within the foreign exchange column because the price volatility of gold has been found to be comparable to the exchange rate volatility of major currencies. In addition, the BSC determined that gold's role as a financial asset distinguishes it from other precious metals. The proposed matrix is designed to accommodate the different structures of contracts, as well as the observed disparities in the volatilities of the associated indices or prices of the underlying assets.

Two footnotes are attached to the matrix to address two particular contract structures. The first relates to contracts with multiple exchanges of principal. Since the level of potential future exposure rises generally in proportion to the number of remaining exchanges, the conversion factors are to be multiplied by the number of remaining payments (that is, exchanges of principal) in the contract. This treatment is intended to ensure that the full level of potential future exposure is adequately covered. The second footnote applies to equity contracts that automatically reset to zero each time a payment is made. The credit risk associated with these contracts is similar to that of a series of shorter contracts beginning and ending at each reset date. For this type of equity contract the remaining maturity is set equal to the time remaining until the next payment.

While the capital charges resulting from the application of the new proposed conversion factors may not provide complete coverage for risks associated with any single contract, the BSC believes the factors will provide a reasonable level of prudential coverage for derivative contracts on a portfolio basis. Like the original matrix, the proposed expanded matrix is designed to provide a reasonable balance between precision, and complexity and burden.

B. Recognition of the Effects of Netting

The simulation studies used to generate the conversion factors for potential future exposure analyzed the implications of underlying rate and price movements on the current exposure of contracts without taking into account reductions in exposure that could result from legally enforceable netting arrangements. Thus, the conversion factors are most appropriately applied to non-netted contracts, and when applied to legally enforceable netted contracts, they could in some cases, overstate the potential future exposure.

Comments provided during the consultative process of revising the Basle Accord to recognize qualifying bilateral netting arrangements and further research conducted by the BSC, have suggested that netting arrangements can reduce not only a banking organization's current exposure for the transactions subject to the netting arrangement, but also its potential future exposure for those transactions.[15]

As a result, in July 1994 the BSC issued a proposal to incorporate into the calculation of the add-on for potential

[12] While commodity, precious metal, and equity contracts were not explicity covered by the original Accord, as the use of such contracts became more prevalent, many G–10 bank supervisors, including U.S. banking supervisors, have informally permitted institutions to apply the conversion factors for exchange rate contracts to these types of transactions pending development of a more appropriate treatment.

[13] The conversion factors for rate contracts with remaining maturities of one to five years are currently applied to any contracts with a remaining maturity of over one year.

[14] The methodology and results of the statistical analyses are summarized in a paper entitled "The Calculation of Add-Ons for Derivative Contracts: The Expanded Matrix Approach" which is available upon request from the FDIC's Reading Room by calling (202) 898–8785.

[15] While current exposure is intended to cover an organization's credit exposure at one point in time, potential future exposure provides an estimate of possible increases in future replacement cost, in view of the volatility of current exposure over the remaining life of the contract. The greater the tendency of the current exposure to fluctuate over time, the greater the add-on for potential future exposure should be to cover expected fluctuations.

future exposure a method for recognizing the risk-reducing effects of qualifying netting arrangements. Under the proposal, institutions could recognize these effects only for transactions subject to legally enforceable bilateral netting arrangements that meet the requirements of netting for current exposure as set forth in the recent amendment to the Accord.

Depending on market conditions and the characteristics of a bank's derivative portfolio, netting arrangements can have substantial effects on a bank's potential future exposure to multiple derivative contracts it has entered into with a single counterparty. Should the counterparty default at some future date, the bank's exposure would be limited to the net amount the counterparty owes on the date of default rather than the gross current exposure of the included contracts. By entering into a netting arrangement, a bank may reduce not only its current exposure, but also its future exposure as well. Nevertheless, while in many circumstances a netting arrangement can reduce the potential future exposure of a counterparty portfolio, this is not always the case.[16]

The most important factors influencing whether a netting arrangement will have an effect on potential future exposure are the volatilities of the current exposure to the counterparty on both a gross and net basis.[17] The volatilities of net current exposure and gross current exposure of the portfolio may not necessarily be the same. Volatility of gross current exposure is influenced primarily by the fluctuations of the market values of positively valued contracts. Volatility of net current exposure on the other hand, is influenced by the fluctuations of the market values of all contracts within the portfolio. In those cases where net current exposure has a tendency to fluctuate more over time than gross current exposure, a netting arrangement will not reduce the potential future exposure. However, in those situations where net current exposure has a tendency to fluctuate less over time than gross current exposure, a netting arrangement can reduce the potential future exposure.

Net current exposure is likely to be less volatile relative to the volatility of gross current exposure when the portfolio of contracts as a whole is more diverse than the subset of positively valued contracts. When a netting arrangement is applied to a diversified portfolio and the positively valued contracts within the portfolio as a group are less diversified than the overall portfolio, then the effect of the netting arrangement will be to reduce the potential future exposure for the portfolio.

The BSC has studied and analyzed several alternatives for taking into account the effects of netting when calculating the capital charge for potential future exposure. In particular, the BSC reviewed one general method proposed by commenters to the April 1993 netting proposal. This method would reduce the amount of the add-on for potential future exposure by multiplying the calculated gross add-on by the ratio of the portfolio's net current exposure to gross current exposure (the net-to-gross ratio or NGR). The NGR is used as a proxy for the risk-reducing effects of the netting arrangement on the potential future exposure. The more diversified the portfolio, the lower the net current exposure tends to be relative to gross current exposure.

The BSC incorporated this method into its proposal. However, given that there are portfolio-specific situations in which the NGR does not provide a good indication of these effects, the BSC proposal gives only partial weight to the effects of the NGR on the add-on for potential future exposure. The proposed method would average the amount of the add-on as currently calculated (A_{gross}) and the same amount multiplied by the NGR to arrive at a reduced add-on (A_{net}) for contracts subject to qualifying netting arrangements in accordance with the requirements set forth in the recently amended Accord. This formula is expressed as:

$$A_{net} = .5(A_{gross} + (NGR * A_{gross})).$$

For example, a bank with a gross current exposure of 500,000, a net current exposure of 300,000, and a gross add-on for potential future exposure of 1,200,000, would have an NGR of .6 (300,000/500,000) and would calculate A_{net} as follows:

$$.5(1{,}200{,}000 + (.6 * 1{,}200{,}000))$$

$$A_{net} = 960{,}000$$

For banks with an NGR of 50 percent, the effect of this treatment would be to permit a reduction in the amount of the add-on by 25 percent. The BSC believes that most dealer banks are likely to have an NGR in the vicinity of 50 percent.

The BSC proposal does not specify whether the NGR should be calculated on a counterparty-by-counterparty basis or on an aggregate basis for all transactions subject to qualifying, legally enforceable netting arrangements. The proposal requests comment on whether the choice of method could bias the results and whether there is a significant difference in calculation burden between the two methods.

The BSC proposal also acknowledges that simulations using bank's internal models for measuring credit risk exposure would most likely produce the most accurate determination of the effect of netting arrangements on potential future exposures. The proposal states that the use of such models would be considered at some future date.

C. The FDIC Proposal

In light of the BSC proposal, the FDIC believes that it is appropriate to seek comment on proposed revisions to the calculation of the add-on for potential future exposure for derivative contracts. Therefore, the FDIC is proposing to amend its risk-based capital guidelines for state nonmember banks to expand the matrix of conversion factors, and to permit institutions that make use of qualifying netting arrangements to recognize the effects of those netting arrangements in the calculation of the add-on for potential future exposure. The second part of the proposed amendment is contingent on the adoption of a final amendment to the FDIC's risk-based capital guidelines to recognize bilateral close-out netting arrangements and would formally extend this recognition to commodity, precious metals, and equity derivative contracts.

With regard to the portion of the proposal to expand the conversion factor matrix, the FDIC is proposing the same conversion factors set forth in the BSC proposal. The FDIC agrees with the BSC that the existing conversion factors applicable to long-dated transactions do not provide sufficient capital for the risks associated with those types of contracts. The FDIC also agrees with the BSC that the conversion factors for foreign exchange transactions are significantly too low for commodity, precious metal, and equity contracts due to the volatility of the associated indices or the prices on the underlying assets.[18]

[16] For purposes of this discussion, a portfolio refers to a set of contracts with a single counterparty. A bank's global portfolio refers to all of the contracts in the institution's derivatives portfolio that are subject to qualifying netting arrangements.

[17] Volatility in this discussion is the tendency of the market value of a contract to vary or fluctuate over time. A highly volatile portfolio would have a tendency to fluctuate significantly over short periods of time. One of the most important factors influencing a portfolio's volatility is the correlation of the contracts within the portfolio, that is, the degree to which the contracts in the portfolio respond similarly to changing market conditions.

[18] Similar to the BSC proposal, the FDIC's proposed amendment specifies that for equity

Continued

The FDIC is proposing the same formula as the BSC proposal to calculate a reduction in the add-on for potential future exposure for contracts subject to qualifying netting contracts. The FDIC recognizes several advantages with this formula. First, the formula uses bank-specific information to calculate the NGR. The NGR is simple to calculate and uses readily available information. The FDIC believes the use of the averaging factor of 0.5 is an important aspect of the proposed formula because it means the add-on for potential future exposure can never be reduced to zero and banks will always hold some capital against derivative contracts, even in those instances where the net current exposure is zero.

The FDIC is seeking comment on all aspects of this proposal. As mentioned earlier, the BSC proposal seeks comment on whether the NGR should be calculated on a counterparty-by-counterparty basis, or on a global basis for all contracts subject to qualifying bilateral netting arrangements. The FDIC's proposed regulatory language would require the calculation of a separate NGR for each counterparty with which it has a qualifying netting contract. However, the FDIC is also seeking comment as to which method of calculating the NGR would be most efficient and appropriate for institutions with numerous qualifying bilateral netting arrangements. With either calculation method the NGR would be applied separately to adjust the add-on for potential future exposure for each netting arrangement. The FDIC notes that some preliminary findings indicate that a global NGR may be less burdensome to apply since the same NGR would be used for each counterparty with a netting arrangement, but counterparty specific NGRs may provide a more accurate indication of the credit risk associated with each counterparty.

Regulatory Flexibility Act Analysis

The FDIC does not believe that adoption of this proposal would have a significant economic impact on a substantial number of small business entities (in this case, small banks), in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C 601 et. seq.). In this regard, while some small banks with limited derivative portfolios may experience an increase in capital charges, for most banks the overall effect of the proposal will be to reduce regulatory burden and to reduce the capital charge for certain transactions.

Paperwork Reduction Act

The FDIC has determined that its proposed amendments, if adopted, would not increase the regulatory paperwork burden of state nonmember banks pursuant to the provisions of the paperwork Reduction Act (44 U.S.C. 3501 et. seq.).

List of Subjects in 12 CFR Part 325

Bank deposit insurance, Banks, banking, Capital adequacy, Reporting and recordkeeping requirements, Savings associations, State nonmember banks.

For the reasons set forth in the preamble, the Board of Directors of the FDIC proposes to amend 12 CFR part 325 as follows:

PART 325—CAPITAL MAINTENANCE

1. The authority citation for part 325 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819 (Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 3907, 3909; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note) Pub. L. 102–242, 105 Stat. 2236, 2355, 2386 (12 U.S.C. 1828 note).

2. In appendix A to part 325, section II is amended by:

a. Revising the last sentence in section II.C. Category 3;

b. Redesignating footnotes 36 through 40 as footnotes 37 through 41;

c. Adding new footnote 35 at the end of the introductory text of section II.D.; and

d. Revising the heading and the introductory text of section II.E. (preceding paragraph E.1.) to read as follows:

APPENDIX A TO PART 325—STATEMENT OF POLICY ON RISK-BASED CAPITAL

* * * * *

II. * * *

C. * * *

Category 3 * * * In addition, the credit equivalent amount of derivative contracts that do not qualify for a lower risk weight are assigned to the 50 percent risk category.

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D. * * *[35] * * *

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E. Derivative Contracts (Interest Rate, Exchange Rate, Commodity and Equity Derivative Contracts)

Credit equivalent amounts are computed for each of the following off-balance-sheet derivative contracts:

Interest Rate Contracts

(1) Single currency interest rate swaps.
(2) Basis swaps
(3) Forward rate agreements.
(4) Interest rate options (including caps, collars, and floors purchased).
(5) Any other instrument that gives rise to similar credit risks (including when-issued securities and forward deposits accepted).

Exchange Rate Contracts

(1) Cross-currency interest rate swaps.
(2) Forward foreign exchange contracts
(3) Currency options purchased.
(4) Any other instrument that gives rise to similar credit risks.

Commodity (including precious metal) or Equity Derivative Contracts

(1) Commodity or equity linked swaps.
(2) Commodity or equity linked options purchased.
(3) Forward commodity or equity linked contracts.
(4) Any other instrument that gives rise to similar credit risks.

Exchange rate contracts with an original maturity of fourteen calendar days or less and derivative contracts traded on exchanges that require daily payment of variation margin may be excluded from the risk-based ratio calculation. Over-the-counter options purchased, however, are included and treated in the same way as other derivative contracts.

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3. In Appendix A to part 325, section II.E.1., as that section was proposed to be revised at 59 FR 37726, July 25, 1994, is revised to read as follows:

II. * * *

E. * * *

1. *Credit Equivalent Amounts for Derivative Contracts.* The credit equivalent amount of a derivative contract that is not subject to a qualifying bilateral netting contract in accordance with section II.E.3. of this appendix A is equal to the sum of (i) the current exposure (which is equal to the mark-to-market value,[41] if positive, and is sometimes referred to as the replacement cost) of the contract and (ii) an estimate of the potential future credit exposure over the remaining life of the contract.

The current exposure is determined by the mark-to-market value of the contract. If the mark-to-market value is positive, then the current exposure is equal to that mark-to-market value. If the mark-to-market value is zero or negative, then the current exposure is zero.

The potential future credit exposure of a contract, including contracts with negative mark-to-market values, is estimated by

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contracts that automatically reset to zero value following a payment, the remaining maturity is set equal to the time remaining until the next payment. Also, for contracts with multiple exchanges of principal, the conversion factors are to be multiplied by the number of remaining payments in the contract.

[35] The sufficiency of collateral and guarantees for off-balance-sheet items is determined by the market value of the collateral or the amount of the guarantee in relation to the face amount of the item, except for derivative contracts, for which this determination is generally made in relation to the credit equivalent amount. Collateral and guarantees are subject to the same provisions noted under section II.B.

[41] Mark-to-market values are measured in dollars, regardless of the currency or currencies specified in the contract and should reflect changes in both underlying rates, prices and indices, and counterparty credit quality.

multiplying the notional principal amount of the contract by one of the following credit conversion factors, as appropriate:

CONVERSION FACTOR MATRIX [A]

[Numbers in percent]

Residual maturity	Interest rate	Exchange rate and gold	Equity [B]	Precious metals, except gold	Other commodities
Less than one year	0.0	1.0	6.0	7.0	12.0
One to five years	0.5	5.0	8.0	7.0	12.0
Five years or more	1.5	7.5	10.0	8.0	15.0

[A] For contracts with multiple exchanges of principal, the factors are to be multiplied by the number of remaining payments in the contract.
[B] For contracts that reset to zero value following a payment, the remaining maturity is set equal to the time until the next payment.

No potential future exposure is calculated for single currency interest rate swaps in which payments are made based upon two floating rate indices (so called floating/floating or basis swaps); the credit exposure on these contracts is evaluated solely on the basis of their mark-to-market values.

4. In Appendix A to part 325, section II.E.2, as that section was proposed to be revised at 59 FR 37726, July 25, 1994, is revised to read as follows:

II. * * *

E. * * *

2. *Risk Weights and Avoidance of Double Counting.* Once the credit equivalent amount for a derivative contract, or a group of derivative contracts, has been determined, that amount is assigned to the risk category appropriate to the counterparty, or, if relevant, the guarantor or the nature of any collateral. However, the maximum weight that will be applied to the credit equivalent amount of such contracts is 50 percent.

In certain cases, credit exposures arising from the derivative contracts covered by these guidelines may already be reflected, in part, on the balance sheet. To avoid double counting such exposures in the assessment of capital adequacy and, perhaps, assigning inappropriate risk weights, counterparty credit exposures arising from the types of instruments covered by these guidelines may need to be excluded from balance sheet assets in calculating banks' risk-based capital ratios.

The FDIC notes that the conversion factors set forth in section II.E.1. of appendix A, which are based on observed volatilities of the particular types of instruments, are subject to review and modification in light of changing volatilities or market conditions.

Examples of the calculation of credit equivalent amounts for these types of contracts are contained in table IV of this appendix A.

5. In Appendix A to part 325, section II.E.3, as that section was proposed to be added at 59 FR 37726, July 25, 1994, is revised to read as follows:

II. * * *

E. * * *

3. *Netting.* For purposes of this appendix A, netting refers to the offsetting of positive and negative mark-to-market values when determining a current exposure to be used in the calculation of a credit equivalent amount. Any legally enforceable form of bilateral netting (that is, netting with a single counterparty) of derivative contracts is recognized for purposes of calculating the credit equivalent amount provided that:

* * * * *

(d) The bank maintains in its files documentation adequate to support the netting of derivative contracts, including a copy of the bilateral netting contract and necessary legal opinions.

A contract containing a walkaway clause is not eligible for netting for purposes of calculating the credit equivalent amount.[42]

By netting individual contracts for the purpose of calculating its credit equivalent amount, a bank represents that it has met the requirements of this appendix A and all the appropriate documents are in the bank's files and available for inspection by the FDIC. Upon determination by the FDIC that a bank's files are inadequate or that a netting contract may not be legally enforceable under any one of the bodies of law described in paragraphs (b) (i) through (iii) of this section, underlying individual contracts may be treated as though they were not subject to the netting contract.

The credit equivalent amount of derivative contracts that are subject to a qualifying bilateral netting contract is calculated by adding (i) the net current exposure of the netting contract and (ii) the sum of the estimates of potential future exposure for all individual contracts subject to the netting contract, adjusted to take into account the effects of the netting contract.

The net current exposure is the sum of all positive and negative mark-to-market values of the individual contracts subject to the netting contract. If the net sum of the mark-to-market values is positive, then the net current exposure is equal to that sum. If the net sum of the mark-to-market values is zero or negative, then the net current exposure is zero.

The sum of the estimates of potential future exposure for all individual contracts subject to the netting contract (A_{gross}), adjusted to reflect the effects of the netting contract (A_{net}), is determined through application of a formula. The formula, which employs the ratio of the net current to the gross current exposure (NGR), is expressed as:

$$A_{net} = .5(A_{gross} + (NGR * A_{gross}))$$

Gross potential future exposure, or A_{gross}, is calculated by summing the estimates of potential future exposure (determined in accordance with section II.E.1. of this appendix A) for each individual contract subject to the qualifying bilateral netting contract.[43] The NGR is determined as the ratio of the net current exposure of the netting contract to the gross current exposure of the netting contract. The gross current exposure is the sum of the current exposures of all individual contracts subject to the netting contract calculated in accordance with section II.E.1. of this appendix A. The effect of this treatment is that A_{net} is the average of A_{gross} and A_{gross} adjusted by the NGR.

6. In Appendix A to part 325, the chart in Table III and its heading, as that section was proposed to be amended at 59 FR 37726, July 25, 1994, is revised to read as follows:

Table III. * * *

* * * * *

Credit Conversion for Derivative Contracts

* * * * *

[42] For purposes of this section, a walkaway clause means a provision in a netting contract that permits a non-defaulting counterparty to make lower payments than it would make otherwise under the contract, or no payments at all, to a defaulter or to the estate of a defaulter, even if a defaulter or the estate of a defaulter is a net creditor under the contract.

[43] For purposes of calculating gross potential future credit exposure for foreign exchange contracts and other similar contracts in which notional principal is equivalent to cash flows, total notional principal is defined as the net receipts to each party falling due on each value date in each currency.

CONVERSION FACTOR MATRIX [A]

[Numbers in percent]

Residual maturity	Interest rate	Exchange rate	Equity [B]	Precious metals	Other commodities
Less than one year	0.0	1.0	6.0	7.0	12.0
One to five years	0.5	5.0	8.0	7.0	12.0
Five years or more	1.5	7.5	10.0	8.0	15.0

[A] For contracts with multiple exchanges of principal, the factors are to be multiplied by the number of remaining payments in the contract.
[B] For contracts that reset to zero value following a payment, the remaining maturity is set equal to the time until the next payment.

* * * * *

6. In Appendix A to part 325, Table IV, as that table was proposed to be added at 59 FR 37726, July 25, 1994, is revised to read as follows:

TABLE IV.—CALCULATION OF CREDIT EQUIVALENT AMOUNTS FOR DERIVATIVE CONTRACTS

Potential exposure	+		=	Credit equivalent amount		
Type of contract (remaining maturity)	Notional principal (dollars)	Current exposure	Potential Exposure (dollars)	Market-to market value	Current exposure (dollars)	Credit equivalent amount
(1) 120-Day Forward Foreign Exchange	5,000,000	.01	50,000	100,000	100,000	150,000
(2) 6-Year Forward Foreign Exchange	6,000,000	.075	450,000	−120,000	0	450,000
(3) 3-Year Interest Rate Swap	10,000,000	.005	50,000	200,000	200,000	250,000
(4) 1-Year Oil Swap	10,000,000	.12	1,200,000	−250,000	0	1,200,000
(5) 7-Year Interest Rate Swap	20,000,000	.015	300,000	−1,300,000	0	300,000
Total			2,050,000		300,000	2,350,000

If contracts (1) through (5) above are subject to a qualifying bilateral netting contract, then the following applies:

	Potential future exposure (from above)		Net current exposure*		Credit equivalent amount
(1)	50,000				
(2)	450,000				
(3)	50,000				
(4)	1,200,000				
(5)	300,000				
Total	2,050,000	+	0	=	2,050,000

* The total of the mark-to-market values from above is −1,370,000. Since this is a negative amount, the net current exposure is zero.

To recognize the effects of netting on potential future exposure, the following formula applies:

$A_{net} = .5\ (A_{gross} + (NGR * A_{gross}))$

In the above example:

NGR = 0 (0/300,000)

$A_{net} = .5\ (2{,}050{,}000 + (0 * 2{,}050{,}000))$

$A_{net} = 1{,}025{,}000$

Credit Equivalent Amount: 1,025,000 + 0 = 1,025,000

If the net current exposure was a positive amount, for example, $200,000, the credit equivalent amount would be calculated as follows:

NGR = .67 (200,000/300,000)

$A_{net} = .5(2{,}050{,}000 + (.67 * 2{,}050{,}000))$

$A_{net} = 1{,}711{,}750$

Credit Equivalent Amount: 1,711,750 + 200,000 = 1,911,750

By order of the Board of Directors.

Dated at Washington, D.C. this 27 day of September, 1994.

Federal Deposit Insurance Corporation

Robert E. Feldman,

Acting Executive Secretary.

[FR Doc. 94–25662 Filed 10–18–94; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 93–NM–207–AD]

Airworthiness Directives; Canadair Model CL–600–1A11, –2A12, and –2B16 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier supplemental proposed airworthiness directive (AD), applicable to certain Canadair Model CL–600–1A11, –2A12, and –2B16 series airplanes, that would have required a functional check of the idle stop function of the engine throttle quadrant; repair or replacement, if necessary; and eventual replacement of the engine throttle quadrant. That proposal was prompted by reports of unintentional engine shutdown on certain of these airplanes due to problems associated with operation of the engine throttle quadrant. This action further revises the proposed rule by adding a second type

of test of the engine throttle quadrant to determine if the throttle levers bypass the idle stop into the shut-off position. The actions specified by this proposed AD are intended to ensure the proper operation of the throttle quadrant so as to prevent inadvertent shutdown of an engine while the airplane is taxiing or in flight.

DATES: Comments must be received by November 23, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 93–NM–207–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Bombardier, Inc., Canadair Aerospace Group, P.O. Box 6087, Station Centre-ville, Quebec H3C 3G9, Canada. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Engine and Propeller Directorate, New York Aircraft Certification Office, 181 South Franklin Avenue, Valley Stream, New York.

FOR FURTHER INFORMATION CONTACT: Raymond J. O'Neill, Aerospace Engineer, Propulsion Branch, ANE–174, FAA, Engine and Propeller Directorate, New York Aircraft Certification Office, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581; telephone (516) 791–7421; fax (516) 791–9024.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 93–NM–207–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 93–NM–207–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to certain Canadair Model CL–600–1A11, –2A12, and –2B16 series airplanes, was published as a supplemental notice of proposed rulemaking (NPRM) in the **Federal Register** on June 28, 1994 (59 FR 33233). That supplemental NPRM would have required a functional check of the idle stop function of the throttle quadrant; repair or replacement of the throttle quadrant if the check failed; and the eventual replacement of the throttle quadrant with a new model. In addition, that supplemental NPRM expanded the applicability of the initially-issued NPRM to include additional airplanes that were found to be subject to the addressed unsafe condition.

That supplemental NPRM was prompted by reports of unintentional engine shutdown that occurred on Model CL–600–2A12 and –2B16 series airplanes when a throttle lever over-rode the idle stop during throttle retardation, due to a quick, sharp pull on the throttle levers, and the throttle lever consequently moved directly to the shut-off position. The proposed functional check (hereafter called "the abrupt-movement check") was intended to ensure that such unintentional shutdowns of engines would not occur while the airplane is taxiing or in flight. The abrupt-movement check procedures are described in Canadair Challenger Service Bulletins A600–0629 and A601–0410, both dated November 1, 1993.

Subsequent to the issuance of that supplemental NPRM, the FAA became aware that a necessary requirement, which was previously proposed in the initially-issued NPRM, was incorrectly omitted from the supplemental NPRM. The original NPRM was published in the **Federal Register** on February 9, 1994, (59 FR 5966). That action would have required operators to test the engine throttle quadrant to determine if the throttle levers bypass the idle stop into the shut-off position due to side loads on the throttle levers; quadrants that failed the test (hereafter called "the side-load test") would be required to be modified or replaced. Those actions would have been required to be accomplished in accordance with the instructions contained in Canadair Alert Service Bulletin A600–0615, dated June 10, 1992 (for Model CL–600–1A11 series airplanes); or Canadair Alert Service Bulletin A601–0374, Revision 1, dated September 30, 1992 (for Models CL–600–2A12 and CL–600–2B16 series airplanes).

The FAA has determined that performance of this side-load test is necessary in order to adequately address the unsafe condition presented by the problems identified with the operation of the engine throttle quadrant.

Operators should note that the originally-issued NPRM would have required that throttle quadrants failing the side-load test be modified in accordance with the Canadair service bulletins released in 1992 (referred to above). However, in accordance with the recommendations of the Canadair service bulletins released in November 1993 (referred to above), throttle quadrants that failed the abrupt-movement check would be replaced with a new unit. The FAA has determined that it is not logical to require that the throttle quadrants be modified if they fail the side-load test and subsequently be replaced by a new unit if they fail the abrupt-movement check. The FAA has determined, instead, that both the side-load test and the abrupt-movement check must be performed, and units that fail either test must be replaced in accordance with the Canadair service bulletins dated November 1993. (Units that pass the tests would be required eventually to be replaced at a later time.)

Additionally, the compliance time for the proposed eventual replacement of the engine throttle quadrant on all airplanes was incorrectly expressed in the previous supplemental NPRM as "1,200 flight hours." The compliance time for this proposed requirement should have been specified as "4,500 hours time-in-service." (The "1,200" figure actually represented the number of landings that is approximately equivalent to 4,500 hours time-in-service for the majority of the affected fleet.)

This airplane model is manufactured in Canada and is type certificated for operation in the United States under the provisions of § 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this supplemental NPRM would require:

1. A one-time test of the engine throttle quadrant to determine if side loads on the throttles will cause the throttle levers to bypass the idle stop into the shut-off position, and replacement of the throttle quadrant if it fails this test;

2. A one-time functional check of the engine throttle quadrant to determine if a quick, sharp pull on the throttles will cause the throttle levers to bypass the idle stop into the shut-off position, and replacement of the throttle quadrant if it fails this functional check; and

3. Replacement of the throttle quadrant as terminating action for the requirements of this AD.

Additionally, paragraph (e) of this supplemental NPRM indicates the corrected compliance time of "4,500 hours time-in-service" for replacement of the throttle quadrant. Expressing this compliance time in terms of "hours time-in-service" makes it consistent with the compliance terms for the other requirements of this proposed AD.

Since certain of these changes expand the scope of the previously proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Cost Impact

The FAA estimates that 150 airplanes of U.S. registry would be affected by this proposed AD.

The proposed side-loads test of the engine throttle quadrant would take approximately 17 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of this proposed requirement on U.S. operators is estimated to be $140,250, or $935 per airplane.

The proposed abrupt-movement check of the idle stop function of the throttle quadrant would take approximately 1 work hour per airplane to accomplish, at an average labor rate of $55 per work hour. Based on these figures, the total cost impact of the proposed functional check on U.S. operators is estimated to be $8,250, or $55 per airplane.

The proposed installation of a modified throttle quadrant would take approximately 10 work hours per airplane to accomplish, at an average labor rate of $55 per work hour. Required parts would be provided by the manufacturer at no cost to operators. Based on these figures, the total cost impact of the proposed installation on U.S. operators is estimated to be $82,500, or $550 per airplane.

Based on the figures discussed above, the total cost impact of this proposed AD on U.S. operators is estimated to be $231,000, or $1,540 per airplane. This total cost impact figure is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Canadair: Docket 93–NM–207–AD.

Applicability: Model CL–600–1A11 series airplanes, serial numbers 1004 through 1085, inclusive, equipped with throttle quadrant part numbers 600–90601–69, –71, –73, –75, –77, and –79; Model CL–600–2A12 series airplanes, serial numbers 3001 through 3066, inclusive, equipped with throttle quadrant part numbers 600–90601–983, –987, –989, –1013, –1015, –1017, –1019, –1021, –1023, –1025, and –1027; and Model CL–600–2B16 series airplanes, serial numbers 5001 through 5139, inclusive, equipped with throttle quadrant part numbers 600–90601–983, –987, –989, –1013, –1015, –1017, –1019, –1021, –1023, –1025, and –1027; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent inadvertent shutdown of an engine while the airplane is taxiing or in flight, accomplish the following:

(a) Within 50 hours time-in-service after the effective date of this AD, perform a test of the engine throttle quadrant to determine if the throttle levers bypass the idle stop into the shut-off position, in accordance with Canadair Alert Service Bulletin A600–0615, dated June 10, 1992 (for Model CL–600–1A11 series airplanes); or Canadair Alert Service Bulletin A601–0374, Revision 1, dated September 30, 1992 (for Models CL–600–2A12 and CL–600–2B16 series airplanes), as applicable.

Note 1: Canadair Alert Service Bulletins A600–0615 and A601–0374 reference Sargent Aerospace Service Bulletins 43058–76–03 (for Model CL–600–1A11 series airplanes) and 43068–76–05 (for Model CL–600–2A12 and –2B16 series airplanes), both dated April 13, 1992, for additional service information.

(b) If the test required by paragraph (a) of this AD indicates that either throttle lever bypasses the idle stop into the shut-off position, prior to further flight, replace the throttle quadrant in accordance with Part B of the Accomplishment Instructions of Canadair Challenger Service Bulletin A600–0629, dated November 1, 1993 (for Model CL–600–1A11 series airplanes); or Canadair Challenger Service Bulletin A601–0410, dated November 1, 1993 (for Models CL–600–2A12 and –2B16 series airplanes); as applicable.

(c) Within 150 hours time-in-service after the effective date of this AD, perform a functional check of the idle stop function of the throttle quadrant in accordance with Part A of the Accomplishment Instructions of Canadair Challenger Service Bulletin A600–0629, dated November 1, 1993 (for Model CL–600–1A11 series airplanes); or Canadair

Challenger Service Bulletin A601–0410, dated November 1, 1993 (for Models CL–600–2A12 and –2B16 series airplanes); as applicable.

Note 2: Canadair Challenger Service Bulletins A600–0629 and A601–0410 reference Sargent Aerospace Service Bulletins 43058–76–04 (for Model CL–600–1A11 series airplanes) and 43068–76–06 (for Model CL–600–2A12 and –2B16 series airplanes), both dated March 24, 1993, for additional service information.

(d) If the functional check required by paragraph (c) of this AD indicates that the idle stop function of the throttle quadrant fails, prior to further flight, replace the throttle quadrant in accordance with Part B of the Accomplishment Instructions of Canadair Challenger Service Bulletin A600–0629 or A601–0410, both dated November 1, 1993, as applicable.

(e) Within 4,500 hours time-in-service after the effective date of this AD, replace the throttle quadrant in accordance with Part B of the Accomplishment Instructions of Canadair Challenger Service Bulletin A600–0629, dated November 1, 1993 (for Model CL–600–1A11 series airplanes); or Canadair Challenger Service Bulletin A601–0410, dated November 1, 1993 (for Models CL–600–2A12 and CL–600–2B16 series airplanes); as applicable. Such replacement constitutes terminating action for the requirements of this AD.

(f) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

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

Issued in Renton, Washington, on October 13, 1994

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–25845 Filed 10–18–94; 8:45 am]

BILLING CODE 4910–13–U

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release Nos. 33–7101; 34–34831; 35–26141; 39–2324; IC–20619) File No. S7–29–94]

Safe Harbor for Forward-Looking Statements

AGENCY: Securities and Exchange Commission.

ACTION: Concept Release and Notice of Hearing.

SUMMARY: The Securities and Exchange Commission ("Commission") is soliciting comment on current practices relating to disclosure of forward-looking information. In particular, the Commission seeks comment on whether the safe harbor provisions for forward-looking statements (set forth in Rule 175 under the Securities Act of 1933 ("Securities Act"), Rule 3b–6 under the Securities Exchange Act of 1934 ("Exchange Act"), Rule 103A under the Public Utility Holding Company Act of 1935 and Rule 0–11 under the Trust Indenture Act of 1939) are effective in encouraging disclosure of voluntary forward-looking information and protecting investors or, if not, should be revised and if revised, how. The Commission also seeks comment on various changes to the existing safe harbor provisions that have been suggested by certain commentators. Finally, the Commission is announcing that public hearings will be held beginning February 13, 1995, to consider these issues.

DATES: Comments should be received on or before January 11, 1995. Public hearings will begin at 10:00 a.m. on February 13, 1995. Those who wish to testify at the hearings must notify the Commission in writing of their intention to appear on or before December 31, 1994. The written notification should include a brief summary of the proposed testimony. Those who do not wish to appear at the hearings may submit written testimony on or before January 11, 1995 for inclusion in the hearing record. The schedule of appearances, date for submission of final written testimony by persons who will appear, and an agenda for the hearings will be announced by the Commission shortly before the hearings commence.

ADDRESSES: Persons wishing to submit notice of an intent to appear at the hearings, written comments or testimony should file three copies thereof with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. All written notice, comments and testimony should refer to File No. S7–9–4. All written material will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549.

FOR FURTHER INFORMATION CONTACT: Kevin C. Bruce or Andrew A. Gerber, Attorney-Advisers in the Division of Corporation Finance or Amy Bowerman Freed, Deputy Chief Counsel, Division of Corporation Finance at (202) 942–2900.

SUPPLEMENTARY INFORMATION:

I. Introduction

Forward-looking information [1] occupies a vital role in the United States securities markets. Investors typically consider management's forward-looking information important and useful in evaluating a company's economic prospects and consequently in making their investment decisions.[2] Analysts and other market participants report that they view consideration of management's own performance projections, *i.e.*, earnings and revenues, to be critical to their own forecasts of a company's future performance. As such, forward-looking information is often considered a critical component of investment recommendations made by broker-dealers, investment advisers and other securities professionals.[3]

A. Development of Safe Harbor

1. Wheat Commission

Until the early 1970s, the Commission prohibited disclosure of forward-looking information.[4] This policy was based primarily on the Commission's perception that such information was inherently unreliable, and that unsophisticated investors would place

[1] The term "forward-looking statement" is defined in current Rule 175 as limited to the following: (1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items; (2) A statement of management's plans and objectives for future operations; (3) A statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations included pursuant to Item 303 of Regulation S–K or Item 9 of Form 20–F; or (4) Disclosed statements of the assumptions underlying or relating to any of the statements described in (1), (2), or (3) above. 17 CFR 230.175.

[2] Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, *Report to the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Session,* (Committee Print 1977) [hereinafter the "Advisory Committee Report"]; Securities Act Release No. 6084 (Jun. 25, 1979); *see also* H. Pitt and K. Groskaufmanis, *Securities Law*, Nat. L. J. (Aug. 22, 1994) at B4.

[3] *Advisory Committee Report, supra* note 2, at 351.

[4] Securities Act Release No. 5362 (Feb. 2, 1973).

undue emphasis on the information in making investment decisions.[5]

Acting on the recommendation of a number of securities analysts,[6] the Commission formed a Disclosure Policy Group (the "Wheat Commission") to study a variety of disclosure issues, including whether projections should be permitted or mandated in Commission filings.

While the Wheat Commission's Report to the Commission, published in 1969, recognized that most investment decisions are based essentially on estimates of future earnings, the Commission determined that the detriments to investors associated with permitting forward-looking disclosure weighed against lifting the ban on disclosure of such information. In the Wheat Commission's view, the heightened litigation exposure, updating requirements and risk of undue investor reliance on this information outweighed any countervailing benefits.[7]

2. Rulemaking Initiatives

The Commission continued to consider these issues and conducted hearings in 1972 to determine whether to lift the ban and, instead, either mandate or permit disclosure of forward-looking information. The 1972 hearings involved fifty-three witnesses and resulted in the submission of over 200 letters of comment. A significant number of those letters were from issuers objecting to any suggestion that they be required to file forward-looking statements with the Commission. Following those hearings, the Commission elected in 1973 not to require disclosure of forward-looking information, but announced in a policy statement its intention to promulgate rules to permit voluntary disclosure of projections and to protect those projections from civil antifraud liability.[8]

In 1975, the Commission issued a series of proposals designed to implement the 1973 policy statement.[9] Specifically, the proposals would have:

1. Required the filing of a Form 8–K by any registrant that (a) had furnished a projection to any person, (b) had reason to believe that its public projections no longer had a reasonable basis, (c) had determined to cease issuing projections, or (d) wished to disassociate itself from a third person's projections;

2. Amended Form 10–K to (a) require inclusion therein of all prior projections, together with actual and historical results; (b) require inclusion of projections for future periods that had been previously filed with the Commission; and (c) limit the filing of projections to those issuers with Exchange Act reporting histories and budgeting experience and to those projections that satisfied the requirements of proposed safe harbor Rules 132 (a proposed predecessor of Rule 175) and 3b–6;

3. Created new Rules 132 and 3b–6, providing a safe harbor "by defining circumstances under which a projection would be deemed not to be an untrue or misleading statement of a material fact or a manipulative, deceptive, or fraudulent device, contrivance, act or practice as those terms are used in the various liability provisions of the federal securities laws"; and

4. Required that all projection information contained in the text of Form 10–K (but not exhibits) be included in the registrant's annual report to shareholders.[10]

In 1976, these proposed rules were withdrawn by the Commission in response to opposition from commenters.[11] In withdrawing the proposals, the Commission stated its hope that forward-looking information and the need for a safe harbor would be among those issues considered by the newly formed Advisory Committee on Corporate Disclosure.[12]

3. Advisory Committee Report

The Advisory Committee on Corporate Disclosure was formed in 1976 to evaluate certain of the Division of Corporation Finance's disclosure policies—among them the Division's policy on disclosure of forward-looking information.[13] On November 3, 1977, the Advisory Committee submitted its report to the Commission.[14]

In the course of its deliberations, the Advisory Committee had sought input from all interested persons on the costs and benefits of forward-looking information.[15] The Advisory Committee recommended in its report that the Commission act to encourage forward-looking disclosures, and made several specific recommendations regarding the form and substance of proposed Commission action.

First, in recognition that the Commission needed experience with projections disclosure in order to evaluate the wisdom of establishing a regulatory framework for such disclosure, the Committee stated that its recommendations were intended to encourage projections on an experimental basis. Such voluntary disclosure would enable the Commission to assess both the usefulness of the information to investors, and the costs to issuers of providing that information.[16] If forward-looking information disclosures ultimately were found to be beneficial to investors, the Committee believed that market forces, rather than a Commission mandate, would operate effectively to compel issuers to make such disclosures.[17]

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[5] *Disclosure to Investors: A Reappraisal of Administrative Policies Under the 1933 and 1934 Acts* (1969) at 94 [hereinafter the "Wheat Report"].

[6] Security analysts had suggested that the Commission permit "controlled" projections of sales and earnings in prospectuses and other documents filed with the Commission. *Wheat Report, supra* note 5, at 95–96.

[7] The Wheat Report stated these findings as follows: From a management standpoint, projections may change rapidly during a given year as changes occur in the factors on which they are based. Inclusion of such changing projections in a prospectus, which might be used long after it became effective would give rise to significant problems. It has been the Commission's long-standing policy not to permit projections and predictions in prospectuses and reports filed with the Commission. Such documents are designed to elicit material facts. Their factual character is widely recognized. Investors and their advisers are at liberty to make their own projections based on the disclosures resulting from the Commission's requirements. A real danger exists, in the Study's judgment, that projections appearing in prospectuses and other documents filed under securities laws and reviewed by the Commission would be accorded a greater measure of validity by the unsophisticated than they would deserve. *Wheat Report, supra* note 5, at 95–96.

[8] Securities Act Release No. 5362 (Feb. 2, 1973) ("[t]he Commission has never required a company to publicly disclose its projections and does not intend to do so now"). The Commission stated that its decision not to mandate disclosure of forward-looking statements was based on its desire not to deviate too far from its historical position of prohibiting such disclosure. *Id.*

[9] *See* Securities Act Release No. 5581 (April 28, 1975).

[10] *See id.*

[11] *See* Securities Act Release No. 5699 (Apr. 23, 1976).

[12] *See id.* At the same time, the Commission expressed initial approval of new Division of Corporation Finance guides designed to encourage the inclusion of projections in Commission filings. These guides called for: (1) A good faith assessment of the reliability of the projection; (2) a reasonable basis for that assessment; (3) outside review of the projections; (4) the use of reasonable ranges; (5) the use of a reasonable period of projection; (6) the inclusion of assumptions on which the projection is based; (7) the inclusion of cautionary language; and (8) disclosure of the accuracy of the issuer's prior projections. The Commission authorized issuance of substantially similar final guides in Securities Act Release No. 5992 (Nov. 7, 1978).

[13] *See* Exchange Act Release No. 12454 (May 18, 1976).

[14] Advisory Committee Report, *supra* note 2.

[15] *Id.; see also* Exchange Act Release No. 12454 (May 18, 1976) (noting public meetings held by the Advisory Committee and case studies to be conducted by the Advisory Committee of thirty public companies, financial analysts and investment decision makers).

[16] Advisory Committee Report, *supra* note 2, at 353.

[17] *Id.* at 354.

Second, the Committee recommended that the Commission adopt a safe harbor that would protect forward-looking statements made in good faith and with a reasonable basis, regardless of whether those statements were included in documents filed with the Commission. The Committee recommended that the burden be placed on the person seeking to establish antifraud liability for the forward-looking statement to show a lack of good faith or reasonable basis.[18]

Third, the Committee opined that a safe harbor should be available to all registrants, regardless of size and reporting history. It also recommended that companies be required to publish cautionary language along with the projection, to indicate clearly the nature of the projection and caution investors against ascribing undue weight thereto.[19] The Committee believed that disclosure of assumptions should be encouraged, but not required.[20] Further, the Committee concluded that companies should be encouraged, but not required, to compare actual results with earlier projections and to explain any significant variance.

While the Committee recommended that companies be reminded of their obligations to keep a published projection from becoming misleading in light of subsequent events, it urged that no formal requirement to update projections be imposed. In the Committee's view, companies should be permitted either to discontinue making projections or to resume such projections after discontinuation, but should not do so without a reasonable basis.

The Committee had a different view of mandatory disclosure and updating in connection with forward-looking information disseminated during the Securities Act registration process. Specifically, the Committee expressed its opinion that "the Commission should require companies to include such current projections covering the current period in their registration statements (updated as necessary) filed under the Securities Act."[21]

With respect to the type of information that should be disclosed, the Committee believed that companies should have the flexibility to choose which items to disclose, but should not be permitted to disclose only "favorable" items. Finally, the Committee recommended that the Commission permit third-party review of projections, provided that the third-party reviewer's credentials, extent of review, and relationship with the issuer were disclosed.[22]

4. Adoption of Safe Harbor Provision

In response to the Advisory Committee Report, the Commission announced in early 1978 that the Committee's recommended safe harbor rule would receive formal Commission consideration, along with any alternatives the Commission deemed appropriate.[23] Later that year, the Commission issued for public comment two versions of a safe harbor rule for forward-looking information: the Advisory Committee version, in the same form as the Committee had proposed, and another version formulated by the Commission.[24]

As set forth in the Commission's proposing release, the differences between the two proposals, as well as the questions asked and comments requested, reflected the Commission's reservations with respect to certain aspects of the Advisory Committee proposal. First, the Commission was particularly concerned that the burden of proving a lack of reasonable basis, which the Committee recommended be imposed on the plaintiff, "could be insurmountable."[25] The Commission therefore proposed an alternative rule that would have placed the burden on the defendant to prove that a challenged projection was made in good faith and with a reasonable basis.

There were several other substantive differences between the two proposals. Unlike the Advisory Committee's proposal, the Commission's alternative extended to third-party projections, while concomitantly restricting safe harbor protection to financial projections and similar statements, limiting safe harbor protection to statements made about reporting companies, and excluding statements about investment companies. Significantly, both proposed safe harbor rules covered all oral and written forward-looking information, not just when contained in Commission filings. Neither proposal specifically required inclusion of current projections in registration statements filed under the Securities Act, and no mention was made in the release of the reasons for this omission.

In response to the proposals, the Commission received approximately 90 letters of comment. A majority of commenters expressed a belief that a rule incorporating aspects of both proposals would provide the best incentive for projection disclosure.[26] Although a few commenters expressed continuing reservations about the Commission's proposed shift in policy from prohibiting to encouraging projection disclosure, virtually all agreed that a safe harbor rule was desirable and necessary.[27] Most commenters agreed that the safe harbor should be extended to statements made on behalf of the issuer (*i.e.*, by third party reviewers).

Several commenters criticized other aspects of the Commission's alternative proposal, arguing that the burden of proof for establishing that a projection did not have a reasonable basis or was not made in good faith should be imposed on the plaintiff,[28] and that the rule's coverage should be extended beyond revenues, earnings, and "other financial items" to encompass management's plans and objectives.[29] Commenters argued that the rule's protections should not be limited to companies with a reporting history.[30] Commenters concurred in the proposal to forego conditioning the rule's availability on inclusion of the information in Commission filings on the ground that such a condition could result in a loss of the safe harbor's protections based on a technical or inadvertent filing delinquency. Comments on the propriety of projections by investment companies were mixed.[31]

[18] *Id.* at 344.

[19] *See id.*

[20] Although the Committee recognized the value of assumptions, it opted against requiring disclosure of assumptions for two reasons: (a) because of the experimental nature of the program, the Committee apparently concluded that fewer mandatory disclosure items were appropriate; and (b) in order to encourage as many issuers to use the safe harbor rule as possible, the Committee wanted to keep the rule simple and thus facilitate compliance. *Id.*

[21] *Id.* at 361.

[22] The Committee believed that any such reviewer should be deemed an expert and should file an appropriate consent with the registration statement. *Id.*

[23] Securities Act Release No. 5906 (Feb. 15, 1978).

[24] *See* Securities Act Release No. 5993 (Nov. 7, 1978).

[25] *Id.*

[26] Securities Act Release No. 6084 (Jun. 25, 1979).

[27] *Id.*

[28] *Id.* Placing the burden on corporate defendants to prove that a projection was prepared with a reasonable basis and disclosed in good faith was viewed as undermining the Commission's goal of encouraging projection disclosure, and possibly worse than no rule at all.

[29] *Id.*

[30] *Id.* According to the release, commenters argued that "forecast information may be most valuable regarding companies that do not have a history of public information." *Id.*

[31] *Id.* As the Commission observed, "some commenters did not perceive a basis for distinguishing between investment companies and other issuers . . . . Other commenters believed that the type of information generated by investment companies would be more difficult to forecast with reliability and is dependent upon market factors and responses to market events that are inherently unpredictable."

In 1979, the Commission adopted a safe harbor provision that generally combined aspects of both proposals.[32] Virtually identical safe harbor provisions were codified in Rule 175 under the Securities Act and Rule 3b–6 under the Exchange Act.[33] These provisions offered safe harbor protection for specified forward-looking statements but only where made, reaffirmed, or later published, in documents filed with the Commission. On this point, the Commission stated that this "filing" requirement would provide investors with better access to the information and a more reliable framework within which to evaluate the forward-looking statement, and would enable the Commission to maintain oversight of the accuracy and completeness of the disclosure.

Second, the final rule incorporated the Advisory Committee's recommendation of placing the burden of proof on the plaintiff to show that the forward-looking information lacked a reasonable basis and was made otherwise than in good faith. The Commission reasoned that the liberal discovery procedures available in the federal courts had permitted plaintiffs to elicit the evidence necessary to sustain this burden. The Commission stated that it would monitor the operation of the safe harbor rule to assure that it was not inconsistent with the pre-eminent statutory goal of investor protection.[34]

The safe harbor provision, as adopted, did not require the publication of assumptions underlying forward-looking statements covered by the rule. In describing the basis for this decision, the Commission "re-emphasize[d] its position on the significance of assumption disclosures," explaining that:

> Under certain circumstances the disclosure of underlying assumptions may be material to an understanding of the projected results. The Commission also believes that the key assumptions underlying a forward-looking statement are of such significance that their disclosure may be necessary in order for such statements to meet the reasonable basis and good faith standards embodied in the rule. Because of the potential importance of assumptions to investor understanding and in order to encourage their disclosure, the rule as adopted indicates specifically that disclosed assumptions are also within its scope.[35]

The Commission made explicit the availability of the safe harbor to third-party reviewers, both those retained by the company and those making projections on behalf of management. Also, while not adding any requirement to update projections, the Commission reiterated its earlier position that projections protected by the safe harbor must be corrected when subsequent events or discoveries render them false or misleading.

Finally, the Commission elected not to extend coverage of the rule to investment companies registered under the Investment Company Act of 1940. While not rejecting the possibility that projections could be valuable to shareholders of registered investment companies, the Commission stated that "the nature of information reported by investment companies is sufficiently distinct to warrant separate consideration."[36]

The safe harbor provision has retained its essential elements, although the Commission has made several technical modifications since its adoption.[37]

B. Management's Discussion and Analysis Interpretative Release

Since 1979, the Commission has further refined its position on disclosure of forward-looking information, particularly in the context of developing and interpreting the management's discussion and analysis ("MD&A") requirements applicable to the Form 10–K and other required filings, as codified in Regulation S–K Item 303.[38] These contain a number of provisions that call for disclosure of prospective information.[39] An instruction to Item 303(a) states that the MD&A "shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of [the] future * * *."[40] In contrast to this required disclosure of "presently known data which will impact upon future operating results," registrants are expressly encouraged, but not required, to supply forward-looking information.[41] The Commission clarified the distinction between "voluntary" and "mandatory" forward-looking disclosure in a 1989 interpretative release relating to MD&A:

> Both required disclosure regarding the future impact of presently known trends, events or uncertainties and optional forward-looking information may involve some prediction or projection. The distinction between the two rests with the nature of the prediction required. Required disclosure is based on currently known trends, events, and uncertainties that are reasonably expected to have material effects, such as: a reduction in the registrant's product prices; erosion in the registrant's market share; changes in insurance coverage; or the likely non-renewal of a material contract. In contrast, optional forward-looking disclosure involves anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty.[42]

Thus, the Commission has distinguished between mandatory and voluntary forward-looking statements for disclosure purposes. Moreover, in the context of transactions involving an issuer's or affiliate's purchase of the issuer's shares, or a business combination, forward-looking information (including projections) may be required pursuant to Rule 10b–5.[43]

C. Qualitative Performance

There appears to be increasing interest, on the part of both registrants and users of their financial reports in the investor and analyst communities, in enhanced disclosure of information that may affect corporate performance but is not readily susceptible of measurement in traditional, quantitative terms.[44] Among such qualitative informational items are workforce training and development, product and

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[32] *See* Securities Act Release No. 6084 (Jun. 25, 1979).

[33] 17 CFR 230.175 (1994), 17 CFR 240.3b–6 (1994).

[34] *Id.*

[35] *Id.*

[36] *Id.* The Commission decided not to require that investment companies provide forward-looking disclosure under the recently-adopted "management's discussion of performance" requirement for registered open-end investment companies. Securities Act Release No. 6988 (Apr. 6, 1993).

[37] *See* Securities Act Release No. 6949 (Jul. 30, 1992); Securities Act Release No. 6353 (Mar. 3, 1982); Securities Act Release No. 6304 (Mar. 27, 1981); Securities Act Release No. 6291 (Feb. 17, 1981); and Securities Act Release No. 6288 (Feb. 9, 1981).

[38] Regulation S–K Item 303, 17 CFR 238.303 (1994).

[39] With respect to liquidity, disclosure is required of "any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in * * *" material changes. *See* Regulation S–K Item 303(a)(1), 17 CFR 229.303(a)(1) (1994). With respect to capital resources, the disclosure calls for "any known material trends, favorable or unfavorable * * *" Regulation S–K Item 303(a)(2)(ii), 17 CFR 229.303(a)(2)(ii) (1994). With respect to sales, revenue or income, the Item calls for "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact * * *" Regulation S–K Item 303(a)(3)(ii), 17 CFR 229.303(a)(3)(ii).

[40] *See* Regulation S–K Item 303, Instruction 3, 17 CFR 229.303 (1994).

[41] *See* Regulation S–K, Item 303, Instruction 7, 17 CFR 229.303 (1994).

[42] Securities Act Release No. 6835 (May 18, 1989).

[43] Projections might also be contained in documents required to be filed and discussed pursuant to specific line item requirements. *See* Item 4(b) of Form S–4; 17 CFR 239.25; Item 9 of Schedule 13E–3; 17 CFR 240.13e.100

[44] *See* R. Eccles and S. Mavrinac, *Improving the Corporate Disclosure Process* (Harvard Business School Working Paper 94–061 (1994) (hereinafter "Eccles & Mavrinac"); Stewart, *Your Company's Most Valuable Asset: Intellectual Capital*, Fortune, October 3, 1994 at 68 (hereinafter "Stewart").

process quality and customer satisfaction. A large registrant considers one such item—product quality—to be so important to its profitability that it has chosen to make it a key determinant of executive compensation.[45] Other companies are beginning to experiment with voluntary disclosure of the utilization of an intangible asset termed "intellectual capital," or employee knowledge.[46] In this connection, another federal agency has urged more corporate disclosure of the use of measures of "high performance work practices and other nontraditional measures" of corporate performance.[47]

With respect to the interest of users in this type of "soft," or nonquantitative, corporate information, a large public pension fund factors labor-management relations and other aspects of human resource management into analyses of portfolio company performance in connection with the fund's investment and voting decisions, based on research indicating that workplace practices can be linked to corporate performance.[48] Private pension fund fiduciaries are likely to follow this example, given the Department of Labor's recent issuance of an interpretive bulletin urging such fiduciaries to monitor more closely portfolio companies' investment in training and otherwise developing their workforce.[49]

Notwithstanding this growing market interest in access to qualitative performance information, registrants have expressed significant concern that disclosure of such information may expose them to greater litigation risk.[50] To the extent that this type of "soft" information does not fall within the current safe harbor definition of "forward-looking statements," however, it would not receive the protection of Rule 175 or 3b–6.

II. Judicial Approaches Toward Liability for Forward-Looking Statements

Contemporaneously with the evolution of the Commission's policy on disclosure of forward-looking information, the federal courts have adopted a variety of approaches toward private antifraud claims arising from such disclosures.[51]

A. Untrue Statement of Fact

The courts first addressed the question of whether predictions or statements of opinion could ever be considered to be "facts" which could be said to be false or misleading for purposes of liability under the securities laws. In *Marx* v. *Computer Sciences Corporation*,[52] the court found that while predictions could properly be characterized as facts, the failure of a prediction to prove true was not in itself actionable. Instead, the court looked at the factual representations which it found were impliedly made in connection with the prediction; namely that, at the time the prediction was made, it was believed by its proponent and it had a valid basis.[53] If a prediction was not believed when made or did not have a valid basis, it would constitute an untrue statement of fact which could then be analyzed in accordance with the other necessary elements of the action:[54] *i.e.*, materiality, reliance, scienter, and causation.

B. Materiality and Reliance

Some courts have disposed of cases involving forward-looking statements without reaching the issue of these implied factual assertions by examining another element of the claim—materiality or, as described in some cases, reliance. Most of these cases have been decided on the basis of the "bespeaks caution" doctrine,[55] which has been described as follows:

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[45] *See* Chrysler Corporation, 1994 Proxy Statement, filed March 16, 1994.

[46] *See Stewart, supra* note 44; (*citing* Skandia AFS' 1994 Annual Report to Shareholders). *See also* 1994 Annual Reports to Shareholders submitted to the Commission by Dow Chemical Corporation and National Steel Company.

[47] Letter from Secretary Robert B. Reich to Chairman Arthur Levitt (Oct. 3, 1994).

[48] *See IRRC Corporate Governance Highlights*, (July/August 1994) at 15–16 (reporting that the California Public Employees' Retirement System, the nation's largest public pension fund, announced that it will consider workplace practices along with financial performance criteria in connection with the fund's annual corporate governance review of portfolio companies, based on the positive correlation found by economist Lilli A. Gordon between "high-performance workplace practices" and enhanced productivity and long-term financial performance of such companies).

[49] Department of Labor Interpretive Bulletin 94–2; 59 FR 38860 (July 29, 1994).

[50] *See, e.g.*, Letter from Frank J. Borelli, Treasurer, Financial Executives Institute to Edmund L. Jenkins, Chairman, AICPA Special Committee on Financial Reporting, dated Aug. 8, 1994 (objecting to Jenkins Committee proposals for expanded disclosure of additional forward-looking and qualitative performance information due in part to litigation exposure). *See also Eccles & Mavrinac, supra* note 44; *Stewart, supra* note 44. The Conference Board has established a working group headed by Dr. Carolyn Brancato and comprised of U.S and foreign companies, institutional investors, analysts, and U.S. regulators. Charged with developing a systemic approach to disclosure of corporate performance, both on a financial and non-financial basis, by the spring of 1995, the Group is exploring ways of: (a) Encouraging companies to report their use of qualitative performance criteria despite the perceived litigation risk; and (b) educating institutional investors, analysts and others as to the utility of such information and its relationship to such quantitatively measured indicia of corporate performance as earnings.

[51] The safe harbor provided by Rules 175 and 3b–6 has been implicated in only a small portion of cases involving forward-looking statements. *See Arazi* v. *Mullane*, 2 F.3d 1456 (7th Cir. 1993); *Krim* v. *BancTexas Group, Inc.*, 989 F.2d 1435 (5th Cir. 1993); *Roots Partnership* v. *Lands' End, Inc.*, 965 F.2d 1411 (7th Cir. 1992); *Wielgos* v. *Commonwealth Edison Co.*, 892 F.2d 509 (7th Cir. 1989).

[52] 507 F.2d 485 (9th Cir. 1974).

[53] *Id.* at 489–90 ("[T]he forecast may be regarded as a representation that * * * [the issuer's] informed and reasonable belief was that at the end of the coming period, earnings would be approximately $1.00. * * * In addition, because such a statement implies a reasonable method of preparation and a valid basis, we believe also that it would be 'untrue' absent such preparation or basis."). Many courts have adopted similar formulations. *See In re Apple Computer Securities Litigation*, 886 F.2d 1109, 1113 (9th Cir. 1989) ("A projection or statement of belief contains at least three implicit factual assertions: (1) that the statement is genuinely believed, (2) that there is a reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement. A projection or statement of belief may be actionable to the extent that one of these implied factual assertions is inaccurate." (citing *Marx*)); *Isquith* v. *Middle South Utilities, Inc.*, 847 F.2d 186, 203–04 (5th Cir. 1988) ("Most often, whether liability is imposed depends on whether the predictive statement was 'false' when it was made. The answer to this inquiry, however, does not turn on whether the prediction in fact proved to be wrong; instead, falsity is determined by examining the nature of the prediction—with the emphasis on whether the prediction suggested reliability, bespoke caution, was made in good faith, or had a sound factual or historical basis." (footnote omitted)); *Kirby* v. *Cullinet Software, Inc.*, 721 F.Supp. 1444, 1450 (D.Mass. 1989) ("At a minimum, a prediction must be made in good faith and with a sound historical or factual basis.").

Rule 175 and Rule 3b–6 follow a similar path by providing that a covered statement shall not be deemed to be, *inter alia*, an untrue statement of a material fact, unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith. Although the Rules use the term "fraudulent statement" to refer to such an untrue statement of a material fact, a separate determination must be made as to whether the statement, though untrue, is fraudulent or otherwise actionable under the securities laws. In *Wielgos* v. *Commonwealth Edison Co.*, *supra* at 513, the court considered the use of the term "fraudulent statement" in the Rules, but easily determined that Rule 175 applies to actions under § 11 of the Securities Act even though liability under that section does not depend on "fraud."

[54] *Id.* at 490. In the recent case of *Rubinstein* v. *Collins*, 20 F.3d 160, 169 (5th Cir. 1994), the court stated this point succinctly: Simply alleging that the predictive statements at issue here did not have a reasonable basis—that is, that they were negligently made—would hardly suffice to state a claim under Rule 10b–5. As we have consistently held, scienter is an element of such a claim. * * * Plaintiffs have satisfied the pleading requirements for scienter. They have claimed that the defendants either knew—or were recklessly indifferent to—the fact that the predictive statements did not have a reasonable basis. (Footnotes omitted.)

[55] Seven circuit courts have applied the bespeaks caution doctrine in analyzing forward-looking statements (although the Sixth Circuit, after applying the doctrine in one case, stepped back somewhat in a subsequent decision). *See In re Worlds of Wonder Sec. Litig.*,—F.3d —, 1994 WL 501261 (9th Cir. 1994); *Rubinstein* v. *Collins*, 20 F.3d 160 (5th Cir. 1994); *In re Donald J. Trump Casino Sec. litig.*, 7 F.3d 357 (3d Cir. 1993); *Luce*

Continued

The essence of the doctrine is that where an offering statement, such as a prospectus, accompanies statements of its future forecasts, projections and expectations with adequate cautionary language, those statements are not actionable as securities fraud.[56]

Under the bespeaks caution doctrine, cautionary language, as a part of the "total mix" of information, may render a predictive statement immaterial as a matter of law,[57] or make it unreasonable for an investor to rely upon a predictive statement.[58] Recently, some courts have warned, however, that cautionary language, in and of itself, is not necessarily sufficient.[59] "To suffice, the cautionary statements must be substantive and tailored to the specific future projections, estimates or opinions in the prospectus which the plaintiffs challenge."[60]

Some courts have taken a more extreme position, determining that, even without cautionary language, some predictions are not material. For example, referring to "soft," "puffing" statements, upon which no reasonable investor would rely, the Court of Appeals for the Fourth Circuit stated that, "projections of future performance not worded as guarantees are generally not actionable under the federal securities laws."[61]

v. *Edelstein*, 802 F.2d 49 (2d Cir. 1986); *Romani* v. *Shearson Lehman Hutton*, 929 F.2d 875 (1st Cir. 1991); *Moorhead* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 949 F.2d 243 (8th Cir. 1991). The Sixth Circuit adopted the doctrine in *Sinay* v. *Lamson & Sessions Co.*, 948 F.2d 1037 (6th Cir. 1991), but revised its application of the doctrine in *Mayer* v. *Mylod*, 988 F.2d 635 (6th Cir. 1993). *See generally* Donald C. Langevoort, *Disclosures that "Bespeak Caution,"* 49 Bus. Law. 481 (February 1994).

[56] *In re Donald J. Trump Casino Sec. Litig.*, 793 F.Supp. 543, 549 (D.N.J. 1992), *aff'd*, 7 F.3d 357 (3d Cir. 1993).

[57] *See In re Donald J. Trump Sec. Litig., supra* at 371 ("[C]autionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law."); *In re Worlds of Wonder Sec. Litig., supra; Rubinstein v. Collins, supra.*

[58] *Rubinstein* v. *Collins, supra* at 167 (cautionary language affects "the reasonableness of the reliance on and the materiality of [the] projections." (footnotes omitted)).

[59] *See Rubinstein* v. *Collins, supra* at 167–68; *In re Donald J. Trump Casino Sec. Litig., supra* at 371–72.

[60] *In re Donald J. Trump Casino Sec. Litig., supra* at 371–72.

[61] *Raab* v. *General Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993) (quoting *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1446 (5th Cir. 1993)). In *Malone* v. *Microdyne Corp.*, 26 F.3d 471, 479–0 (4th Cir. 1994), the Court of Appeals relied on *Raab* in finding that a forward-looking statement was not actionable because the "statement obviously did not constitute a guarantee and was certainly not specific enough to perpetrate a fraud on the market."

III. Criticisms of the Commission's Safe Harbor

Some have suggested that companies that make voluntary disclosure of forward-looking information subject themselves to a significantly increased risk of securities antifraud class actions.[62] Recent surveys suggest that this threat of mass shareholder litigation, whether real or perceived, has had a chilling effect on disclosure of forward-looking information.[63]

Contrary to the Commission's original intent, the safe harbor is currently invoked on a very limited basis in a litigation context.[64] Some critics of the current safe harbor provisions cite, among other things, the following as weaknesses of the safe harbor:

—the protections of the safe harbor are too narrow because they are limited to filed documents, resulting in selective disclosure made outside Commission documents;[65]

—the provisions of the safe harbor are not applied by the courts in a manner that results in quick and inexpensive dismissals of frivolous lawsuits;[66]

—there is a great deal of confusion over the nature and scope of any duty to correct or update projections once they are made;[67] and

—the safe harbor language is silent as to when a company may be liable for statements made by third parties.

A. Suggested Underinclusiveness of Current Safe Harbor

Some critics argue that the current safe harbor is ineffective largely because it is too narrow, in that it only covers statements made in documents filed with the Commission.[68] They contend that, due to this underinclusiveness, the safe harbor provides no comfort in most situations involving disclosure of forward-looking information. While acknowledging concern that the problem of selective disclosure prompted the Commission to adopt such a limitation in 1979,[69] these critics contend that this very limitation has created the unintended by-product of fostering such selective disclosure.

Many public companies complain that they face increasing analyst and institutional demands for immediate access to predictive information. Some issuers argue that, solely to gain the benefits of the safe harbor through reaffirmation of oral responses to recurring marketplace inquiries in Commission documents, they would be put to the impossible task of memorializing every analyst discussion. Given the informal and often unpredictable nature of communications between issuers and analysts, the provision in the safe harbor requiring Commission filing of forward-looking information is viewed as both counterproductive and highly impractical.

B. Judicial Application

Another complaint commonly raised is that the provisions of the existing safe harbor do not influence the standards that courts apply in securities fraud cases. The safe harbor is infrequently raised by defendants, perhaps because it compels judicial examination of reasonableness and good faith, which raise factual issues that often preclude early, prediscovery dismissal. Thus, critics state that the safe harbor is ineffective in ensuring the quick and inexpensive dismissal of frivolous private lawsuits. These critics argue that, unless the courts vigorously apply a higher pleading threshold sufficient to sustain a motion to dismiss based on the allegations of a class-action complaint, the mere threat of litigation will continue both to discourage management from making forward-looking disclosure and cause those companies that nonetheless provide such disclosure to incur significant costs in defense of nonmeritorious litigation. Those urging reform thus maintain that, in order for a safe harbor effectively to encourage forward-looking

[62] U. Gupta & B. Bowers, *Small Fast-Growth Firms Feel Chill of Shareholder Suits*, Wall St. J., April 5, 1994 at B2. *See generally* Staff Sen. Subcommittee on Securities of the Committee on Banking, Housing and Urban Affairs, *Report on Private Securities Litigation*, (1994) ("Senate Staff Report").

[63] National Venture Capital Association, *The Impact of Securities Fraud Suits on Entrepreneurial Companies* (Jan. 1994); National Investors Relations Institute, *Corporate Survey on Shareholder Litigation Effects* (Feb. 1994); American Stock Exchange CEO Survey, *Securities Litigation and Stock Option Accounting* 1 (Apr. 1994).

[64] *See* Louis Loss and Joel Seligman, Securities Regulation, 622–39 (1992); Barondes, *The Bespeaks Caution Doctrine: Revisiting the Application of Federal Securities Law to Opinions and Estimates*, J.Corp. L. 243, 247 (1994).

[65] *See* American Stock Exchange Survey, *CEOs Would Release More Financial Information If Litigation Albatross Were Removed* (1994); *See generally* S. Marino and R. Marino, *An Empirical Study of Recent Securities Class Action Settlements Involving Accountants, Attorneys, or Underwriters*, Sec. Reg. L. J. (1994) at 115; V. O'Brien and R. Hodges, *A Study of Class Action Securities Fraud Cases 1988–1993* (working draft 1994); J. Macey and G. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chicago L. Rev. 1 (1991).

[66] Senate Staff Report, *supra* note 62.

[67] Manns, *Duty to Correct: A Suggested Framework*, 46 Md. L. Rev. 1250 (1987).

[68] *See, e.g.*, M. Seeley, *In I.P.O.'s, the More Data the Better*, New York Times Forum, April 26, 1992. The majority of litigated cases appear to arise out of non-filed forward-looking statements further undercutting the utility of the safe harbor.

[69] *See* Advisory Committee Report, *supra* note 2.

disclosure, it must add protection over and above those afforded by judicial doctrines developed under what are characterized as the "housekeeping" provisions of the Federal Rules of Civil Procedure—Rules 9(b) and 12(b)(6).[70]

A related criticism is that courts are inconsistent in applying the safe harbor when it is implicated in the litigation. The courts do not always refer to the safe harbor when it is implicated.[71] One court refused to permit the use of the safe harbor because the earnings forecast in question had been presented "as a fact certain rather than as a 'projection' or 'forward-looking statement.'"[72] In this regard, commenters assert that the Commission should provide greater guidance to the judiciary with respect to the appropriate application of the safe harbor.

C. Duty To Correct or Update

A further criticism of the Commission's existing safe harbor is that the rule has created confusion over whether and when there is a duty to correct or update projections once they are made. A recent article suggests that issuers are often advised by their counsel to refrain from making forward-looking statements in Commission filings, or even from speaking to analysts, because they fear that by doing so they will "assume" a duty to update their forward-looking statements as and when the facts and circumstances surrounding their original statements change.[73] Furthermore, the paucity of caselaw in this area has left issuers without comfort or certainty as to when and if there is any duty to update or correct.[74] Commentators have questioned how long a forward-looking statement will be considered current and how far in the future, if at all, an issuer must continue to update.[75]

D. Entanglement and Endorsement

Another concern voiced by companies is whether to make forward-looking disclosures to securities analysts and institutional investors, whether in the context of initial public offering "roadshows" or otherwise, and the corresponding liability for any forward-looking statements included in the analysts' reports or statements. Companies complain that a better balance must be struck between the incentives and disincentives of disclosure to analysts.[76] The New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers encourage listed or quoted corporations to seek out formal and informal contact with analysts to facilitate the accurate pricing of their securities.[77] The Commission also encourages such communications as a complement to disclosure under the Exchange Act.[78]

The foregoing regulatory incentives must be viewed in light of potential issuer liabilities. While courts appear generally to impose no duty on a corporation to review or comment on analysts' reports, a corporation may become sufficiently entangled with the analysts' statements, by reviewing or correcting drafts of reports or otherwise, so as to assume a duty to correct or update the analyst's statements.[79]

Another risk arises from selective disclosures that may be characterized as tipping.[80] As a result of these risks, frequently perceived to outweigh the benefits, some corporations have gone so far as to announce that they will not speak to analysts about future earnings projections.[81]

IV. Alternatives to Current Safe Harbor Provision

The Commission generally is examining the current effectiveness of its safe harbors as codified in Rules 175 and 3b-6. Some commentators and groups have submitted proposals to amend the safe harbor. The Commission is considering these proposals and the issues that each proposal raises, as well as its own experience in interpreting and administering the safe harbor. Where specific proposed regulatory text has been provided by these commentators or groups, that text is attached in the appendix to this release.[82]

A. "Seasoned Issuer" Proposal

The "Seasoned Issuer" Proposal, suggested by the Association of Publicly Traded Companies ("APTC"), would provide a safe harbor precluding private actions for oral and written forward-looking statements with respect to securities quoted on the NASDAQ Stock Market or listed on a national securities exchange. It would apply only to secondary trading transactions and would not modify the Commission's enforcement authority. The proposed safe harbor would be available to issuers subject to the reporting requirements of sections 13 or 15(d) of the Exchange Act that have timely filed all reports required to be filed within the six months prior to the making of the statement. The proposed safe harbor would not be available to penny stock issuers. It also excludes issuers that had been convicted of securities law violations or issuers that had been the subject of any securities related injunction within the previous five years.

The term "forward-looking statement" is defined in the proposed safe harbor

[70] In deciding motions under Rule 12(b)(6) of the Federal Rules of Civil Procedure, at least one commentator has noted that courts apply different standards of materiality. *See* Sullivan, *Materiality of Predictive Information After Basic: A Proposed Two-Part Test of Materiality*, 1990 U. Ill. L. Rev. 207 (1990). For motions decided under Rule 9(b) of the Federal Rules of Civil Procedure, some courts have imposed a high burden on plaintiffs, requiring them to allege specific facts that give rise to an inference of fraudulent intent. *Romani* v. *Shearson Lehman Hutton*, 929 F.2d 875 (1st Cir. 1991); *see also DiLeo* v. *Ernst & Young*, 901 F.2d 624 (7th Cir. 1990). Other courts appear to have been more lenient. *In re Glenfed*, 11 F.3d 849 (9th Cir. 1993) ("plaintiff must allege facts that would give rise to an inference that the defendant did not believe the statements or knew of their falsity").

[71] The courts seldom refer to the safe harbor unless it is raised by the defendant. Examples of cases in which the safe harbor was implicated but not referenced include *Mayer* v. *Mylod*, 988 F.2d 635 (6th Cir. 1993), *Romani* v. *Shearson Lehman Hutton*, 929 F.2d 875 (1st Cir. 1991), and *In re Control Data Corp.*, 933 F.2d 616 (8th Cir. 1991).

[72] *Allyn Corp.* v. *Hartford National Corp.*, 1982 WL 1301 (D.Conn. 1982).

[73] *See* H. Pitt and K. Groskaufmanis, *Selective Disclosure can be Perilous*, Nat'l. L. J. (Apr. 18, 1994) at B4.

[74] The First Circuit has stated that the duty to update is triggered if a statement having a forward intent or implication, upon which investors are expected to rely, has been made. *Backman v. Polaroid*, 910 F.2d 17 (1st Cir. 1990) (en banc). The Ninth Circuit stated that an accurate announcement of past events did not carry with it the duty to disclose whether past trends would continue. *In re Convergent Technologies Securities Litigation*, 948 F.2d 507 (9th Cir. 1991). *See generally* Schneider, *Update on the Duty to Update: Did Polaroid Produce the Instant Movie After All?*, 23 Rev. of Sec. & Commodities Reg. 83 (May 9, 1990).

[75] *See generally*, C. Schneider, *Soft Disclosure: Thrust and Parries When Bad News Follows Optimistic Statements*, 26 Rev. Sec. & Comm. Reg. 5 (1993); R. Rosenblum, *An Issuer's Duty Under Rule 10b–5 To Correct and Update Materially Misleading Statements*, 40 Cath. Univ. L. Rev. 289 (1991).

[76] *See generally* A. Berkeley & M. Smith, *Corporate Disclosure: Potential Pitfalls*, Securities & Commodities Regulation (June 26, 1991).

[77] *See* New York Stock Exchange Manual, § 202.02; American Stock Exchange Guide § 402; and National Association of Securities Dealers Investor Relations Guide, *Cultivating the Investment Community*, at 18.

[78] Securities Act Release No. 6504 (Jan. 13, 1984).

[79] *Elkind v. Liggett & Myers*, 635 F.2d 156, 163 (2d Cir. 1980). Commentators have suggested that even a management response that an analyst's estimates are "too high," "too low" or "in the ballpark" can give rise to liability by suggesting that management bore some type of responsibility for the estimate; *see generally* Potential Pitfalls, *supra* note 76.

[80] *See Securities and Exchange Commission v. Stevens*, Lit. Rel. No. 12813 (March 19, 1991); *Elkind, supra*. *See generally* M. Goldman, K. Schuelke, J. Danforth and S. Thau, *Disclosures to Financial Analysts* (PLI September-October 1993).

[81] *See, e.g.*, J. Coffee, *Disclosures to Analysts are Risky*, Nat'l L.J. (Feb. 1, 1993).

[82] The transmittal letters pursuant to which some of these proposals were submitted to the Commission are included in the public file (S7–29–94).

to include any economic projection, statement of management's plans and objectives for future operations, statement of future performance and assumptions underlying the foregoing.

B. Business Judgment Rule Proposal

Commissioner Beese has proposed a safe harbor provision patterned after the state-law "business judgment rule." [83] In the pattern of that rule, the safe harbor would establish a principle of judicial non-intervention. As such, the safe harbor would protect directors and officers from judicial review of shareholder antifraud claims when forward-looking statements are made unless a plaintiff can establish a conflict, a lack of good faith, or a failure of honest and reasonable belief.

The safe harbor would cover oral or written forward-looking information, whether or not made or reaffirmed in Commission filings. Liability still could be imposed on directors or officers who make fraudulent statements, intentionally misstate facts, or fail to disclose material information when required.

To ensure that an officer or director was meeting his duties under the business judgment rule, a company would be encouraged to keep a projection binder reflecting the data underlying the projections. In the event that a private lawsuit was filed, the company would proffer the binder to the court. The burden then would shift to the plaintiffs to show why the projections lacked a proper factual basis at the time they were made. If unable to meet this burden, the case would be dismissed without any discovery.[84]

C. "Heightened Definition" Proposal

The "Heightened Definition" Proposal, put forth jointly by the Business Roundtable and the National Association of Manufacturers, would apply to all forward-looking statements and reaffirmations thereof, by or on behalf of a registrant or an outside reviewer retained by the registrant, whether or not filed with the Commission. The proposed safe harbor would apply to the same information as is protected by the current safe harbor but would expressly extend to both qualitative and quantitative statements of management's plans and objectives for future operations, including plans for the development and delivery of new products or services.

The provision would apply to all statements of reporting issuers that have timely filed their most recent annual report. As provided under the existing rule, non-reporting issuers also could rely on the safe harbor, but only if the forward-looking statement were made in a solicitation of interest document submitted under Securities Act Rule 254, in a registration statement or Regulation A Offering Circular filed under the Securities Act, or in a registration statement filed under the Exchange Act.

Liability would be imposed only if a misstatement or omission is material, made or omitted with scienter, and, for private plaintiffs, relied upon. Materiality would be defined as information that would significantly alter the total mix of information available. Scienter would be defined as actual knowledge or intentional omission to state a material fact. Reliance would be defined as actual knowledge of and actual reliance on the forward-looking statement in connection with the purchase or sale of a security. Under the proposal, there would be no attribution to the issuer of statements made by third parties unless the issuer expressly endorsed or approved of the statement. Finally, an issuer would not have a duty to update a forward-looking statement unless it expressly undertook to do so at the time the statement was made.

D. "Bespeaks Caution" Proposal

Professor John Coffee suggests a safe harbor that would codify a variant of the "Bespeaks Caution" doctrine—articulated in terms of an investor's inability to rely in an action for fraud upon statements protected by the safe harbor. Under this proposed safe harbor, which would be available to reporting companies (except penny-stock issuers), a forward-looking statement would be protected so long as it were properly qualified and accompanied by "clear and specific" cautionary language that explains in detail sufficient to inform a reasonable person of both the approximate level of risk associated with that statement and the basis therefor. Forward-looking statements made, either orally or in writing, outside the four corners of a Commission filing would be covered only if reaffirmed in a filed document or annual report made publicly available within a reasonable period after the statement is first disseminated. The suggested safe harbor would not require that the forward-looking statement have a "reasonable basis" (as under existing Rules 175 and 3b–6) because, according to Professor Coffee, this requirement often raises factual issues that cannot easily be resolved at the pre-trial stage.

Professor Coffee's approach also contemplates amendments to the incorporation-by-reference provisions of the Securities Act registration forms [85] that would exempt qualifying forward-looking statements made in Exchange Act filings from automatic incorporation by reference in Securities Act filings, and therefore from potential liability under the antifraud provisions of the Securities Act. Existing Rule 175 would remain available where registrants affirmatively seek inclusion of Exchange Act filings in Securities Act registration statements.

E. "Fraudulent Intent" Proposal

Under the "Fraudulent Intent" proposal, submitted by Mr. William Freeman, a forward-looking statement would be protected by the safe harbor unless it is shown that the statement was made recklessly or with an actual intent to deceive. In order to demonstrate that a statement was made recklessly, a plaintiff would be required to demonstrate that at the time the statement was made, the issuer was aware of facts that made it highly unlikely that the projection could be achieved.

F. "Disimplication" Theory

Professor Joseph A. Grundfest has suggested that, just as the courts have implied the existence of a private right of action under Rule 10b–5, the Commission may disimply such a right of action by redefining the element of a private Rule 10b–5 claim.[86] For example, Professor Grundfest has suggested that if the Commission should decide that if "projections deserve greater protection than is now afforded by Rule 175, then Rule 10b–5 can be amended to require a showing of 'knowing securities fraud,' demonstrating 'actual knowledge that the [projection] is false,' as a precondition for private recovery in a Rule 10b–5 action complaining of a falsely optimistic projection." [87]

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[83] *See, e.g., Paramount Communications Inc.* v. *QVC Network, Inc.*, 637 A.2d 34, 46 n.17 (1994); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (1993).

[84] The Association for Investment Management and Research ("AIMR") has expressed support for Commissioner Beese's proposal. *See* Letter from Michael S. Caccesse, Senior Vice President and General Counsel, AIMR, to Catherine Dixon dated October 7, 1994.

[85] *See, e.g.*, Item 12 of Forms S–2 and S–3 (17 CFR 239.12–13 (1994)); Items 11–13 of Form S–4 (17 CFR 239.25 (1994)); Item 12 of Forms F–2 and F–3, (17 CFR 239.32–33 (1994)); Items 11–14 of Form F–4 (17 CFR 239.36) (1994)).

[86] Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 Harv. L. Rev. 961 (1994).

[87] *Id.* at 1012 (footnotes omitted).

G. Reasonable Basis In Fact Proposal

The "Reasonable Basis In Fact" proposal, suggested by Jonathan Cuneo on behalf of the National Association of Securities and Commercial Attorneys ("NASCAT") protects forward-looking statements, whether written or oral and whether or not filed with the Commission, unless it can be shown that the statement was made without a reasonable basis in fact, was seriously undermined by existing facts, was not genuinely believed or was made other than in good faith.

The term "forward-looking statement" is defined to include any statement concerning future revenues, income, earnings, capital expenditures, dividends, products, services or lines of business, capital structure or other financial items, as well as management's plans or objectives for the future or the future economic performance of the corporation. The term also includes statements or assumptions underlying or relating to the foregoing.

H. "Opt-In" Proposal

The "Opt-In" proposal, suggested by Harvey Pitt, Karl Groskaufmanis and Gilbey Strub, would require issuers to make a formal election to "opt in[to]" a specified safe harbor disclosure regime.[88] Issuers opting in would be required to make forward-looking disclosure for a minimum of four quarters. Before a company may "opt out" of the safe harbor disclosure regime, it must provide notice 30 days before its next periodic report. The notice must detail the reasons for opting out, and statements therein would not be protected by the safe harbor. The company would be prohibited from opting back into the safe harbor disclosure regime for another year.

In order to be protected, the statements must have an adequate basis in fact, be issued in good faith and be consistent with any similar forward-looking information used contemporaneously by the issuer. For an issuer that has "opted in" to the safe harbor disclosure regime, only the Commission would be permitted to bring suit for projections that are made in bad faith or without a reasonable basis.

V. Solicitation of Public Comment

The Commission seeks comment on a number of issues. Commenters should discuss both the continuing effectiveness of the current safe harbors in accomplishing the primary goal of encouraging broader dissemination of forward-looking information to the investing public, and whether the Commission should consider any change to the current safe harbor. Would one or more of the proposals outlined above, any combination thereof, or any other proposal commenters may wish to identify, fulfill this goal more effectively without compromising investor protection? Do the concerns outlined in Part III above, either individually or in the aggregate, warrant revisiting and/or revising the existing safe harbor? Commenters should explain in detail all bases for their conclusion.

A. Types of Information Covered by a Safe Harbor

Assuming a safe harbor continues to be necessary or appropriate in the interests of the investing public, commenters should discuss what types of information should be eligible for safe harbor coverage.

Commenters supporting safe harbor coverage for forward-looking information should address the reasons justifying a distinction between forward-looking and historical information (either purely retrospective or based on estimate or opinion) with respect to the level of protection afforded to each. Does the fact that the person making the statements has unique knowledge concerning the basis for forward-looking statements, support or undercut this distinction? Commenters may wish to specify whether qualitative information, including but not limited to the type described above in Part I, is relevant to investors such that its disclosure should be encouraged. If so, should such information be included in the safe harbor? Should forward-looking information that is currently part of required audited financial information (such as loan-loss reserves, pension liabilities or contingent environmental liabilities) be included?[89] Are there certain types of forward-looking information that should be *per se* excluded from the safe harbor (*e.g.*, such as required audited information, or the "known trends and uncertainties" disclosure required by the MD&A)?

Should the safe harbor distinguish between oral and written statements, between statements filed with the Commission and non-filed statements, or between Securities Act required statements and others? Should the Commission require that any oral statement for which safe harbor coverage is sought be reduced to writing and filed with the Commission at or around the time that statement is first disseminated? If not, commenters should describe the legal and/or practical impediments, if any, to a contemporaneous filing requirement. Are there certain situations, *i.e.*, an initial public offering, in which safe harbor protection should be limited to statements made in Commission filings? Are commenters' views on these questions affected by the type of forward-looking information under consideration? For example, do different types of forward-looking information imply different degrees of reliability, *e.g.*, numerical financial projections as opposed to general statements of management's outlook? If so, should a broader safe harbor provide protection for a narrower category of information than does Rule 175 currently, or would differing safe harbors be warranted?

B. Voluntary Disclosure

Should the Commission continue its current general policy of voluntary disclosure of forward-looking information or should some or all of such information, given its significance, be mandated? If left voluntary, should any such information used in the offer or sale of securities by the issuer be required to be included in the prospectus? Would this be an appropriate solution to the issue of selective disclosure of key soft information during road shows? If not, commenters should explain this conclusion and discuss alternative approaches.

C. Scope of the Safe Harbor

Should the safe harbor be procedurally based or substantively based or both? For example, should the safe harbor be available only if the forward-looking information is reviewed by the board Audit Committee, or some other board level committee or committee of top management or an outside reviewer, or should the standard be a substantive one dependent on the reasonableness or other criteria of the information itself, regardless of the review process, or both?

D. Eligibility for and Conditions To Use of Safe Harbor

Should all issuers be eligible for the safe harbor or only certain issuers that satisfy specified conditions, such as sufficient reporting history and/or public float to ensure a market following? What other conditions might be appropriate? Should issuers be required to opt-in or opt-out of a safe harbor alone or in combination with the

[88] H. Pitt, K. Groskaufmanis and G. Strub, *Securities Law*, Nat. L. J., August 22, 1994, at B4.

[89] *See* Regulation S-K Item 101(c)(xii), 17 CFR 229.101(c)(xii); Industry Guide 3, Summary of Loan Loss Experience, 17 CFR 229.801 (1994).

foregoing? If so, what should the opt-in/opt-out conditions be? Should an issuer be required to specify that it is seeking the protection of the safe harbor by making a public filing, or by stating with regard to each safe harbor-eligible statement (where the issuer chooses the safe harbor's protection), that the statement is being made subject to the safe harbor, or by otherwise providing a "bespeaks caution" or other cautionary language? How could this condition be met (or policed) for oral statements or written statements made outside of Commission filings? Should the burden of proof be shifted from the plaintiff to the defendant corporation, generally or with respect to certain types of disclosures, *i.e.*, written statements outside Commission filings, oral statements, etc.? Should shareholders be permitted, or required to vote on the availability of any safe harbor? If so, should shareholders be permitted to approve or authorize more extensive safe harbors than those that would otherwise be available at the election of the issuer?

Should the safe harbor require disclosure of key assumptions because that information is uniquely within the control of the issuer? If assumptions were required to be disclosed along with the forward-looking information, how would this affect the judicial treatment of forward-looking cases? For example, if assumptions were required to be disclosed, would it make it easier for courts to evaluate motions to dismiss cases on a procedural motion and/or impose sanctions for the bringing of frivolous suits? Would this requirement be more or less effective coupled with any proposed litigation reforms?

Should the safe harbor be unavailable (or provide greater or absolute protection) if an insider, or specified insiders, traded (or no insider, or specified insiders, traded) within a specified period where the insiders(s) avoided a loss or made a gain (or failed to do so) based on the dissemination and subsequent correction of the forward-looking statement?

E. Elements of the Safe Harbor

Commenters should outline and discuss each element of an effective safe harbor. In this connection, should the safe harbor set forth a separate definition of materiality differing from that otherwise applicable under Commission rules and case law? Should the safe harbor impose and/or specify parameters for a duty to update or correct? Should the safe harbor require that a private plaintiff establish that he or she actually relied on forward-looking statements? Should a new definition of scienter be included in the safe harbor, *e.g.*, by eliminating recklessness as an element of proof? In answering this question, commenters should discuss separately implied and express rights of action, as well as Commission and private actions. Should a safe harbor include judicially developed concepts such as the "business judgment rule," "bespeaks caution" doctrine and/or any other judicial approaches discussed in the release? What treatment should the safe harbor give to information that the issuer does not disclose that may be relevant to evaluating the forward-looking statement?

F. Private Actions

Should the safe harbor distinguish between Commission enforcement action and private actions? Should the answer to the foregoing question depend on whether the underlying cause of action is express or implied? Would the Commission be able to compensate through enhanced enforcement for any reduction in the number of private suits in this area resulting from adoption of a particular safe harbor? How would any limitation on private actions, whether directly imposed or incorporated in a safe harbor, affect the Commission's longstanding policy of promoting private actions for fraud as a necessary supplement to Commission enforcement?

Should private litigants be required to pursue any antifraud claims arising from statements covered by a safe harbor in a nonjudicial forum—for example, through arbitration or some other form of alternate dispute resolution? Some commentators have suggested that a safe harbor should be adopted that would permit private antifraud actions to proceed only if the Commission first brings a successful enforcement action for fraud. Commenters are invited to address the merits of this suggestion and means of its implementation.

G. Issuer Duties Under the Safe Harbor

Should an issuer be required to update any forward-looking information? If so, for how long? Should the answer turn on whether disclosure is mandated by the Commission's disclosure requirements (*i.e.*, MD&A) or voluntary? Should an issuer be required to compare projections to actual results to provide information as to the reliability of the projections? Should an issuer be required to disclose and/or to file assumptions or the basis for a statement, as now required for issuers that elect to provide option grant values calculated under the option pricing models?[90]

Should the safe harbor require a registrant to correct forward-looking information rendered false or misleading after its initial disclosure? Should this duty extend only to information filed with the Commission?

Should a duty be imposed on issuers to update and/or correct forward-looking information disclosed by others? Should the safe harbor expressly provide that there is no duty to update and/or correct statements made by others? Should the safe harbor include a duty to update and/or correct statements only if the issuer becomes sufficiently "entangled" with the third party? If so, should the safe harbor delineate those acts or omissions that would support a finding of entanglement?

H. Registered Investment Companies

Is the forward-looking information that might be disclosed by registered investment companies, *i.e.*, projections of fund performance, inappropriate for the protection of the safe harbor because it is contingent on the performance of the securities markets, and therefore subject to greater uncertainty and frequency of change? Do any other characteristics of registered investment companies warrant separate treatment of their forward-looking disclosure for purposes of the safe harbor or, more generally, should such disclosure by registered investment companies be afforded any protection under a safe harbor? Comment also is specifically invited as to whether distinctions should be made among different kinds of registered investment companies (*e.g.*, open-end and closed-end, unit investment trust and management) for the purpose of encouraging forward-looking disclosure and providing safe harbor protection? In light of the fact that investment companies, unlike most other public companies, are not currently required to file current reports (Form 8–K) or quarterly reports (Form 10–Q), commenters should address how projections or other forward-looking information by investment companies would be revised or updated.

I. Multiple Safe Harbors

Some suggest that if private actions were to be reduced or eliminated, some issuers would be willing to make additional filings with the Commission, either in connection with current periodic reports or on a new disclosure form, and be subjected to greater

[90] *See* Item 402(c) of Regulation S–K, 17 CFR 229.402(c).

Commission oversight with lower thresholds for Commission enforcement actions and greater restrictions on information that can be provided orally. Other issuers may find these protections unnecessary, but would benefit from a safe harbor that simply made certain types of antifraud claims more difficult to prosecute successfully. Would it be reasonable to provide for or make available different types of safe harbors tailored to the particularized needs of differently situated issuers? Specifically, does the need for heightened protections of statements to analysts, whether oral or written, vary with the size and/or reporting history of the issuer? Should a different, more rigorous, safe harbor be made available to companies conducting an initial public offering, than that made available to companies with reporting histories? For example, are smaller issuers potentially affected differently than larger issuers so that different safe harbors should be available? Should the existing safe harbors in the Trust Indenture Act and the Public Utility Holding Company Act also be modified and, if so, why?

J. Possible Alternatives or Supplements to a Safe Harbor

Commenters also may wish to discuss whether there are alternatives to a safe harbor that would accomplish the same goal of promoting enhanced disclosure of forward-looking information. For example, are there reforms with regard to the content and/or presentation of soft information—whether within or outside of Commission filings—that would obviate the need for a safe harbor or the need to change the current safe harbor? Are there litigation reforms relating more broadly to the scope of antifraud liability under the securities laws that would obviate the need for the safe harbor? For example, could an issuer be presumed to have no liability for forward-looking statements otherwise eligible for the safe harbor unless the named plaintiff or group of plaintiffs represents at least a minimum percentage (say 10%) of the affected shareholder class? To the extent that the current safe harbor is strengthened in favor of issuers, should there be concomitant strengthening of other safeguards for investors? In this regard, commenters may wish to discuss the practicality of accomplishing any such reforms, and the likelihood that any such reforms would succeed. In lieu of or in addition to revising the existing safe harbor, should the Commission redefine one or more elements of a private Rule 10b-5 claim (*e.g.*, scienter, materiality and reliance)?

VI. Public Hearings

The issues addressed in this release have attracted the interest of investors, registrants, analysts and other market participants, as well as lawyers, accountants, federal legislators and academics. In view of this broad interest, as well as the importance and complexity of these issues, the Commission intends to authorize public hearings to be conducted after the close of the comment period. Among other matters, these hearings will explore the assumptions underlying the different views expressed by these and other members of the public. Testimony from witnesses will be elicited about the efficacy and potential effects of different safe harbor approaches, the costs and benefits of each approach, the design of any safe harbor and issues that may be raised by the comment letters. After these hearings, the Commission will determine whether to propose amendments to the rules regarding forward-looking information.

The hearings will begin at 10 a.m. on February 13, 1995 at 450 Fifth Street, NW., Washington, DC 20549 room 1C30. The agenda and format for the hearings, as well as the schedule of witnesses will be announced in a subsequent release to be issued shortly before the hearings commence.

Members of the public interested in testifying at the hearing should notify the Commission in writing of their intention to appear no later than December 31, 1994. The written notification should include a brief summary of the individual's intended testimony. Any person who does not wish to appear at the hearing may submit written testimony to be included in the hearing record. Such written testimony should be received by the Commission no later than January 11, 1995.

All written notifications, testimony and comment letters should be addressed in triplicate to Jonathan Katz, 450 Fifth Street, NW., Washington, DC 20549 and should refer to the comment file number of this release [S7–29–94]. All written submissions and a transcript of the hearings will be made available for public inspection and copying in the Commission's Public Reference Room. The hearings will be open to the public.

Dated: October 13, 1994.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

Appendix—Seasoned Issuer Proposal—Association of Publicly Traded Companies

(a) A forward-looking statement made by or on behalf of an issuer, or an omission to state a fact necessary to make the statement not misleading, shall not serve as the basis for a private action for damages under the Securities Act of 1933 or the Securities Exchange Act of 1934 if:

(1) The forward-looking statement is made in connection with a listed equity security or Nasdaq security for which transaction reports are required to be made on a mandatory real-time basis pursuant to an effective transaction reporting plan of an issuer which has been subject to the requirements of Section 12 or 15(d) of the Act and has filed all the material required to be filed pursuant to Sections 13, 14 or 15(d) for a period of six months;

(2) The issuer is not an issuer of penny stock as defined in Section 3(a)(51)(A) of the Act and Commission regulations;

(3) The issuer has not been convicted within five years prior to the making of the statement of any felony or misdemeanor in connection with the purchase or sale of any security or involving the making of any false filing with the Commission;

(4) The issuer is not subject to any order, judgement or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is not subject to any order, judgement or decree of any court of competent jurisdiction, entered within five years prior to the making of the statement, permanently restraining or enjoining the issuer from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the Commission;

(b) The term "forward-Looking statement" means:

(1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, growth rates, order rates, margin performance, price performance, backlog or other financial items whether stated in quantitative or qualitative terms;

(2) A statement of management's plans and objectives for future operations;

(3) A statement of future economic, product or business performance; or

(4) Disclosed statements of the assumptions underlying or relating to any of the statements described in paragraph (b) (1), (2) or (3) above.

Heightened Definition Proposal—Business Roundtable and National Association of Manufacturers

Rule 3b–6. Liability for Certain Statements by Issuers.

Preliminary Note

The Commission has recognized for many years that investors make decisions about the purchase and sale of securities with the future in mind. The market value of securities accordingly reflects the judgments of investors about the future economic performance of an issuer. Notwithstanding the inherent uncertainty of all statements about the future, investors regard forward-looking statements by issuers as an important source of relevant information. Forward-looking statements therefore make an important contribution to the efficiency of

the U.S. securities markets, and the Commission wishes to encourage issuers to make such statements. At the same time, the Commission recognizes that issuers have a justified concern about becoming involved in litigation arising out of such statements. As the Supreme Court has observed, "even a complaint which by objective standards may have very little success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Blue Chip Stamps v.* Manor Drug Store, 421 U.S. 723, 740 (1975).

In order to encourage the release by issuers of forward-looking information, the Commission has adopted this "safe harbor" rule. The Commission encourages the courts to apply the rule so as to implement the Commission's intent, i.e., to provide issuers with reasonable assurance regarding the standards that will govern their liability for such information while at the same time assessing liability where an issuer's conduct falls outside the rule and is otherwise actionable under the federal securities laws.

(a) *General Rule.* A statement within the coverage of paragraph (b) below which is made or alleged to be made by or on behalf of an issuer or by an outside reviewer retained by the issuer shall not serve as the basis of a violation of the Act unless (1) it relates to a misstatement or omission that is material within the meaning of paragraph (f), (2) it is made or omitted with *scienter* within the meaning of paragraph (g) and (3) the person challenging the statement (other than the Commission) relied on the statement within the meaning of paragraph (h).

(b) *Covered Statements.* This rule applies to the following statements:

(1) A forward-looking statement (as defined in paragraph (c) below), *provided* that:

(i) At the time such statements are made or reaffirmed, either the issuer is subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and has complied with the requirements of Rule 13a–1 or 15d–1 thereunder, if applicable, to file its most recent annual report on Form 1O–K, Form 1O–KSB, Form 20–F, or Form 40–F; or, if the issuer is not subject to the reporting requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, the statements are made in a registration statement filed under the Securities Act of 1933, offering statement or solicitation of interest written document or broadcast script under Regulation A, or pursuant to Section 12 (b) or (g) of the Securities Exchange Act of 1934, and

(ii) The statements are not made by an issuer that is an investment company registered under the Investment Company Act of 1940; and

(2) Information which relates to (i) the effects of changing prices on the business enterprise, presented voluntarily or pursuant to Item 303 of Regulation S–K, or Regulation S–B, or Item 9 of Form 20–F, "Management's discussion and analysis of financial condition and results of operations," or Item 302 of Regulation S–K, "Supplementary financial information," or Rule 3–20(c) of Regulation S–X, or (ii) the value of proved oil and gas reserves (such as a standardized measure of discounted future net cash flows relating to proved oil and gas reserves as set forth in paragraphs 30–34 of Statement of Financial Accounting Standards No. 69) presented voluntarily or pursuant to Item 302 of Regulation S–K.

(c) *Forward-Looking Statement.* For the purpose of this rule, the term "forward-looking statement" shall mean and shall be limited to:

(1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

(2) A statement of management's plans and objectives for future operations, whether qualitative or quantitative, including plans for the development and delivery of new products or services;

(3) A statement of future economic performance; or

(4) Disclosed statements of the assumptions underlying or related to any of the statements described in paragraph (c)(1), (2), or (3) above.

(d) *Third-Party Statements.* A forward-looking statement shall be deemed not to have been made by or on behalf of an issuer for the purposes of paragraph (a) if it is made by any person other than the issuer or outside reviewer retained by the issuer and the issuer has not expressly and substantially contemporaneously endorsed or approved the statement. An issuer shall not be deemed to have any obligation to correct or update any statement made by a third party.

(e) *Duty to Update.* An issuer shall not be deemed to have any obligation to update a forward-looking statement made by it unless it has expressly and substantially contemporaneously undertaken to update such statement.

(f) *Materiality.* A forward-looking statement shall be deemed to be material only if it significantly alters the total mix of information made available regarding an issuer or its securities.

(g) *Scienter.* An issuer shall be deemed not to have acted with *scienter* with respect to a forward-looking statement unless the issuer had actual knowledge that the statement was false or knowingly and intentionally omitted to state a fact for the purpose of rendering such statement misleading. Evidence that (1) the issuer's officers, directors or employees traded contemporaneously in the issuer's securities or were the beneficiaries of compensation awards (whether or not related to the value of the issuer's securities) or (2) information tending to cast doubt on a statement's accuracy was in the possession of the issuer's employees below the level at which reporting decisions are made (or at such level but prior to the time such information could reasonably be expected to have been taken into account in making the statement), shall not in either case, or in both cases, in and of itself, be sufficient to support a finding of actual knowledge that a statement is false or misleading.

(h) *Reliance.* A forward-looking statement (or a statement derived therefrom) shall not be deemed to have been relied upon unless a person claiming such reliance had actual knowledge of and actually relied on such statement in connection with the purchase or sale of a security.

Bespeaks Caution Proposal—Professor Coffee

Proposed Rule 10b–22. *Liability for Certain Statements by Issuers*

(a) A purchaser or seller of securities shall not be entitled to rely in any action for fraudulent statement (as defined in paragraph (c) of this rule) upon a statement within the coverage of paragraph (b) of this rule.

(b) This rule applies to the following statements (with the burden being on the plaintiff to show that a statement asserted by an issuer or other defendant to fall within this paragraph does not in fact so qualify):

(1) A forward-looking statement (as defined in Rule 3b–6 under the Securities Exchange Act of 1934) made in a document filed with the Commission, or in an annual report meeting the requirements of Rules 14a–3 (b) and (c) or 14c–3 (a) and (b) under the Securities Exchange Act of 1934, a statement reaffirming such forward-looking statement subsequent to the date the document was filed or the annual report was made publicly available, or a forward-looking statement made prior to the date the document was filed or the date that the annual report was made publicly available if such statement is reaffirmed in a filed document or in an annual report made publicly available within a reasonable period after the making of such forward-looking statement;

(2) Information disclosed in a document filed with the Commission or in an annual report meeting the requirements of Rules 14a–3 (b) and (c) or 14c–3 (a) and (b) in response to (A) Item 303 of Regulation S–K or Regulation S–B with respect to liquidity, capital resources, and results of operations to the extent that such information identifies or describes the likely future impact of known trends or known demands, commitments, events or uncertainties or any expected changes with regard thereto, or (B) Item 302 of Regulation S–K or Rule 3–20(c) of Regulation S–X with regard to the affects of changing price levels on the business enterprise or the value of proved oil and gas reserves;

Provided that, in either case—

(i) Such statement contains or is closely accompanied by clear and specific cautionary language that explains in detail sufficient to inform a reasonable person of the level of risk associated with, or inherent in, the statement and that identifies the specific basis for such statement and for such level of risk;

(ii) At the time such statements are made or reaffirmed, the issuer is subject to the reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 and has complied with the requirements of Rule 13a–l or 15d–l thereunder, as applicable, to file its most recent annual and quarterly reports on [form references omitted];

(iii) the statements are not made by or on behalf of an issuer that (A) is an investment company registered under the Investment Company Act of 1940, (B) has outstanding a

"penny stock" (as defined in section 3(a)(50) of the Securities Exchange Act of 1934), or (C) would then be disqualified under Rule 262(a) from use of Regulation A under the Securities Act of 1933.

(c) For the purpose of this rule, the term fraudulent statement shall mean * * * [same as Rule 175(d)].

Fraudulent Intent Proposal—William Freeman, Esquire

The following language would be substituted into paragraph (a) of Rules 175 and 3b–6 (new language in boldface italics):

(a) A statement within the coverage of paragraph (b) of this section which is made by or on behalf of an issuer or by an outside reviewer retained by an issuer shall be deemed not to be a fraudulent statement (as defined in paragraph (d) of this section), unless it is shown that such statement was made or reaffirmed *recklessly or with actual intent to deceive. A forward looking statement will not be deemed to be made or reaffirmed recklessly unless it is shown that the issuer was, or had to be, aware of facts that made it highly unlikely that the projection could be achieved.*

Reasonable Basis in Fact—National Association of Securities and Commercial Law Attorneys ("NASCAT")

Liability for Certain Statements by Issuers

(a) A statement within the coverage of paragraph (b) of this rule which is made by or on behalf of an issuer (whether directly or by or through the means of any other person) or by an outside reviewer retained by the issuer shall be deemed to not be a fraudulent statement (as defined in paragraph (d) of this rule), unless it is shown that, at the time such statement was made or reaffirmed (i) facts seriously undermining its accuracy existed; (ii) it was not genuinely believed; (iii) it lacked a reasonable basis in fact; or (iv) it was issued other than in good faith.

(b) This rule applies to any forward-looking statement (as defined in paragraph (c) of this rule), whether written or oral.

(c) For the purpose of this rule the term "forward-looking statement" shall mean:

(1) Any statement concerning future revenues, income (loss), earnings (loss) per share, products, services or lines of business, capital expenditures, dividends, capital structure or other financial items;

(2) Any statement of management's plans or objectives for the future;

(3) Any statement of future economic performance; or

(4) Disclosed statements of the assumptions underlying or relating to any of the statements described in paragraphs (c) (1), (2) or (3) above.

(d) For the purpose of this rule the term "fraudulent statement" shall mean a statement which is an untrue statement of a material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or which constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud, as those terms are used in the Securities Act of 1933, the Securities Exchange Act of 1934 or the rules or regulations promulgated thereunder.

[FR Doc. 94–25814 Filed 10–18–94; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 40 and 48

[PS–66–93]

RIN 1545–AS10

Gasoline and Diesel Fuel Excise Tax; Rules Relating to Gasohol; Tax on Compressed Natural Gas

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to gasohol blending and the taxes on diesel fuel and compressed natural gas. This document also proposes to remove obsolete excise tax regulations. The proposed regulations reflect and implement certain changes made by the Energy Policy Act of 1992 (the Energy Act) and the Omnibus Budget Reconciliation Act of 1993 (the 1993 Act). The proposed regulations relating to gasoline and diesel fuel affect certain blenders, enterers, industrial users, refiners, terminal operators, and throughputters. The proposed regulations relating to compressed natural gas affect persons that sell or buy compressed natural gas for use as a fuel in a motor vehicle or motorboat.

DATES: Written comments must be submitted by December 19, 1994. Outlines of comments to be presented at the public hearing scheduled for January 11, 1995, must be received by December 21, 1994.

ADDRESSES: Send submissions to: CC:DOM:CORP:T:R (PS–66–93), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:T:R (PS–66–93), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. The public hearing will be held in the IRS Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Frank Boland, (202) 622–3130; concerning submissions and the hearing, Carol Savage, at (202) 622–8452; (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act (44 U.S.C. 3504(h)). Comments on the collections of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, PC:FP, Washington, DC 20224.

The collections of information in this proposed regulation are in §§ 48.4041–21 and 48.6427–10. This information is required by the IRS to verify compliance with sections 4041 and 6427 and will be used to determine whether an amount of tax, credit, or payment has been computed correctly. The likely respondents are businesses and other for-profit organizations, including small businesses and organizations.

Estimated total annual reporting burden: 10 hours.

Estimated average annual burden per respondent: .1 hour.

Estimated number of respondents: 100

Estimated annual frequency of responses: On occasion.

Explanation of Provisions

Background

Effective January 1, 1994, the 1993 Act amends section 4081 to impose the diesel fuel tax in the same manner as the gasoline tax. Thus, tax is imposed on (1) the removal of gasoline and diesel fuel (collectively taxable fuel) from any refinery, (2) the removal of taxable fuel from any terminal, (3) the entry of taxable fuel into the United States for consumption, use, or warehousing, and (4) the sale of taxable fuel to an unregistered person unless there was a prior taxable removal, entry, or sale of the taxable fuel. However, tax does not apply to any entry or removal of taxable

fuel transferred in bulk to a refinery or terminal if the persons involved (including the terminal operator) are registered by the IRS.

Conforming Amendments to Gasoline Regulations

On November 30, 1993, the IRS published in the **Federal Register** (58 FR 63069) temporary regulations under section 4081 relating to the imposition of the diesel fuel excise tax for diesel fuel that is removed at a terminal rack, removed from a refinery, entered into the United States, or blended outside of the bulk/transfer terminal system. Those rules are similar to the rules relating to the removal, entry, or blending of gasoline under §§ 48.4081–2 and 48.4081–3.

These proposed regulations generally consolidate the rules relating to gasoline and diesel fuel into a single set of rules applicable to all taxable fuel.

Compressed Natural Gas

Effective October 1, 1993, section 4041(a)(3) (added to the Internal Revenue Code by section 13241(e) of the 1993 Act) imposes a tax on compressed natural gas (CNG) that is sold for use or used as a fuel in a motor vehicle or motorboat.

The proposed regulations provide rules relating to the imposition of, and liability for, the tax on CNG. These rules are similar to the regulations relating to taxes on special motor fuels imposed by section 4041.

Gasohol; Tolerance Rule

The gasoline tax rate is 18.4 cents per gallon (the regular rate). However, a reduction from the regular rate is allowed for gasohol (a gasoline/alcohol mixture). Before January 1, 1993, section 4081(c) treated a mixture of gasoline and alcohol as gasohol only if at least 10 percent of the mixture was alcohol. The rate reduction under pre-1993 law was 5.4 cents per gallon for gasohol containing ethanol and 6 cents per gallon for gasohol containing alcohol other than ethanol. This was equivalent to a subsidy of 54 cents or 60 cents per gallon of alcohol used to produce gasohol.

Section 48.4081–6(b)(2) provides a special rule for the application of the "at least 10 percent" requirement by allowing a tolerance for mixtures that contain less than 10 percent alcohol but at least 9.8 percent alcohol. Under the tolerance rule, a portion of the mixture equal to the number of gallons of alcohol in the mixture multiplied by 10 is considered to be gasohol. Any excess liquid in the mixture is taxed at the regular rate. Absent the tolerance rule, pre-1993 law would have taxed the entire mixture at the regular rate.

The tolerance rule accommodates operational problems associated with the blending of gasohol. For example, blenders may fail to attain the required 10-percent alcohol level because the device used to meter the amount of gasoline or alcohol added to a tank truck is imprecise or because the high-speed gasoline or alcohol pump used does not shut off at the proper moment. Blenders cannot compensate for these errors by aiming for an alcohol content in excess of 10 percent because Environmental Protection Agency (EPA) rules do not authorize the sale of gasohol containing more than 10 percent alcohol.

Effective January 1, 1993, section 1920 of the Energy Act amended section 4081(c) to allow a reduction from the regular rate for mixtures containing at least 5.7 percent alcohol but less than 7.7 percent alcohol (5.7 percent gasohol) and mixtures containing at least 7.7 percent alcohol but less than 10 percent alcohol (7.7 percent gasohol). The 5.4- and 6-cents-per-gallon rate reductions were retained for mixtures containing at least 10 percent alcohol (10 percent gasohol) and were prorated for 5.7 percent and 7.7 percent gasohol to maintain the subsidy level of 54 cents or 60 cents per gallon, respectively, for ethanol or other alcohol that is mixed with gasoline.

The proposed regulations continue the present tolerance rule for mixtures that contain less than 10 percent alcohol but at least 9.8 percent alcohol. However, a similar rule is not extended to mixtures that contain less than 7.7 or 5.7 percent alcohol because blenders can compensate for any operational problems by aiming for an alcohol content above 7.7 or 5.7 percent without violating EPA rules.

Gasohol; Blender Credit or Payment

If a gasohol blender produces gasohol from gasoline that was taxed at the regular rate, section 6427(f) allows the gasohol blender to obtain a partial credit or payment relating to that tax. The proposed regulations provide the conditions under which a credit or payment under section 6427(f) will be allowed.

Gasohol; ETBE

The regulations under section 40 provide that alcohol used to produce ethyl tertiary butyl ether (ETBE) generally is treated as *alcohol* for purposes of the alcohol fuels credit when the ETBE is mixed with gasoline. The proposed regulations provide a similar rule with respect to alcohol used to produce ETBE for purposes of the reduced tax rates for gasohol.

For example, a gasoline/ETBE mixture would qualify as 5.7 percent gasohol if the mixture contains 12.7 percent ETBE and each gallon of ETBE is made from .45 gallon of alcohol.

Reliance on These Proposed Regulations

These regulations are being issued in proposed form to provide timely guidance to taxpayers and to allow interested parties appropriate opportunity to provide comments before issuance of final regulations. Although final regulations may include changes made, for example, in response to comments, taxpayers may rely on the proposed regulations until final regulations are issued. For example, alcohol used to produce ETBE is treated as *alcohol* for purposes of the gasohol tax rates.

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight copies) to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Wednesday, January 11, 1995, at 1 p.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC. Because of access restrictions, visitors will not be admitted beyond the building lobby more than 15 minutes before the hearing starts.

The rules of § 601.601(a)(3) apply to the hearing.

Persons that have submitted written comments by December 19, 1994 and want to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to

be devoted to each topic by December 21, 1994.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Frank Boland, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Parts 40 and 48

Excise taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 40 and 48 are proposed to be amended as follows:

PART 40—EXCISE TAX PROCEDURAL REGULATIONS

Paragraph 1. The authority citation for part 40 continues to read in part as follows:

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

Par. 2. Section 40.6302(c)-0 is amended by revising the entries for § 40.6302(c)-1(b)(1)(ii), (b)(5)(ii), (b)(6)(iii), (c)(2)(iv), and (c)(3)(iii) to read as follows:

§ 40.6302(c)–0 Table of contents.

* * * * *

§ 40.6302(c)–1 Use of Government depositaries.

* * * * *

(b) * * *

(1) * * *

(ii) Special rule for section 4081 tax deposits for September.

* * * * *

(5) * * *

(ii) Special rule for section 4081 tax deposits for September.

* * * * *

(6) * * *

(iii) Special rule for section 4081 tax deposits for September.

* * * * *

(c) * * *

(2) * * *

(iv) Modification for section 4081 tax deposits for September.

(3) * * *

(iii) Modification for section 4081 tax deposits for September.

* * * * *

Par. 3. Section 40.6302(c)-1 is amended as follows:

1. Paragraph (a) is amended by removing the parenthetical "(relating to taxes imposed on gasoline by section 4081)" from the last sentence and adding the parenthetical "(relating to section 4081 taxes)" in its place.

2. The heading for paragraph (b)(1)(ii) is revised.

3. Paragraph (b)(1)(ii) is amended by removing the parenthetical "(relating to gasoline)".

4. The heading for paragraph (b)(5)(ii) is revised.

5. Paragraph (b)(5)(ii) is amended by removing the parenthetical "(relating to gasoline)" from the first sentence.

6. Paragraph (b)(6)(ii) is amended by removing the parenthetical "(relating to deposits of gasoline tax for September)" and adding "(relating to deposits of section 4081 tax for September)" in its place.

7. The heading for paragraph (b)(6)(iii) is revised.

8. Paragraph (b)(6)(iii)(A), first sentence, is amended by removing the parenthetical "(relating to gasoline)".

9. Paragraph (b)(6)(iii)(B), first sentence, is amended by removing the parenthetical "(relating to gasoline)".

10. The heading for paragraph (c)(2)(iv) is revised.

11. Paragraph (c)(2)(iv)(A) is amended by removing the parenthetical "(relating to gasoline)".

12. The heading for paragraph (c)(3)(iii) is revised.

13. Paragraph (c)(3)(iii)(A) is revised by removing the parenthetical "(relating to gasoline)".

14. The revised provisions read as follows:

§ 40.6302(c)–1 Use of Government depositaries.

* * * * *

(b) * * *

(1) * * *

(ii) *Special rule for section 4081 tax deposits for September.* * * *

* * * * *

(5) * * *

(ii) *Special rule for section 4081 tax deposits for September.* * * *

* * * * *

(6) * * *

(iii) *Special rule for section 4081 tax deposits for September.* * * *

* * * * *

(c) * * *

(2) * * *

(iv) *Modification for section 4081 tax deposits for September.* * * *

(3) * * *

(iii) *Modification for section 4081 tax deposits for September.* * * *

* * * * *

Par. 4. In § 40.6302(c)–4, paragraph (a) is amended by removing the parenthetical "(relating to gasoline)".

Par. 5. In § 40.9999–1, *Example 3* is amended by removing the language "diesel fuel" each place it appears (including the heading) and adding "aviation fuel" in its place.

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

Par. 6. The authority citation for part 48 is amended by removing the entries for §§ 48.4041.21 and 48.4081–2; revising the entry for § 48.4081–4; and adding an entry in numerical order to read as follows:

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

Section 48.4081–4 also issued under 26 U.S.C. 4083(a)(2). * * *

Section 48.6427–10 also issued under 26 U.S.C. 6427(f).

Par. 7. Section 48.4041–21 is revised to read as follows:

§ 48.4041–21 Compressed natural gas.

(a) *Delivery of compressed natural gas into the fuel supply tank of a motor vehicle or motorboat*—(1) *Imposition of tax.* Tax is imposed on the delivery of compressed natural gas (CNG) into the fuel supply tank of the propulsion engine of a motor vehicle or motorboat unless tax was previously imposed on the CNG under paragraph (b) of this section.

(2) *Liability for tax.* If the delivery of the CNG is in connection with a sale, the seller of the CNG is liable for the tax imposed under paragraph (a)(1) of this section. If the delivery of the CNG is not in connection with a sale, the operator of the motor vehicle or motorboat, as the case may be, is liable for the tax imposed under paragraph (a)(1) of this section.

(b) *Bulk sales of CNG*—(1) *In general.* Tax is imposed on the sale of CNG that is not in connection with the delivery of the CNG into the fuel supply tank of the propulsion engine of a motor vehicle or motorboat if, by the time of the sale—

(i) The buyer has given the seller a written statement stating that the entire quantity of the CNG covered by the statement is for use as a fuel in a motor vehicle or motorboat; and

(ii) The seller has given the buyer a written acknowledgement of receipt of the statement described in paragraph (b)(1)(i) of this section.

(2) *Liability for tax.* The seller of the CNG is liable for the tax imposed under paragraph (b) of this section.

(c) *Exemptions*—(1) *In general.* The taxes imposed under this section do not apply to a delivery or sale of CNG for a use described in § 48.4082–4T(c)(1)

through (5)(A) or (6) through (11). However, if the person otherwise liable for tax under this section is the seller of the CNG, the exemption under this section applies only if, by the time of sale, the seller has an unexpired certificate (described in this section) from the buyer and has no reason to believe any information in the certificate is false.

(2) *Certificate; in general.* The certificate to be provided by a buyer of CNG is to consist of a statement that is signed under penalties of perjury by a person with authority to bind the buyer, should be in substantially the same form as the model certificate provided in paragraph (c)(4) of this section, and should contain all information necessary to complete the model certificate. A new certificate must be given if any information in the current certificate changes. The certificate may be included as part of any business records normally used to document a sale. The certificate expires on the earliest of the following dates:

(i) The date one year after the effective date of the certificate (which may be no earlier than the date it is signed).

(ii) The date a new certificate is provided to the seller.

(iii) The date the seller is notified by the Internal Revenue Service or the buyer that the buyer's right to provide a certificate has been withdrawn.

(3) *Withdrawal of right to provide certificate.* The Internal Revenue Service may withdraw the right of a buyer of CNG to provide a certificate under this paragraph (c) if the buyer uses CNG to which a certificate applies in a taxable use. The Internal Revenue Service may notify any seller to whom the buyer has provided a certificate that the buyer's right to provide a certificate has been withdrawn.

(4) *Model certificate.*

CERTIFICATE OF PERSON BUYING CNG FOR A NONTAXABLE USE

(To support tax-free sales of CNG under section 4041 of the Internal Revenue Code.)

_____

_____

Name, address, and employer identification number of seller

_____ ("Buyer") certifies the

Name of buyer

following under penalties of perjury:

The CNG to which this certificate relates will be used in a nontaxable use.

This certificate applies to the following (complete as applicable):

If this is a single purchase certificate, check here _____ and enter:

1. Invoice or delivery ticket number _____

2. _____ (number of MCFs)

If this is a certificate covering all purchases under a specified account or order number, check here _____ and enter:

1. Effective date _____

2. Expiration date _____

(period not to exceed 1 year after the effective date)

3. Buyer account or order number _____

Buyer will not claim a credit or refund under section 6427 of the Internal Revenue Code for any CNG to which this certificate relates.

Buyer will provide a new certificate to the seller if any information in this certificate changes.

Buyer understands that if Buyer violates the terms of this certificate, the Internal Revenue Service may withdraw Buyer's right to provide a certificate.

Buyer has not been notified by the Internal Revenue Service that its right to provide a certificate has been withdrawn. In addition, the Internal Revenue Service has not notified Buyer that the right to provide a certificate has been withdrawn from a purchaser to which Buyer sells CNG tax free.

Buyer understands that the fraudulent use of this certificate may subject Buyer and all parties making any fraudulent use of this certificate to a fine or imprisonment, or both, together with the costs of prosecution.

_____

Printed or typed name of person signing

_____

Title of person signing

_____

Employer identification number

_____

Address of Buyer

_____

Signature and date signed

(d) *Rate of tax.* The rate of the taxes imposed under this section is the rate prescribed by section 4041(a)(3).

(e) *Effective date.* This section is effective January 1, 1995.

Par. 8. Section 48.4081–0 is amended as follows:

1. The heading is revised.

2. The entries for §§ 48.4081–1 (c) and (k) and 48.4081–3(f) are revised.

3. The entries for the headings of §§ 48.4081–1, 48.4081–2, 48.4081–3, 48.4081–5, 48.4081–7, and 48.4081–8 are revised.

4. The revisions read as follows:

§ 48.4081–0 Taxable fuel; table of contents.

* * * * *

Section 48.4081–1 Taxable Fuel; Definitions

* * * * *

(c) Blended taxable fuel.

* * * * *

(k) Taxable fuel registrant.

* * * * *

Section 48.4081–2 Taxable Fuel; Tax on Removal at a Terminal Rack

* * * * *

Section 48.4081–3 Taxable Fuel; Taxable Events Other Than Removal at the Terminal Rack

* * * * *

(f) Tax on sales of taxable fuel within the bulk transfer/terminal system.

* * * * *

Section 48.4081–5 Taxable Fuel; Notification Certificate of Taxable Fuel Registrant

* * * * *

Section 48.4081–7 Taxable Fuel; Conditions for, and Reporting Relating to, Refunds of Taxable Fuel Tax Under Section 4081(e)

* * * * *

Section 48.4081–8 Taxable Fuel: Measurement

* * * * *

Par. 9. Section 48.4081–1 is amended as follows:

1. The heading for § 48.4081–1 is revised.

2. In paragraphs (a) and (b) the language "gasoline" is removed each place it appears and "taxable fuel" is added in its place.

3. Paragraph (c) is revised.

4. In paragraphs (d) through (h), the heading and text of paragraph (k), and paragraphs (m), (n), (p), (q), (r)(1), (s), (u), and (v) the language "gasoline" is removed each place it appears and "taxable fuel" is added in its place.

5. Paragraph (w) is revised.

6. The revised provisions read as follows:

§ 48.4081–1 Taxable fuel tax; definitions.

* * * * *

(c) *Blended taxable fuel*—(1) *In general.* Except as provided in paragraph (c)(2) of this section, *blended taxable fuel* is a mixture of—

(i) Taxable fuel with respect to which tax has been imposed under section 4041(a)(1) or 4081(a); and

(ii) Any substance with respect to which tax has not been imposed under section 4041(a)(1) or 4081(a), other than a minor amount of a product such as carburetor detergent or oxidation inhibitor.

(2) *Exception.* Gasohol (as defined in § 48.4081–6(b)(2)), is not *blended taxable fuel* if—

(i) The gasohol is a mixture of—

(A) Gasoline with respect to which tax was imposed under section 4081(a) at the gasohol production tax rate described in § 48.4081–6(e) (relating to gasohol) or with respect to which a valid claim is made under section 6427(f); and

(B) Alcohol (or alcohol and a minor amount of a product such as carburetor detergent or oxidation inhibitor); and

(ii) The mixture contains—

(A) At least 9.8 percent alcohol by volume, without rounding, but not more than 10 percent alcohol by volume, without rounding;

(B) 7.7 percent alcohol by volume, without rounding; or

(C) 5.7 percent alcohol by volume, without rounding.

* * * * *

(w) *Effective date.* This section is effective January 1, 1994.

Par. 10. Section 48.4081–2 is amended as follows:

1. The heading for § 48.4081–2 is revised.

2. The language "and" is added immediately following the semicolon at the end of paragraph (c)(3)(ii).

3. Paragraph (c)(3)(iii) is revised.

4. Paragraph (c)(3)(iv) is removed.

5. Paragraph (e) is revised.

6. The revised and added provisions read as follows:

§ 48.4081–2 Taxable fuel; tax on removal at a terminal rack.

* * * * *

(c) * * *

(3) * * *

(iii) Has no reason to believe that any information in the certificate is false.

* * * * *

(e) *Effective date.* This section is effective January 1, 1994.

Par. 11. Section 48.4081–3 is amended as follows:

1. The heading for § 48.4081–3 is revised.

2. In paragraphs (a), (d)(1), (d)(2)(i), and (d)(2)(ii)(A) the language "gasoline" is removed each place it appears and "taxable fuel" is added in its place.

3. Paragraph (d)(2)(iii) is revised.

4. The introductory text of paragraph (e)(1) is revised.

5. In paragraphs (e)(1)(i), (e)(1)(iii), and (e)(2)(i) the language "gasoline" is removed each place it appears and "taxable fuel" is added in its place.

6. Paragraph (e)(2)(ii) is revised.

7. In paragraph (e)(2)(iii) the language "gasoline" is removed each place it appears and "taxable fuel" is added in its place.

8. In paragraphs (f)(1) and (f)(2)(i) the language "gasoline" is removed each place it appears and "taxable fuel" is added in its place.

9. Paragraphs (f)(2)(ii) is revised.

10. In paragraphs (f)(2)(iii) and (g)(1) the language "gasoline" is removed each place it appears and "taxable fuel" is added in its place.

11. Paragraph (h) is revised.

12. The revised provisions read as follows:

§ 48.4081–3 Taxable fuel; taxable events other than removal at the terminal rack.

* * * * *

(d) * * *

(2) * * *

(iii) *Conditions for avoidance of liability.* A terminal operator is not liable for tax under this paragraph (d)(2) if, at the time of the bulk transfer, the terminal operator—

(A) Is a taxable fuel registrant;

(B) Has an unexpired notification certificate (described in § 48.4081–5) from the position holder; and

(C) Has no reason to believe that any information in the certificate is false.

* * * * *

(e) * * * (1) * * * Except as provided in § 48.4081–4 (relating to gasoline blendstocks), and § 48.4082–1T (relating to diesel fuel), a tax on taxable fuel is imposed if—

* * * * *

(2) * * *

(ii) *Conditions for avoidance of liability.* An owner of taxable fuel is not liable for tax under paragraph (e)(2)(i) of this section if, at the time the taxable fuel is removed from the pipeline or vessel, the owner of the taxable fuel—

(A) Is a taxable fuel registrant;

(B) Has an unexpired notification certificate (described in § 48.4081–5) from the operator of the terminal or refinery where the taxable fuel is received; and

(C) Has no reason to believe that any information in the certificate is false.

* * * * *

(f) * * *

(2) * * *

(ii) *Conditions for avoidance of liability.* A seller is not liable for tax under paragraph (f)(2)(i) of this section if, at the time of the sale, the seller—

(A) Is a taxable fuel registrant;

(B) Has an unexpired notification certificate (described in § 48.4081–5) from the buyer; and

(C) Has no reason to believe that any information in the certificate is false.

* * * * *

(h) *Effective date.* This section is effective January 1, 1994.

Par. 12. Section 48.4081–4 is amended as follows:

1. In paragraphs (b)(1)(i), (b)(2)(i), and (c)(1), the language "gasoline registrant" is removed each place it appears and "taxable fuel registrant" is added in its place.

2. The language "and" is added immediately following the semicolon at the end of paragraph (c)(2).

3. Paragraph (c)(3) is revised.

4. Paragraph (c)(4) is removed.

5. In paragraph (d), the language "gasoline registrant" is removed and "taxable fuel registrant" is added in its place.

6. Paragraph (f) is revised.

7. The revised provisions read as follows:

§ 48.4081–4 Gasoline tax; special rules for gasoline blendstocks.

* * * * *

(c) * * *

(3) Has no reason to believe that any information in the certificate is false.

* * * * *

(f) *Effective date.* This section is effective January 1, 1994.

Par. 13. Section 48.4081–5 is amended as follows:

1. The heading for § 48.4081–5 is revised.

2. In paragraph (a), the first sentence in paragraph (b)(1), and paragraph (b)(2), the language "gasoline" is removed each place it appears and "taxable fuel" is added in its place.

3. Paragraph (c) is revised.

4. The revised provisions read as follows:

§ 48.4081–5 Taxable fuel; notification certificate of taxable fuel registrant.

* * * * *

(c) *Effective date.* This section is effective January 1, 1994.

Par. 14. Section 48.4081–6 is amended as follows:

1. The heading for § 48.4081–6 is revised.

2. In the last sentence of paragraph (a), the parenthetical "(which has been taxed at a reduced rate)" is removed and "that has been taxed at a reduced rate" is added in its place.

3. Paragraph (b)(1)(iii) is added.

4. Paragraph (b)(2) is revised.

5. In paragraphs (c)(1)(i) and (ii), the language "gasoline registrant" is removed each place it appears and "taxable fuel registrant" is added in its place.

6. The language "and" is added immediately following the semicolon at the end of paragraph (c)(1)(ii)(A).

7. Paragraph (c)(1)(ii)(B) is revised.

8. Paragraph (c)(1)(ii)(C) is removed.

9. Paragraph (c)(2)(ii) is revised.

10. In the first sentence of paragraph (d), the language ", provided that the alcohol mixture credit allowed by section 40 has not been taken with respect to the alcohol in the gasohol" is added before the end thereof.

10a. Paragraph (e) is revised.

11. In paragraphs (f)(1)(i) and (iii), the language "10 percent" is removed each place it appears and "5.7 percent" is added in its place.

12. In paragraph (f)(4), *Example 1*, second sentence, the language "gasohol" is removed and "10 percent gasohol" is added in its place.

13. In paragraph (f)(4), *Example 2*, fourth sentence, the language "10 percent" is removed both places it appears and "5.7 percent" is added in its place.

14. Paragraphs (g)(2)(i) and (iii) are revised.

15. Paragraph (g)(2)(iv) is added.

16. Paragraph (h) is revised.

17. The added and revised provisions read as follows:

§ 48.4081–6 Taxable fuel; gasohol.

* * * * *

(b) * * *

(1) * * *

(iii) *Products derived from alcohol. Alcohol* includes alcohol described in paragraphs (b)(1)(i) and (ii) of this section that is chemically transformed in producing another product so that the alcohol is no longer present as a separate chemical in the other product, provided that there is no significant loss in the energy content of the alcohol. Thus, for example, alcohol described in paragraphs (b)(1)(i) and (ii) of this section that is used to produce ethyl tertiary butyl ether (ETBE) in a chemical reaction in which there is no significant loss in the energy content of the alcohol is treated as *alcohol* when the ETBE is mixed with gasoline.

(2) *Gasohol*—(i) *In general.* Gasohol is a mixture of gasoline and alcohol that is 10 percent gasohol, 7.7 percent gasohol, or 5.7 percent gasohol immediately after the mixture is blended. The determination of whether a particular mixture is 10 percent gasohol, 7.7 percent gasohol, or 5.7 percent gasohol is made on a batch-by-batch basis. A batch of gasohol is a discrete mixture of gasoline and alcohol. If a batch is splash blended, the contents of the batch typically correspond to a gasoline meter delivery ticket and an alcohol meter delivery ticket, each of which shows the number of gallons of liquid delivered into the mixture. In such case, the volume of each component in a batch (without adjustment for temperature) ordinarily is determined by the number of metered gallons shown on the delivery tickets for the gasoline and alcohol delivered. However, if a blender adds metered gallons of gasoline and alcohol to a tank already containing more than a minor amount of liquid (other than gasohol), the determination of whether a batch is gasohol and of its type will be made by taking into account the amount of alcohol and non-alcohol fuel contained in the liquid already in the tank. Ordinarily, any amount in excess of 0.5 percent of the capacity of the tank will not be considered minor.

(ii) *10 percent gasohol*—(A) *In general.* A batch of gasoline/alcohol mixture is 10 percent gasohol if it contains at least 10 percent alcohol by volume, without rounding.

(B) *Batches containing less than 10 percent but at least 9.8 percent alcohol.* If a batch of mixture contains less than 10 percent alcohol but at least 9.8 percent alcohol, without rounding, a portion of the batch is considered to be 10 percent gasohol. That portion equals the number of gallons of alcohol in the batch multiplied by 10. Any remaining liquid in the mixture is *excess liquid.* If tax was imposed on the excess liquid at the gasohol production rate (as defined in paragraph (e)(1) of this section), the excess liquid in the batch is considered to be gasoline with respect to which there is a failure to blend into gasohol for purposes of paragraph (g) of this section. Excess liquid is considered to be removed before the removal of the gasohol portion. If tax was imposed on the excess liquid at the rate of tax described in section 4081(a), a credit or refund under section 6427(f) is not allowed with respect to the excess liquid.

(iii) *7.7 percent gasohol.* A batch of gasoline/alcohol mixture is 7.7 percent gasohol if and only if it contains at least 7.7 percent, but less than 9.8 percent, alcohol by volume, without rounding.

(iv) *5.7 percent gasohol.* A batch of gasoline/alcohol mixture is 5.7 percent gasohol if and only if it contains at least 5.7 percent, but less than 7.7 percent, alcohol by volume, without rounding.

(v) *Examples.* This paragraph (b)(2) may be illustrated by the following examples. In these examples, a gasohol blender creates a gasoline/alcohol mixture by pumping a specified amount of gasoline into an empty tank. The blender then splash blends a specified amount of alcohol into gasoline.

Example 1. Mixtures containing exactly 10 percent alcohol. The applicable delivery tickets show that the mixture is made with 7200 metered gallons of gasoline and 800 metered gallons of alcohol. Accordingly, the mixture contains 10 percent alcohol (as determined based on the delivery tickets provided to the blender) and qualifies as 10 percent gasohol.

Example 2. Mixtures containing less than 10 percent alcohol but at least 9.8 percent alcohol. The applicable delivery tickets show that the mixture is made with 7205 metered gallons of gasoline and 795 metered gallons of alcohol. Because the mixture contains less than 10 percent alcohol, but more than 9.8 percent alcohol, (as determined based on the delivery tickets provided to the blender), 7950 gallons of the mixture qualify as 10 percent gasohol. If tax was imposed on the gasoline in the mixture at the gasohol production rate, the remaining 50 gallons of the mixture are treated as gasoline with respect to which there was a failure to blend into gasohol for purposes of paragraph (g) of this section. If tax was imposed on the gasoline in the mixture at the rate of tax described in section 4081(a), a credit or refund under section 6427(f) is allowed only with respect to 7155 gallons of gasoline.

Example 3. The applicable delivery tickets show that the mixture is made with 7550 metered gallons of gasoline and 450 metered gallons of alcohol. Because the mixture contains only 5.625 percent alcohol (as determined based on the delivery tickets provided to the blender), the mixture does not qualify as gasohol.

* * * * *

(c) * * *

(1) * * *

(ii) * * *

(B) Has no reason to believe that any information in the certificate is false.

(2) * * *

(ii) *Model certificate.*

CERTIFICATE OF REGISTERED GASOHOL BLENDER

(To support sales of gasoline at the gasohol production tax rate under section 4081(c) of the Internal Revenue Code)

_____

Name, address, and employer identification number of seller

_____ (Buyer) certifies the

Name of Buyer

following under penalties of perjury:

Buyer is registered as a gasohol blender with registration number _____. Buyer's registration has not been suspended or revoked by the Internal Revenue Service. The gasoline bought under this certificate will be used by Buyer to produce gasohol (as defined in § 48.4081–6(b) of the Manufacturers and Retailers Excise Tax Regulations) within 24 hours after buying the gasoline.

Type of gasohol Buyer will produce (check one only):

_____ 10% gasohol

_____ 7.7% gasohol

_____ 5.7% gasohol

If the gasohol the Buyer will produce will contain ethanol, check here: _____.

This certificate applies to the following (complete as applicable):

If this is a single purchase certificate, check here and enter:

1. Account number _____
2. Number of gallons _____

If this is a certificate covering all purchases under a specified account or order number, check here _____ and enter:

1. Effective date _____
2. Expiration date _____

(period not to exceed 1 year after the effective date)

3. Buyer account or order number _____

Buyer will not claim a credit or refund under section 6427(f) of the Internal Revenue Code for any gasoline covered by this certificate.

Buyer agrees to provide seller with a new certificate if any information on this certificate changes.

Buyer understands that Buyer's registration may be revoked if the gasoline covered by

this certificate is resold or is used other than in Buyer's production of the type of gasohol identified above.

Buyer will not take the alcohol mixture credit under section 40(b) with respect to the alcohol in the gasohol to which this certificate relates.

Buyer understands that the fraudulent use of this certificate may subject Buyer and all parties making any fraudulent use of this certificate to a fine or imprisonment, or both, together with the costs of prosecution.

Printed or typed name of person signing

Title of person signing

Employer identification number

Address of Buyer

Signature and date signed

* * * * *

(e) *Tax rates*—(1) *Gasohol production tax rate.* The gasohol production tax rate is the applicable rate of tax determined under section 4081(c)(2)(A).

(2) *Gasohol tax rate.* The gasohol tax rate is the applicable alcohol mixture rate determined under section 4081(c)(4)(A).

* * * * *

(g) * * *

(2) *Failure to blend*—(i) *Imposition of tax.* Tax is imposed on the entry, removal, or sale of gasoline (including excess liquid described in paragraph (b)(2)(ii)(B) of this section) with respect to which tax was imposed at a gasohol production tax rate if—

(A) The gasoline was not blended into gasohol; or

(B) The gasoline was blended into gasohol but the gasohol production tax rate applicable to the type of gasohol produced is greater than the rate of tax originally imposed on the gasoline.

* * * * *

(iii) *Rate of tax.* The rate of tax imposed on gasoline described in paragraph (g)(2)(i)(A) of this section is the difference between the rate of tax applicable to gasoline not described in this section and the rate of tax previously imposed on the gasoline. The rate of tax imposed on gasoline described in paragraph (g)(2)(i)(B) of this section is the difference between the gasohol production tax rate applicable to the type of gasohol produced and the rate of tax previously imposed on the gasoline.

(iv) *Example.* The following example illustrates the rule of this paragraph (g)(2):

Example. (i) A registered gasohol blender bought gasoline in connection with a removal described in paragraph (c)(1)(ii) of this section. Based on the blender's certification (described in paragraph (c)(2) of this section) that the blender would produce 10 percent gasohol with the gasoline, tax at the gasohol production tax rate applicable to 10 percent gasohol was imposed on the removal.

(ii) The blender then produced a mixture by splash blending in a tank holding approximately 8000 gallons of mixture. The applicable delivery tickets show that the mixture was blended by first pumping 7220 metered gallons of gasoline into the empty tank, and then pumping 780 metered gallons of alcohol into the tank. Because the mixture contains 9.75 percent alcohol (as determined based on the delivery tickets provided to the blender) the entire mixture qualifies as 7.7 percent gasohol, rather than 10 percent gasohol.

(iii) Because the 7220 gallons of gasoline were taxed at the gasohol production tax rate applicable to 10 percent gasohol but the gasoline was blended into 7.7 percent gasohol, a failure to blend has occurred with respect to the gasoline. As the person that bought the gasoline in connection with the taxable removal, the blender is liable for the tax imposed under paragraph (g)(2)(i) of this section. The amount of tax imposed is the difference between—

(A) 7220 gallons times the gasohol production tax rate applicable to 7.7 percent gasohol; and

(B) 7220 gallons times the gasohol production tax rate applicable to 10 percent gasohol.

(iv) Because the gasohol does not contain exactly 7.7 percent alcohol, the benefit of the gasohol production tax rate with respect to the alcohol is less than the amount of the alcohol mixture credit under section 40(b) (determined before the application of section 40(c). Accordingly, the blender may be entitled to claim an alcohol mixture credit for the alcohol used in the gasohol. Under section 40(c), however, the amount of the alcohol mixture credit must be reduced to take into account the benefit provided with respect to the alcohol by the gasohol production tax rate.

(h) *Effective date.* This section is effective January 1, 1993.

Par. 15. Section 48.4081–7 is amended as follows:

1. The heading for § 48.4081–7 is revised.

2. In paragraphs (a), (b), (c), and (d), the language "gasoline" is removed each place it appears and "taxable fuel" is added in its place.

3. In paragraph (f), *Example 1*, paragraph (i), first and fourth sentences, and paragraph (ii), first and third sentences, the language "1993" is removed each place it appears and "1994" is added in its place.

4. Paragraph (g) is revised.

5. The revised provisions read as follows:

§ 48.4081–7 Taxable fuel; conditions for, and reporting relating to, refunds of taxable fuel tax under section 4081(e).

* * * * *

(g) *Effective date.* This section is effective in the case of taxable fuel with respect to which the first tax is imposed after December 31, 1993.

Par. 16. Section 48.4081–8 is revised to read as follows:

§ 48.4081–8 Taxable fuel; measurement.

(a) *In general.* For purposes of the tax imposed by section 4081, gallons of taxable fuel may be measured on the basis of—

(1) Actual volumetric gallons;

(2) Gallons adjusted to 60 degrees Fahrenheit; or

(3) Any other temperature adjustment method approved by the Commissioner.

(b) *Effective date.* This section is effective January 1, 1994.

§ 48.4221 [Removed]

Par. 17. Section 48.4221 is removed.

Par. 18. Section 48.4221–1 is amended as follows:

1. Paragraph (a) is revised.

2. Paragraph (b)(2)(iv) is amended by adding "and" at the end thereof.

3. Paragraph (b)(2)(v) is revised.

4. Paragraphs (b)(2)(vi) through (xii) are removed.

5. Paragraph (b)(3) is removed and paragraphs (b)(4) and (5) are redesignated as paragraphs (b)(3) and (4), respectively.

6. The revised provisions read as follows:

§ 48.4221–1 Tax free sales; general rule.

(a) *Application of regulations under section 4221*—(1) *In general.* The regulations under section 4221 provide rules under which the manufacturer, producer, or importer of an article subject to tax under chapter 32 (or the retailer of an article subject to tax under subchapter A or C of chapter 31) may sell the article tax free under section 4221.

(2) *Limitations.* The following restrictions must be taken into account in applying the regulations under section 4221:

(i) The exemptions under section 4221(a)(4) and (5) do not apply to the tax imposed by section 4064 (gas guzzler tax).

(ii) The exemptions under section 4221 do not apply to the tax imposed by section 4081 (gasoline and diesel fuel tax).

(iii) The exemptions under section 4221 do not apply to the tax imposed by section 4091 (aviation fuel tax). For rules relating to tax-free sales of aviation fuel, see section 4092 and the regulations thereunder.

(iv) The exemptions under section 4221 do not apply to the tax imposed by section 4121 (coal tax).

(v) The exemptions under sections 4221(a)(3), (4), and (5) do not apply to the tax imposed by section 4131 (vaccine tax). In addition, the exemption under section 4221(a)(2) applies to the vaccine tax only to the extent provided in § 48.4221–3(e) (relating to tax-free sales of vaccine for export).

(vi) The exemptions under section 4221(a) apply only in those cases where the exportation or use referred to is to occur before any other use.

(b) * * *

(2) * * *

(v) Section 4221(e)(3) relating to the sale of tires used on intercity, local, or school buses (see § 48.4221–8).

* * * * *

Par. 19. Section 48.4221–2 is amended by:

1. Removing from the first sentence of paragraph (a)(1) the language "(other than a tire or inner tube taxable under section 4071, which are given special treatment under sections 4221(e)(2) and (4), and §§ 48.4221–7 and 48.4221–8)" and adding "(other than a tire taxable under section 4071, which is given special treatment under section 4221(e)(2) and § 48.4221–7)" in its place.

2. Removing paragraph (a)(2) and redesignating paragraph (a)(3) as paragraph (a)(2).

3. Revising paragraph (b).

4. The revised provision reads as follows:

§ 48.4221–2 Tax-free sale of articles to be used for, or resold for, further manufacture.

* * * * *

(b) *Circumstances under which an article is considered to have been sold for use in further manufacture*—(1) An article shall be treated as sold for use in further manufacture if the article is sold for use by the buyer as material in the manufacture or production of, or as a component part of, another article taxable under chapter 32 of the Internal Revenue Code.

(2) An article is used as material in the manufacture or production of, or as a component of, another article if it is incorporated in, or is a part or accessory of, the other article when the other article is sold by the manufacturer. In addition, an article is considered to be used as material in the manufacture of another article if it is consumed in whole or in part in testing such other article. However, an article that is consumed in the manufacturing process other than in testing, so that it is not a physical part of the manufactured article, is not considered to have been used as material in the manufacture of, or as a component part of, another article.

* * * * *

§ 48.4221–5 [Amended]

Par. 20. Section 48.4221–5 is amended as follows:

1. Paragraph (c)(1) is amended by:

a. Removing the first sentence.

b. Removing the language "If a State or local government is not registered, the" and adding "The" in its place in the new first sentence.

2. In paragraph (d), the first sentence, is amended by:

a. Removing the language "(whether on the basis of a registration number or an exemption certificate)".

b. Removing the language "(such as gasoline that is" and adding "(such as tires that are" in its place.

§§ 48.4221–8, 48.4221–9, 48.4221–10 [Removed]

Par. 21. Sections 48.4221–8, 48.4221–9, and 48.4221–10 are removed.

§ 48.4221–11 [Redesignated § 48.4221–8]

Par. 22. Section 48.4221–11 is redesignated § 48.4221–8.

§ 48.4221–12 [Removed]

Par. 23. Section 48.4221–12 is removed.

Par. 24. In § 48.4222(a)–1, paragraphs (a) and (b) are revised to read as follows:

§ 48.4222(a)–1 Registration.

(a) *General rule.* Except as provided in § 48.4222(b)–1, tax- free sales under section 4221 may be made only if the manufacturer, first purchaser, and second purchaser, as the case may be, have been registered by the Internal Revenue Service.

(b) *Application instructions.* Application for registration under section 4222 must be made in accordance with instructions for Form 637 (or such other form as the Commissioner may designate).

* * * * *

Par. 25. In § 48.4222(b)–1, paragraph (a) is revised to read as follows:

§ 48.4222(b)–1 Exceptions to the requirement for registration.

(a) *State and local governments.* The Internal Revenue Service will not register state or local governments under section 4222. To establish the right to sell articles tax free to a state or local government, the manufacturer must obtain from a state or local government the information described in § 48.4221–5(c).

* * * * *

§ 48.6416(b)(2)–2 [Amended]

Par. 26. In § 48.6416(b)(2)–2, paragraphs (g) through (k) are removed.

§ 48.6416(g)–1 [Removed]

Par. 27. Section 48.6416(g)–1 is removed.

§§ 6424–0 through 48.6424–6 [Removed]

Par. 28. Section 48.6424–0 through 48.6424–6 are removed.

Par. 29. Section 48.6427–10 is added to read as follows:

§ 48.6427–10 Credit or payment with respect to gasoline used to produce gasohol.

(a) *Conditions to allowance of credit or payment.* A claim for credit or payment with respect to gasoline is allowed under section 6427(f) only if—

(1) The gasoline to which the claim relates was taxed at the aggregate rate of tax imposed by section 4081 without regard to section 4081(c);

(2) The claimant used the gasoline to produce gasohol (as defined in § 48.4081–6(b)(2)) that was sold or used in the claimant's trade or business; and

(3) The claimant has filed a timely claim for a credit or payment that contains the information required under paragraph (c) of this section.

(b) *Form of claim.* Each claim for a payment under section 6427(f) must be made on Form 8849 (or such other form as the Commissioner may designate) in accordance with the instructions for that form. Each claim for a credit under section 6427(f) must be made on Form 4136 (or such other form as the Commissioner may designate) in accordance with the instructions for that form.

(c) *Content of claim.* Each claim for credit or payment under section 6427(f) must contain the following information with respect to each batch of gasohol that contains the gasoline covered by the claim:

(1) The claimant's registration number, if the claimant is a registered gasohol blender (as defined in § 48.4081–6(b)(4)).

(2) The name, address, and employer identification number of the person that sold the claimant the gasoline.

(3) The date and location of the sale of the gasoline.

(4) The volume of the gasoline.

(5) The name, address, and employer identification number of the person that sold the claimant the alcohol.

(6) The date and location of the sale of the alcohol.

(7) The volume and type of the alcohol.

(8) In the case of a claim for a payment, a copy of the invoice or other record of sale relating to each purchase of alcohol.

(9) The written or typed name of the individual signing the claim and the telephone number of that individual.

(10) The amount of credit or payment claimed.

(d) *Time for filing claim.* For rules relating to the time for filing a claim under section 6427(f), see section 6427(i). A claim under section 6427(f) is not considered to be filed unless it contains all the information required by paragraph (c) of this section and received at the place required by the form.

(e) *Effective date.* This section is effective with respect to claims relating to gasohol produced after December 31, 1994.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 94–25763 Filed 10–17–94; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[VA20–2–6407b; FRL–5083–1]

Approval and Promulgation of Air Quality Implementation Plans; Virginia: Definition of VOC and Emission Control Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia on November 4, 1992. The revision consists of amendments to Virginia's definition of the term volatile organic compound (VOC) and administrative changes to Virginia's lists of emission control areas for VOC and oxides of nitrogen (NO_x). Virginia's November 4, 1992, SIP revision submittal also contained an emission statement regulation. The portion of Virginia's November 4, 1992, submittal pertaining to emission statements is the subject of a separate rulemaking action.

In the final rules section of this **Federal Register**, EPA is approving the Commonwealth's November 4, 1992, SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial SIP revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule and technical support document (TSD) prepared for that rulemaking action. If no adverse comments are received in response to this proposed rule, no further activity is contemplated in relation to this rule. If 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. 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 must be received in writing by November 18, 1994.

ADDRESSES: Written comments on this action should be addressed to Thomas J. Maslany, Director, Air, Radiation, and Toxics Division (3AT00), U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Radiation, and Toxics Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; and the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia, 23219.

FOR FURTHER INFORMATION CONTACT: Kathleen Stager, (215) 597–0545, at the EPA Regional Office listed.

SUPPLEMENTARY INFORMATION: See the information provided in the direct final action of the same title which is located in the rules and regulations section of this **Federal Register.**

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone.

Authority: 42 U.S.C. 7401–7671q.

Dated: August 4, 1994.

Peter H. Kostmayer,

Regional Administrator, Region III.

[FR Doc. 94–25684 Filed 10–18–94; 8:45 am]

BILLING CODE 6560–50–F

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40 CFR Part 70

[WI001; FRL–5093–8]

Proposed Interim Approval of the Operating Permits Program; Wisconsin

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed interim approval.

SUMMARY: The EPA proposes interim approval of the Operating Permits Program submitted by the State of Wisconsin for the purpose of complying with Federal requirements which mandate that States develop, and submit to EPA, programs for issuing operating permits to all major stationary sources, and to certain other sources, with the exception of sources on Indian lands.

DATES: Comments on this proposed action must be received in writing by November 18, 1994.

ADDRESSES: Written comments should be addressed to: Carlton Nash, Chief, Regulation Development Section (AT–18J), EPA, 77 W. Jackson Boulevard, Chicago, Illinois 60604.

Copies of the State's submittal and other supporting information used in developing the proposed interim approval are available for inspection during normal business hours at the following location: EPA Region 5, Air and Radiation Division (AT–18J), 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Beth Valenziano, Permits and Grants Section (AT–18J), EPA, 77 W. Jackson Boulevard, Chicago, Illinois 60604, (312) 886–2703.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

As required under title V of the Clean Air Act (Act) as amended (1990), EPA has promulgated rules which define the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which EPA will approve, oversee, and withdraw approval of State operating permits programs. See 57 FR 32250 (July 21, 1992). These rules are codified at title 40 of the Code of Federal Regulations (CFR) part 70. Title V requires States to develop, and submit to EPA, programs for issuing operating permits to all major stationary sources and to certain other sources.

The Act requires that States develop and submit these programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. The EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

II. Proposed Action and Implications

A. Analysis of State Submission

1. Support Materials

The Governor of Wisconsin submitted Wisconsin's title V Operating Permits Program on January 27, 1994. The EPA deemed the submittal complete in a letter to the Governor dated March 24, 1994. The submittal contained all required elements of 40 CFR 70.4, including a description of Wisconsin's operating permits program, permitting program documentation, and the Attorney General's legal opinion that the laws of the State of Wisconsin provide adequate authority to carry out all aspects of the program required by the Act.

The Governor's letter to EPA states that Wisconsin's operating permits program will cover all geographical areas of Wisconsin, except for activities conducted by Indians on Indian reservation lands. Except for a brief reiteration of this statement in the program description, there is no further discussion in the submittal of any basis under which the Wisconsin Department of Natural Resources (WDNR) might assert jurisdiction over sources on tribal lands.

Because WDNR has not demonstrated, consistent with applicable principles of Indian law and Federal Indian policies, legal authority to regulate sources on tribal lands, the proposed interim approval of Wisconsin's operating permits program will not extend to lands within the exterior boundaries of any Indian reservation in the State of Wisconsin.[1] Title V sources located within the exterior boundaries of Indian reservations in Wisconsin will be subject to either the Federal operating permits program, to be promulgated at 40 CFR part 71, or to a tribal operating permits program approved pursuant to title V and the regulations that will be promulgated under section 301(d) of the Act. The section 301(d) regulations will authorize EPA to treat tribes in the same manner as States for appropriate Act provisions.[2]

2. Regulations and Program Implementation

Wisconsin's operating permits program, including the operating permits program regulations (Chapters Natural Resources (NR) 400, 406, 407, 409, 410, 436, 438, 439, 484, 490, and 494, Wisconsin Administrative Code) substantially meet the requirements of 40 CFR part 70, including: §§70.2 and 70.3 with respect to applicability; §70.5 with respect to application forms, completeness requirements, and criteria for defining insignificant activities; §§70.4, 70.5, and 70.6 with respect to permit content (including operational flexibility); §§70.7 and 70.8 with respect to permit processing requirements (including minor permit modifications and public participation); and §70.11 with respect to enforcement authority.

There are two references in Wisconsin's regulations which incorrectly cite the program's compliance certification requirements. The reference in section NR 407.09(4)(a)3.c., Wisconsin Administrative Code (s.NR 407.09(4)(a)3.c., Wis. Adm. Code) to s.NR 439.03(7) is incorrect. The correct reference is s.NR 439.03(8). The reference in s.NR 439.03(1)(c), Wis. Adm. Code, to s.NR 439.03(7) is incorrect. The correct reference is s.NR 439.03(8). WDNR is aware of these incorrect citations and is planning to correct them.

For a detailed analysis of Wisconsin's program submittal, please refer to the Technical Support Document (TSD) for this proposed action, which is available in the docket at the address noted above. The TSD shows that all operating permits program requirements of title V of the Act, 40 CFR part 70, and relevant guidance were met by Wisconsin's submittal, with the exception of those requirements described in subpart II.B. below.

3. Permit Fee Demonstration

Wisconsin's operating permits program fee schedule is established in section 144.399, Wisconsin Statutes (s. 144.399, Wis. Stats.), and in Chapters NR 410 and 438, Wis. Adm. Code. Wisconsin's fee schedule is based on the presumptive minimum program cost established in 40 CFR 70.9, and exceeds the presumptive minimum because the State charges fees for more pollutants than those included in the 40 CFR 70.2 definition of "regulated pollutant (for presumptive fee calculation)". In fiscal year 1995, WDNR estimates the dollar per ton fee to be $30.18 (assuming a 3% increase in the Consumer Price Index). Using the presumptive minimum model, the presumptive cost of the program in fiscal year 1995 is $8,201,717. WDNR's estimated fees for fiscal year 1995 is $8,435,612.

The EPA's approval of Wisconsin's fee schedule does not extend to fees collected pursuant to s.144.399(2)(am), Wis. Stats. and s.NR 410.04(4), Wis. Adm. Code. These provisions allow WDNR to collect emissions fees from utilities with affected units under section 404 of the Act during the years 1995 through 1999. 40 CFR 70.9(b)(4) provides that, for 1995 through 1999, no fee for purposes of title V shall be required to be paid with respect to emissions from any affected unit under section 404 of the Act.

4. Provisions Implementing the Requirements of Other Titles of the Act

a. Authority for Section 112 Implementation

Wisconsin has demonstrated in its title V program submittal adequate legal authority to implement and enforce all section 112 toxics requirements through the title V permit. This legal authority is contained in Wisconsin's enabling legislation and in regulatory provisions that define "applicable requirements" and provide that the permit must incorporate all applicable requirements. The EPA has determined that this legal authority is sufficient to allow Wisconsin to issue permits to part 70 sources that assure compliance with all section 112 requirements.

EPA is interpreting the above legal authority to mean that Wisconsin is able to carry out all section 112 activities for part 70 sources. For further rationale on this interpretation, please refer to the TSD for this proposed action.

b. Implementation of Section 112(g) Upon Program Approval

As a condition of approval of the part 70 program, Wisconsin is required to implement section 112(g) of the Act from the effective date of the part 70 program. Imposition of case-by-case determinations of Maximum Achievable Control Technology or offsets under section 112(g) will require the use of a mechanism for establishing federally enforceable restrictions on a source-specific basis. The EPA is proposing to approve Wisconsin's preconstruction permitting program found in Chapters 406 and 408, Wis. Adm. Code, under the authority of title V and part 70 solely for the purpose of implementing section 112(g) during the transition period between title V approval and adoption of a State rule implementing EPA's section 112(g) regulations. The EPA believes this approval is necessary so that Wisconsin has a mechanism in place to establish federally enforceable restrictions for section 112(g) purposes from the date of part 70 approval. Although section 112(l) generally provides authority for approval of State air programs to implement section 112(g), title V and section 112(g)

[1] This is not a determination that WDNR could not possibly demonstrate jurisdiction over sources within the exterior boundaries of Indian reservations in Wisconsin. However, no such showing has been made.

[2] Tribes may also have inherent sovereign authority to regulate air pollutants from sources on tribal lands.

provide authority for this limited approval because of the direct linkage between the implementation of section 112(g) and title V. The scope of this approval is narrowly limited to section 112(g) and does not confer or imply approval for purposes of any other provision under the Act, for example, section 110. If Wisconsin does not wish to implement section 112(g) through its preconstruction permit program and can demonstrate that an alternative means of implementing section 112(g) exists, EPA may, in the final action on Wisconsin's part 70 program, approve the alternative instead.

This approval is for an interim period only, until such time as the State adopts regulations consistent with any regulations promulgated by EPA to implement section 112(g). Accordingly, EPA is proposing to limit the duration of this approval to a reasonable time following promulgation of section 112(g) regulations so that Wisconsin, acting expeditiously, will be able to adopt regulations consistent with the section 112(g) regulations. The EPA is proposing here to limit the duration of this approval to 18 months following promulgation by EPA of section 112(g) regulations. Comment is solicited on whether 18 months is an appropriate period, considering Wisconsin's procedures for adoption of regulations.

c. Program for Straight Delegation of Section 112 Standards

Requirements for operating permits program approval, specified in 40 CFR 70.4(b), also address section 112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to part 70 sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70.

Therefore, EPA is also proposing to grant approval under section 112(l)(5) and 40 CFR 63.91 of Wisconsin's program for receiving delegation of section 112 standards that are unchanged from the Federal standards as promulgated. Because Wisconsin has the authority under s.144.394(12), Wis. Stats., to include any conditions in an operating permit that are applicable to a source under the Act (including section 112 requirements), EPA proposes to approve the delegation of section 112 standards through automatic delegation. The details of this delegation mechanism will be set forth in a Memorandum of Agreement between Wisconsin and EPA. This program applies to both existing and future standards, but is limited to sources covered by the part 70 program.

d. Implementation of Title IV

Wisconsin's operating permits program contains adequate authority to issue permits which include the requirements of the title IV Acid Rain Program. The WDNR also committed in the program submittal to adopting and submitting to EPA by January 1, 1995, a program implementing the Acid Rain Program.

B. Options for Approval/Disapproval and Implications

The EPA is proposing to grant interim approval to the title V operating permits program submitted by the State of Wisconsin on January 27, 1994. This interim approval of Wisconsin's operating permits program applies to all title V sources, with the exception of sources on Indian lands and source categories described in the source category limited interim approval below (following B.8.). Non-major stationary sources that may be required to obtain a title V operating permit are currently exempted from the program under 40 CFR 70.3. Wisconsin's operating permits program for non-title V sources has been submitted as a revision to Wisconsin's State Implementation Plan and is currently under EPA review.

If interim approval of Wisconsin's title V operating permits program is promulgated, the State must make the following changes to receive full approval:

1. Revise Wisconsin's operating permit program regulations to provide for criminal fines against any person who knowingly makes any false material statement, representation, or certification in a permit application. This provision is required by 40 CFR 70.11(a)(3)(iii). The June 21, 1993, memorandum included in the Attorney General's opinion states that s.144.426(2)(a), Wis. Stats., does not penalize a person who knowingly submits false information because the statutes do not require the submittal of accurate information to obtain a permit. However, the memorandum further explains that WDNR has the authority to promulgate a rule requiring the submittal of accurate information. Section NR 439.03(11), Wis. Adm. Code, provides that all reports required by an operating permit shall be truthful. However, there is no regulatory provision which requires the application submittal itself to be truthful.

2. Revise the following legislation and regulations to provide an application shield for "new" and "modified sources" (as defined by ss.144.30(20s) and (20e), Wis. Stats.): s.144.391(1)(b), Wis. Stats.; s.144.3925(7), Wis. Stats.; s.NR 407.06(2), Wis. Adm. Code; and s.NR 407.08, Wis. Adm. Code. Wisconsin's program does provide an application shield for "existing sources" (as defined by s.144.30(13). 40 CFR 70.7(b) requires that the application shield must apply to all part 70 sources which meet the application shield requirements.

3. Revise the following legislation and regulation to provide for operational flexibility for "new" and "modified sources" (as defined by ss.144.30(20s) and (20e), Wis. Stats.): s.144.391(4m), Wis. Stats.; and s.NR 407.025, Wis. Adm. Code. Wisconsin's program does provide for operational flexibility for "existing sources" (as defined by s.144.30(13). 40 CFR 70.4(b)(12) requires that permit flexibility apply to all part 70 sources.

4. Revise the appropriate legislation and regulations to provide the authority to deny a renewal application for a source that is not in compliance. 40 CFR 70.6(a)(6)(i) requires that any permit noncompliance is grounds for denial of a permit renewal application. Section NR 407.09(1)(f)1., Wis. Adm. Code, states that the authority to deny a permit renewal application for noncompliance is contingent upon the requirements in s.144.3925(6), Wis. Stats., which do not currently provide for a denial in such a circumstance. Appendix P of Wisconsin's operating permits program submittal includes draft statutory revisions that are intended to fix this deficiency. The draft revisions propose to add this authority to s.144.396(3)(c), Wis. Stats. Regardless of the statutory placement of this authority, s.NR 407.09(1)(f)1., Wis. Adm. Code, must be revised if necessary to reference the correct statutory authority.

5. Revise ss.NR 407.14(1)(b), (c), (d), and (h), Wis. Adm. Code, to provide that if the conditions specified in these provisions are met, WDNR is required to reopen a permit for cause. Under the State's current provisions, reopening a permit under these circumstances is discretionary. 40 CFR 70.7(f)(1) establishes the conditions under which reopening a permit for cause is mandatory. However, the conditions of ss.NR 407.14(1)(c) and (d), Wis. Adm. Code, are only mandatory if they meet the 3 year requirement under 40 CFR 70.7(f)(1)(i), or are acid rain requirements under 40 CFR 70.7(f)(1)(ii).

6. Revise s.NR 407.05, Wis. Adm. Code, to include the duty to supplement or correct application provisions, as required under 40 CFR 70.5(b).

7. Revise s.144.3935(1)(a), Wis. Stats., to provide WDNR the authority to issue operating permits to "new" and "modified" part 70 sources (as defined by ss.144.30(20s) and (20e), Wis. Stats.) that are not in compliance. 40 CFR 70.3(a) requires that the permitting agency must have authority to issue permits to all prt 70 sources.

Revise s.NR 407.05(4)(h)2.c., Wis. Adm. Code, to provide that compliance plan application requirements for noncomplying new and modified sources include a narrative description of how the sources will achieve compliance. 40 CFR 70.5(c)(8)(ii)(C) requires this compliance plan application requirement for all part 70 sources that are not in compliance.

Revise s.NR 407.05(4)(h)3.c., Wis. Adm. Code, to provide for schedule of compliance application requirements for noncomplying new and modified sources. 40 CFR 70.5(c)(8)(iii)(C) requires schedules of compliance in all noncomplying part 70 source applications.

Revise s.NR 407.05(4)(h)4., Wis. Adm. Code, to provide for progress report application requirements for noncomplying new and modified sources. 40 CFR 70.5(c)(8)(iv) requires progress report schedules in all noncomplying part 70 source applications.

Revise s.NR 407.09(4)(b), Wis. Adm. Code, to provide for schedule of compliance and progress report requirements in permits issued to noncomplying new and modified sources. 40 CFR 70.6(c)(3) and (4) require schedule of compliance and progress report requirements in all part 70 permits that are issued to noncomplying sources.

8. Revise ss.NR 407.03(1)(d), (g), (h), (o), (s), (sm), and (t), Wis. Adm. Code, to ensure that no part 70 sources are exempted from the requirement to obtain an operating permit, as provided under 40 CFR 70.3. Section NR 407.03(1)(t) potentially exempts certain part 70 sources, and ss.NR 407.03(1)(d), (g), (h), (o), (s), and (sm) do not provide for adequate procedures to limit these sources' potential to emit. The 40 CFR 70.2 definition of "major source" considers the potential to emit of a source in determining major source status. The Wisconsin permitting exemptions listed above determine applicability based in part or totally on these sources' actual emissions or throughput, and the provisions in s.NR 407.03(4) do not provide an enforceable mechanism for limiting these sources' potential emissions to the actual emissions levels or throughput established in the exemptions.

WDNR has demonstrated that the additional exemptions provided for in s.NR 407.03 are acceptable because they do not exempt part 70 sources from the operating permit program. These exemptions are further analyzed in the TSD for this proposed action.

To be eligible for interim approval, 40 CFR 70.4(d)(3)(ii) requires that a program provide for adequate authority to issue permits containing all applicable requirements to all title V sources. Due to the deficiencies outlined in 7. and 8. above, EPA is proposing that Wisconsin's operating permit program be granted source category limited interim approval. See 57 FR 32270 (July 21, 1992). Therefore, EPA is not proposing to include "new" and "modified" part 70 sources that are not in compliance (as defined by Wisconsin's operating permits program), and part 70 sources covered by Chapter NR 407.03(1)(d), (g), (h), (o), (s), (sm), and (t) as part of the interim approval of Wisconsin's program. The exclusion of these source categories from approval, however, does not affect Wisconsin's obligation to fix these deficiencies in order to be eligible for full approval.

For the deficiency outlined in 7. above, EPA considers the legislative drafting oversight in the use of the term "existing source" in a manner inconsistent with the definition of the term to be a compelling reason for granting source category limited interim approval.

For the deficiency outlined in 8. above, EPA considers the lack of EPA guidance in developing prohibitory rules at the time Wisconsin promulgated its operating permits regulations to be a compelling reason for granting source category limited interim approval. For the deficiency with the s.NR 407.03(1)(t) exemption, EPA considers the additional analysis provided by WDNR showing that the exemption could potentially exempt title V sources to be a compelling reason for granting source category limited interim approval. At the time of Wisconsin's operating permits program submittal, WDNR had determined that this exemption would not exclude any title V sources from the requirement to obtain an operating permit. However, WDNR later determined that this exemption could exclude title V sources.

Wisconsin has not requested additional time for issuing initial operating permits, as the State intends to fix the source category limited interim approval deficiencies in time to permit all sources within the 3 year phase-in period. In addition, based on estimates provided by WDNR, EPA believes that only a small number of sources and a small amount of emissions would be affected by source category limited interim approval. For example, WDNR estimates that only 2 or 3 sources per year will be affected by the noncomplying new and modified source deficiency. WDNR is also not aware of any part 70 sources that would meet the s.NR 407.03(1)(t) exemption provisions. For further information, refer to the TSD for this proposed action. EPA has determined that Wisconsin's operating permits program can issue permits to a sufficient number of part 70 sources, and can do so on a schedule that substantially meets the requirements of part 70.

This interim approval, which may not be renewed, extends for a period of up to 2 years. During the interim approval period, the State is protected from sanctions for failure to have a program, and EPA is not obligated to promulgate a Federal permits program in the State. Permits issued under a program with interim approval have full standing with respect to part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon interim approval, as does the 3-year time period for processing the initial permit applications.

As outlined in II.A.4.c. above, EPA is also proposing to grant approval under section 112(l)(5) and 40 CFR 63.91 of the State's program for receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations only applies to sources covered by the part 70 program.

III. Administrative Requirements

A. Request for Public Comments

The EPA is requesting comments on all aspects of this proposed interim approval. Copies of the State's submittal and other information relied upon for the proposed interim approval are contained in an informal docket maintained at the EPA Regional Office. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this proposed interim approval. The principal purposes of the docket are:

(1) To allow interested parties a means to identify and locate documents so that they can effectively participate in the approval process; and

(2) To serve as the record in case of judicial review. The EPA will consider any comments received by November 18, 1994.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

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

Operating permit program approvals under section 502 of the Act do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal operating permit program 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 Act, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Act forbids EPA to base its actions concerning operating permit programs 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).

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, and Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: September 27, 1994.

Robert Springer,

Acting Regional Administrator.

[FR Doc. 94–25866 Filed 10–18–94; 8:45 am]

BILLING CODE 6560–50–F

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40 CFR Part 300

[FRL–5090–1]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of Intent to Delete the Northwestern States Portland Cement Company (NWSPCC) Site, Mason City, Iowa from the National Priorities List: Request for Comments.

SUMMARY: The Environmental Protection Agency (EPA), Region VII announces its intent to delete the NWSPCC Site, Mason City, Iowa from the National Priorities List (NPL) and requests public comment on this action. The NPL constitutes appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which the EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. The reason this action is being taken is that Superfund Remedial Activities have been completed and no further response is appropriate.

DATES: Comments concerning this site may be submitted on or before November 18, 1994.

ADDRESSES: Comments may be mailed to: Michael J. Sanderson, Acting Director, Waste Management Division, U.S. Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101.

Comprehensive information on this site is available through the EPA Region VII public docket, which is located in the EPA's Region VII office and is available for viewing by appointment only from 9 a.m. to 4 p.m., Monday through Friday, excluding holidays. Requests for appointments or copies of the background information from the Regional public docket should be directed formally to the EPA Region VII docket office.

The address for the Regional docket office is: U.S. Environmental Protection Agency, Region VII 726 Minnesota Avenue, Kansas City, Kansas 66101.

Background information from the Regional public docket is also available for viewing at the NWSPCC Site information repository which is located with: Mason City Public Library, 225 2nd SE., Mason City, IA 50401.

FOR FURTHER INFORMATION CONTACT: Paul Roemerman, U.S. Environmental Protection Agency, Region VII 726 Minnesota Avenue, Kansas City, Kansas 66101 (913) 551–7694.

SUPPLEMENTARY INFORMATION:

Table of Contents:

I. Introduction
II. NPL Deletion Criteria
III. Deletion Procedures
IV. Basis for Intended Site Deletions

I. Introduction

The Environmental Protection Agency (EPA), Region VII announces its intent to delete the NWSPCC Site, Mason City, Iowa, from the National Priorities List (NPL), which constitutes appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and requests comments on this proposed deletion. The EPA identifies sites that appear to present a significant risk to public health, welfare, or the environment and maintains the NPL as the list of those sites. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Response Fund (Fund). Pursuant to § 300.425(e)(3) of the National Contingency Plan (NCP), any site deleted from the NPL remains eligible for Fund-financed remedial actions if conditions at the site warrant such action.

The EPA will accept comments on this site for thirty days after the publication of this notice in the **Federal Register.**

Section II of this notice explains the criteria for deleting sites from the NPL. Section III discusses the procedures that the EPA is using for this action. Section IV discusses how the site meets the deletion criteria.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making this determination, EPA, in consultation with the State, will consider whether any of the following criteria have been met:

(i) That responsible parties or other persons have implemented all appropriate response actions required; or

(ii) All appropriate Fund-financed responses under CERCLA have been implemented and no further response action by responsible parties is appropriate; or

(iii) The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

Section 300.425(e)(2) of the NCP requires State concurrence before deleting a site from the NPL.

Deletion of sites from the NPL does not itself create, alter, or revoke any individuals rights or obligations. The NPL is designed primarily for informational purposes and to assist Agency management. As is mentioned in Section II of this document, § 300.425(e)(3) of the NCP makes clear that deletion of a site from the NPL does not preclude eligibility for future Fund-financed response actions.

III. Deletion Procedures

The EPA Region VII will accept and evaluate public comments before making the final decision to delete the site from the NPL. The Agency believes that deletion procedures should focus on notice and comment at the local level. Comments from the local community are likely to be the most pertinent to deletion decisions. The following procedures were used for the intended deletion of the site.

1. The EPA Region VII has recommended the deletion and prepared the relevant documents.

2. The State of Iowa has concurred with the deletion decision.

3. Concurrent with this National Notice of Intent to Delete a notice has been published in local and community newspapers and has been distributed to appropriate federal, state, and local officials and other interested parties. This notice announces a thirty (30) day public comment period on the deletion package, which starts November 3, 1994, and which will conclude on December 5, 1994.

4. The Region has made all relevant documents available in the Regional Office and local site information repository.

The comments received during the notice and comment period will be evaluated before the final decision to delete is made. The Region will prepare a Responsiveness Summary, if necessary, which will address any comments received during the public comment period.

A deletion will occur after the Regional Administrator places a notice in the **Federal Register**. The NPL will reflect any deletions in the next final update. Public notices and copies of the Responsiveness Summary will be made available to local residents by Region VII.

IV. Basis for Intended Site Deletion

The following summary provides the Agency's rationale for recommending deletion of the Northwestern States Portland Cement Company Site, Mason City, Iowa, from the NPL.

Northwestern States Portland Cement Company (NWSPCC), owns and operates a cement manufacturing facility on the north side of Mason City, Iowa. The facility has been in operation since 1908. A byproduct of the cement manufacturing process since 1969 is cement kiln dust (CKD). The West Quarry site (Site) is a quarry covering approximately 150 acres to a depth of 40 feet of which approximately 110 acres were filled with CKD during the period of 1969–1985.

A pH monitoring program of the water in the West Quarry was started in April of 1974 in response to a change in color of the Quarry water. The Quarry water pH rose sharply following January 1976, increased to 11.8 in April 1976, and leveled off at about 12.5 in 1980. The increase in pH is attributed to the breakdown of the natural buffering system which was sustaining the Quarry water at a near-neutral pH. In response to Quarry dewatering initiated in 1987, current pH levels are about 10.5.

In 1979, two seeps emerged from the northeastern portion of the filled West Quarry. High pH water from the seeps flowed overland to Calmus Creek. In 1984, the state initiated a study of Calmus Creek and found pH in the creek elevated 2.0 pH units downstream of the seep area. In April 1985, the state ordered NWSPCC to immediately cease discharge from the seep area to Calmus Creek. NWSPCC was also ordered to cease kiln dust disposal in the Quarry and to conduct a hydrogeologic investigation.

In 1989, the state did a follow-up stream survey of Calmus Creek. The 1989 study concluded that there had been no improvement in water quality since the 1984 study. Conclusions from the 1989 study suggested that runoff from the haul roads and storage areas was contributing to the water quality degradation.

In 1992, a Calmus Creek stream study was done to meet requirements of the National Pollutant Discharge Elimination permit issued by Iowa Department of National Resources. The results of this study suggested water quality had improved with pH dropping from 10.2 in earlier studies to 7.9. The study attributed this improvement to elimination of runoff from the site and the installation of the groundwater extraction/treatment system installed in 1985.

In 1987, EPA conducted a Site Inspection of the NWSPCC Site and, based on the findings of this investigation, the Site was scored with the Hazard Ranking System (HRS) for possible inclusion on the National Priorities List (NPL). Based on the site characterization completed under the direction of EPA, an HRS package for the Site resulted in a score of 57.80. This score was based on the impact to groundwater and direct human contact. The Site was proposed for the National Priority List (NPL), in June of 1988 (53 FR 23988). The Site was added to the NPL in August of 1990 (55 FR 35501).

The RI/FS field work and data collection activities began in August 1988 with the final report submitted in March 1990. The investigation demonstrated that significant impact to groundwater outside the Site boundaries had not occurred.

The U. S. Public Health Service Agency for Toxic Substances and Disease Registry (ATSDR), conducted a draft Health Assessment for the NWSPCC Site. They concluded that the Site is of potential health concern because of the potential risk to human health resulting from possible exposure to hazardous substances at concentrations that may result in adverse health effects.

A final Record of Decision (ROD), was executed in June 1990 by the EPA with concurrence by IDNR. The selected response action addressed the principal threats of surface water and groundwater contamination and the source of contamination—the cement kiln dust. The selected remedy consisted of the following actions.

- Dewatering of the Site which contained high pH water, acid-neutralization and discharge to Calmus Creek.
- Construction of a permanent drain system in the dewatered Site to collect precipitation runoff and groundwater inflow to the quarry.
- Placement of an engineered clay cap over the area of the Site filled with cement kiln dust to minimize infiltration through the kiln dust.
- Installation of bedrock dewatering wells to collect contaminated groundwater beneath the Site, prevent migration of contaminated groundwater from the Site and maintain groundwater levels below the kiln dust.
- Treatment of contaminated water to meet IDNR/NPDES discharge permit limits with discharge to Calmus Creek.
- Assurances that the dewatering system will be operated in perpetuity to maintain isolation of water from the waste kiln dust and collect and treat any contaminated water which is generated.

A Consent Decree was signed in June 1990 which outlined the performance criteria to be met by implementing the approved remedial action alternative as well as the reporting and scheduling requirements of the remedial design and construction activities. The final Remedial Design and Remedial Action Work Plans were completed in June 1992.

The EPA in consultation with the State of Iowa, has determined that all fund-financed response activities under CERCLA at the NWSPCC Site, Mason City, Iowa, have been completed and that no further response is necessary. Therefore, it is proposed to delete the Site from the NPL.

Dated: September 26, 1994.

William Rice,

Acting Regional Administrator, Region VII.

[FR Doc. 94–25869 Filed 10–18–94; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 11

RIN 1090–AA29

Natural Resource Damage Assessments

AGENCY: Department of the Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Department of the Interior is initiating a biennial review of the regulations for assessing natural resource damages resulting from a discharge of oil into navigable waters under the Clean Water Act or a release of a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act. The regulations provide procedures that Federal, State, and Indian tribe natural resource trustees may use to obtain compensation from potentially responsible parties for injuries to natural resources. The regulations provide an administrative process for conducting assessments as well as two types of technical procedures for the actual determination of injuries and damages. "Type A" procedures are standard procedures for simplified assessments requiring minimal field observation in cases of minor discharges or releases in certain environments. "Type B" procedures are site-specific procedures for detailed assessments in other cases. This advance notice solicits comment on how the administrative process and all but one of the type B procedures should be revised.

DATES: Comments will be accepted through January 17, 1995.

ADDRESSES: Comments should be sent in duplicate to the Office of Environmental Policy and Compliance, ATTN: NRDA Rule—Biennial Review, Room 2340, Department of the Interior, 1849 C Street NW., Washington, DC 20240, telephone: (202) 208–3301 (regular business hours 7:45 a.m. to 4:15 p.m., Monday through Friday).

FOR FURTHER INFORMATION CONTACT: Stephen F. Specht at (202) 208–3301, or SSPECHT@IOS.DOI.GOV on Internet.

SUPPLEMENTARY INFORMATION: This notice is organized as follows:

I. Statutory Provisions
II. Overview of the Department's Natural Resource Damage Assessment Regulations
A. Preassessment Phase
B. Assessment Plan Phase
C. Assessment Phase
D. Post-Assessment Phase
III. Related Rulemakings
IV. Potential Topics for Review
A. Administrative Process
B. Injury
C. Economics
D. Legal Topics
E. Restoration, Rehabilitation, Replacement, and/or Acquisition of Equivalent Resources

I. Statutory Provisions

This notice announces the commencement of a review of regulations for assessing natural resource damages under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9601 et seq.) (CERCLA) and the Clean Water Act, as amended (33 U.S.C. 1251 et seq.) (CWA). Under CERCLA, certain categories of potentially responsible parties (PRPs) are liable for natural resource damages resulting from a release of a hazardous substance. CERCLA sec. 107(a). Natural resource damages are monetary compensation for injury to, destruction of, or loss of natural resources. CERCLA sec. 107(a)(4)(C). CWA creates similar liability for natural resource damages resulting from discharges of oil into navigable waters. CWA sec. 311(f).

Only designated natural resource trustees may recover natural resource damages. CWA recognizes the authority of Federal and State officials to serve as natural resource trustees. CERCLA recognizes the authority of Federal and State officials as well as Indian tribes to act as natural resource trustees. CERCLA defines "State" to include:

> The District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction. CERCLA sec. 101(27).

Damages may be recovered for those natural resource injuries that are not fully remedied by response actions as well as public economic values lost from the date of the discharge or release until the resources have fully recovered. All sums recovered in compensation for natural resource injuries must be used to restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources. CERCLA sec. 107(f)(1). Trustee officials may also recover the reasonable costs of assessing natural resource damages.

CERCLA requires the promulgation of regulations for the assessment of natural resource damages resulting either from a discharge of oil into navigable waters under CWA or from a release of a hazardous substance under CERCLA. CERCLA sec. 301(c)(1). These regulations are to identify the "best available" procedures for assessing natural resource damages. CERCLA sec. 301(c)(2). CERCLA requires that the natural resource damage assessment regulations include two types of assessment procedures. "Type A" procedures are "standard procedures for simplified assessments requiring minimal field observation." CERCLA sec. 301(c)(2)(A). "Type B" procedures are "alternative protocols for conducting assessments in individual cases." CERCLA sec. 301(c)(2)(B). Assessments performed by Federal and State trustee officials in accordance with the natural resource damage assessment regulations receive a rebuttable presumption in court. CERCLA sec. 107(f)(2)(C). The promulgation of these regulations was delegated to the Department of the Interior (the Department). E.O. 12316, as amended by E.O. 12580.

The natural resource damage provisions of CWA were amended by the Oil Pollution Act (33 U.S.C. 2701 et seq.) (OPA). The authority to sue for natural resource damages resulting from discharges of oil into navigable waters was extended to not only Federal and State natural resource trustees but also Indian tribe and foreign natural resource trustees. OPA also authorized the National Oceanic and Atmospheric Administration (NOAA) to develop new natural resource damage assessment regulations for discharges of oil into navigable waters. The Department is coordinating its rulemakings with NOAA to ensure, to the maximum extent appropriate, that consistent processes are established for assessing natural resource damages under CERCLA and OPA.

OPA provides that any rule in effect under a law replaced by OPA will continue in effect until superseded. OPA sec. 6001(b). In particular, Senate committee report language makes it clear that "[t]he existing Interior Department rules * * * may be used with a rebuttable presumption in the interim" until NOAA promulgates new regulations. S. Rep. No. 101–94, 101st Cong., 1st Sess. 15 (1990). Therefore, until NOAA promulgates its regulations, the Department's regulations may be used to obtain a rebuttable presumption

for natural resource damage assessments under OPA.

The Department's natural resource damage assessment regulations must be reviewed, and revised as appropriate, every two years. CERCLA sec. 301(c)(3). The regulations provide an administrative process for conducting assessments as well as technical type A and type B procedures for the actual determination of injuries and damages. The purpose of this advance notice is to announce the beginning of the biennial review of the administrative process and all but one of the type B procedures.

II. Overview of the Department's Natural Resource Damage Assessment Regulations

The Department has published various final rules for the assessment of natural resource damages: 51 FR 27674 (Aug. 1, 1986); 52 FR 9042 (March 20, 1987); 53 FR 5166 (Feb. 22, 1988); and 53 FR 9769 (March 25, 1988). These rulemakings are codified in the Code of Federal Regulations at 43 CFR part 11. The Department also recently published a final rule revising the administrative process and the type B procedures that has not yet been codified in the Code of Federal Regulations. 59 FR 14261 (March 25, 1994).

The Department's natural resource damage assessment regulations provide an administrative process for conducting assessments. The administrative process consists of four phases: The Preassessment Phase, the Assessment Plan Phase, the Assessment Phase, and the Post-Assessment Phase. The regulations also provide technical type A and type B procedures to be used during the Assessment Phase for the actual determination of injuries and damages.

During this biennial review, the Department intends to examine all aspects of the Preassessment Phase, Assessment Plan Phase, and Post-Assessment Phase, as well as all but one of the type B procedures available for use during the Assessment Phase. The Department is providing the following brief summary of its existing regulations to assist commenters. Commenters should consult 43 CFR part 11 and 59 FR 14261 to obtain more detailed information about the administrative process and type B procedures.

A. Preassessment Phase

The Preassessment Phase covers the activities that precede the actual assessment. Upon detecting or receiving notification of a discharge or release, trustee officials decide whether further assessment actions are warranted. The Department's regulations provide a number of criteria to assist trustee officials in making this decision. The trustee officials' decision is documented in the Preassessment Screen Determination. For more information on the Preassessment Phase, see subpart B of 43 CFR part 11, as amended by 59 FR 14281.

B. Assessment Plan Phase

If trustee officials decide during the Preassessment Phase that the criteria for continuing an assessment have been met, they then enter the Assessment Plan Phase. The Assessment Plan Phase includes various notification and coordination activities. The Department's regulations provide guidance on coordination among trustee officials, including selection of a "lead authorized official" to act as an administrative point of contact. Trustee officials are also required to notify the PRPs of their intent to perform an assessment.

During the Assessment Plan Phase, trustee officials also prepare a written Assessment Plan describing the procedures, type A, type B, or both, that will be used to determine injury and damages. The Assessment Plan is designed to focus and organize the assessment, which helps ensure that only reasonable assessment costs are incurred. The Assessment Plan is subject to public review and comment. For more information on the Assessment Plan Phase, see subpart C of 43 CFR part 11, as amended by 59 FR 14281–83.

C. Assessment Phase

During the Assessment Phase, the work described in the Assessment Plan is conducted. The work consists of three steps: Injury Determination; Quantification; and Damage Determination. In Injury Determination, trustee officials determine whether any natural resources have been injured and whether there is a pathway of exposure between the site of the discharge or release and the injured resources. If trustee officials determine that resources have been injured and that a pathway of exposure exists, they proceed to the Quantification step.

During Quantification, trustee officials quantify the extent of the resource injuries by measuring the reduction from baseline conditions. "Baseline" conditions are the conditions that would have existed had the discharge or release not occurred. Resources perform functions for humans and for other resources, such as provision of a food source, flood control, or provision of recreational opportunities. These functions are known as "services." Reductions from baseline conditions can be measured by evaluating the change in the level of services provided by the injured resources.

Finally, in Damage Determination, trustee officials calculate the monetary compensation to be sought as damages for the quantified natural resource injuries. The basic measure of damages is the cost of restoring, rehabilitating, replacing, and/or acquiring the equivalent of the injured resources. The Department's regulations also allow for an additional component of damages. Trustee officials have the discretion to assess damages for the economic value of the services lost by the public from the date of the discharge or release until completion of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

This value is known as "compensable value."

When a type A procedure is utilized, trustee officials perform Injury Determination, Quantification, and Damage Determination through the use of a standardized procedure involving minimal field work. The Department is developing different type A procedures for different environments in stages. Only one type A procedure has been included in the regulations to date. That type A procedure incorporates a computer model to perform Injury Determination, Quantification, and Damage Determination for minor discharges or releases in coastal or marine environments. The computer model is known as the Natural Resource Damage Assessment Model for Coastal and Marine Environments (NRDAM/CME). For more information on use of a type A procedure during the Assessment Phase, see subpart D of 43 CFR part 11. There are two ongoing rulemakings concerning type A procedures. The Department is revising the NRDAM/CME in compliance with a court order and the statutory biennial review requirement. The Department is also developing a new type A computer model for use in Great Lakes environments. Therefore, the Department does not intend to address the content of the type A procedures during this review.

When a type A procedure is not applicable, trustee officials use type B procedures instead of a type A procedure. In some cases, trustee officials may also use type B procedures to supplement damages calculated through use of an applicable type A procedure. When type B procedures are utilized, trustee officials perform Injury Determination, Quantification, and Damage Determination through the use

of site-specific studies. The Department's regulations divide natural resources into five categories: surface water, ground water, air, geologic, and biological resources. Specific definitions of injury are provided for each of these categories. The regulations provide guidance on the selection of testing and sampling methodologies to determine whether an injury has occurred and whether a pathway of exposure exists. The regulations also provide guidance on measuring the change in baseline conditions during Quantification.

During the Damage Determination step of an assessment incorporating type B procedures, trustee officials identify and consider a reasonable number of possible alternatives for restoring, rehabilitating, replacing, and/or acquiring the equivalent of the injured resources. Trustee officials select one of the possible alternatives based on several factors. The trustee officials document their decisions in a Restoration and Compensation Determination Plan, which is part of the overall Assessment Plan and, thus, subject to public review and comment.

Once trustee officials have selected a restoration, rehabilitation, replacement, and/or acquisition alternative, they select one or more of the type B cost-estimating methodologies listed in the regulations. The selected methodologies are used to estimate the cost of implementing the restoration, rehabilitation, replacement, and/or acquisition alternative. This estimated cost is the basic measure of damages. Trustee officials also have the discretion to include compensable value in their damage claim. Compensable value is calculated by applying one or more of the type B economic valuation methodologies listed in the regulations. For more information on use of type B procedures during the Assessment Phase, see subpart E of 43 CFR part 11, as amended by 59 FR 14283–87.

D. Post-Assessment Phase

The Department's regulations cover the entire process that trustee officials need to follow if they file a lawsuit and expect to obtain a rebuttable presumption. Trustee officials have the authority to settle their damage claims at any time during the administrative process. However, if the trustee officials do not settle with the PRPs by the end of the Assessment Phase, then trustee officials prepare a Report of Assessment detailing the results of the Assessment Phase. Trustee officials present the Report of Assessment to the PRPs along with a demand for damages and assessment costs. If a PRP does not agree to pay within 60 days, the trustee officials may file suit. Federal and State trustee officials receive a rebuttable presumption of correctness for assessments performed in accordance with the Preassessment Phase, Assessment Plan Phase, Assessment Phase, and Post-Assessment Phase procedures set forth in the regulations.

Once damages have been awarded or settlement has been reached, trustee officials establish an account for the recovered damages and prepare a Restoration Plan for use of the funds. When type B procedures are used, the post-assessment Restoration Plan is based on the restoration, rehabilitation, replacement, and/or acquisition alternative selected in the Restoration and Compensation Determination Plan during the Assessment Phase. For more information on the Post-Assessment Phase, see subpart F of 43 CFR part 11, as amended by 59 FR 14287.

III. Related Rulemakings

There are several ongoing natural resource damage assessment rulemakings other than this biennial review. *State of Ohio* v. *United States Department of the Interior (Ohio* v. *Interior)* remanded portions of the administrative process and the type B procedures. 880 F.2d 432 (D.C. Cir. 1989). On March 25, 1994, the Department published a final rule that addressed all but one aspect of the remand. 59 FR 14261. The March 25, 1994, final rule did not address the assessment of lost nonuse values.

There are two potential types of compensable values associated with natural resource injuries: Lost use values and lost nonuse values. Use values are derived through activities such as hiking or fishing. Nonuse values are not dependent on use of a resource and include the value of knowing that the resource exists and knowing that a resource will be available for future generations. The only method available for the express purpose of estimating lost nonuse values is the contingent valuation methodology (CV). On May 4, 1994, the Department published a notice of proposed rulemaking addressing CV as a type B procedure for estimating lost nonuse values. 59 FR 23097. The comment period on the notice closed on October 7, 1994. 59 FR 32175 (June 22, 1994). The Department does not intend to address the assessment of lost nonuse values during this review.

State of Colorado v. *United States Department of the Interior* remanded the type A procedure for coastal and marine environments. 880 F.2d 481 (D.C. Cir. 1989). The Department intends to publish a proposed rule to revise the NRDAM/CME later this month.

The Department has begun the development of an additional type A procedure for use in Great Lakes environments. This type A procedure uses a computer model known as the Natural Resource Damage Assessment Model for Great Lakes Environments (NRDAM/GLE). The Department published a proposed rule on August 8, 1994. 59 FR 40319. The Department does not intend to address the content of the type A procedures during this biennial review.

Also, on January 7, 1994, NOAA published a proposed rule for assessing natural resource damages resulting from oil discharges into navigable waters under OPA. 59 FR 1062. The comment period on NOAA's proposed rule closed on October 7, 1994. 59 FR 32148 (June 22, 1994).

IV. Potential Topics for Review

During this rulemaking, the Department will be considering ways of revising the administrative process and the type B procedures to reflect both experience to date in the use of the regulations as well as scientific and technical advances. The Department solicits comment on all aspects of the administrative process and the type B procedures, other than the assessment of lost nonuse values. Based on the comments received and its own analysis, the Department will develop a proposed rule to revise the regulations.

The Department has already received numerous comments on the administrative process and type B procedures over the last few years. One source of comments has been State briefings on use of the regulations. The Department has provided these briefings to State trustee officials at their request. Another source of comments has been telephone calls from individuals requesting technical assistance in the application of the regulations to particular cases. Also, in the course of revising the regulations to comply with *Ohio* v. *Interior*, the Department received numerous comments that were beyond the scope of that rulemaking. As indicated during the *Ohio* v. *Interior* rulemaking, the Department has included a discussion of all of those comments in this notice. See 59 FR 14266.

The following discussion is intended neither as an exhaustive treatment of all possible topics for review nor as a definitive indication of the Department's position. Instead, the discussion is simply provided as an aid in generating further information and analysis. Commenters are encouraged to provide comments not only on the topics discussed in this notice but also

on any other topics relating to the administrative process or type B procedures that they deem appropriate.

During this biennial review, the Department will also examine the relationship between its CERCLA damage assessment regulations and the OPA damage assessment regulations being developed by NOAA. The Department will consider ways of clarifying the applicability of its regulations versus NOAA's regulations. In this regard, the Department solicits comment on what provisions, if any, its regulations should continue to make for assessing damages from oil discharges. The Department will also coordinate with NOAA to ensure the greatest consistency appropriate between the two sets of regulations. The Department has noted in the following discussion certain areas where NOAA has proposed an approach that differs from that currently taken in the Department's regulations. The Department solicits comment on whether the Department's regulations should be revised to follow the approach proposed by NOAA in areas of difference.

A. Administrative Process

1. Streamlining

One frequent comment has been that the Department's regulations are "too wordy" and "not in plain English." Many commenters have indicated that the administrative process is too complicated and needs to be streamlined. NOAA's proposed OPA rule provides for an "Expedited Damage Assessment" based on "limited, focused studies in order to facilitate restoration as soon as possible." 59 FR 1177.

Given the wide variety of activities involved in assessing damages, the number of legal, scientific, and economic issues involved in damage assessments, and the broad range of possible types of natural resource damage cases, a certain level of intricacy is unavoidable in the regulations. However, the administrative process and type B procedures were designed to provide trustee officials with the flexibility to tailor the scope and level of detail of an assessment to meet the needs of the particular case. Trustee officials choose from a menu of available type B procedures, using only those procedures and assessing only those injuries and losses that they deem appropriate and adjusting the level of documentation accordingly. The regulations allow both for the performance of a limited number of short-term studies in a simple case involving the release of a single substance affecting a single resource, as well as the performance of numerous, long-term studies in a complex case of a release of multiple substances affecting multiple resources.

Nevertheless, the Department aims to make the regulations as clear and straightforward as possible. Therefore, the Department solicits comment on specific aspects of the administrative process that commenters consider unduly burdensome or complicated.

2. Preassessment Phase

Several commenters requested additional guidance on the conduct of preassessment activities. NOAA has developed a draft guidance document on preassessment activities under OPA. See 59 FR 1065.

The Department's regulations already contain some guidance on preassessment activities. See 43 CFR §§ 11.20–11.25. The Department notes that developing guidance requires balancing increased predictability against reduced flexibility to respond to the unique features of the broad range of potential natural resource damage cases. Thus, there is a limit to the level of specificity that can be appropriately provided in the regulations. With this in mind, the Department solicits comment on specific aspects of the Preassessment Phase that warrant additional guidance. The Department also solicits comment on whether the guidance should be incorporated in the regulations or in a separate guidance document.

Some commenters questioned whether a preassessment screen should be required when a type A procedure is used. During the preassessment screen, trustee officials determine whether the discharge or release is covered by CWA or CERCLA and whether they have a reasonable probability of making a successful claim before expending efforts to carry out a damage assessment. See 43 CFR 11.23(b). This determination appears to be relevant regardless of the substantive assessment methods ultimately used. Moreover, the determination whether to use a type A procedure, type B procedures, or both is not made until the Assessment Plan Phase, which follows the performance of the preassessment screen. See 43 CFR 11.33. The Department solicits comment on ways to reduce the burden of the preassessment screen while at the same time ensuring that trustee officials adequately consider the appropriateness of pursuing a damage claim before proceeding with either a type A procedure, type B procedures, or both.

3. Coordination With Other Agencies

A number of commenters requested additional guidance on coordination among trustee agencies and between trustee agencies and response agencies. Commenters raised questions about the lead authorized official. Some commenters sought clarification of the role of the lead authorized official. Others requested a prohibition against the designation of a trustee official who is also a PRP as lead authorized official.

Suggestions for improved coordination between trustee and response activities included: restricting the time allowed to conduct an assessment in order to avoid potential conflicts with settlement negotiations between response agencies and PRPs; requiring trustee officials to participate in the remedial planning process; requiring response agencies to coordinate with trustee officials; and authorizing the On-Scene Coordinator to contact just one Federal trustee agency and one State trustee agency and requiring that the contacted trustee agencies notify all other trustee agencies.

The Department's regulations already provide some guidance on trustee coordination. See 43 CFR 11.32(a)(1). The regulations also include discussions of coordination with response agencies. 43 CFR 11.23(f) and 11.31(a)(3). The Department intends to take a close look at these coordination provisions during the biennial review. The Department encourages commenters to provide suggestions on ways of improving coordination among trustee agencies and between trustee and response activities.

NOAA's proposed OPA rule includes a model memorandum of understanding designed to facilitate trustee coordination. See 59 FR 1185. Several States have been working to ensure better interagency coordination. Also, as part of the recent National Performance Review designed to streamline government operations, the Department developed a number of recommendations concerning the improvement of trustee coordination for natural resource damage assessments. The Department intends to examine these efforts to see what lessons can be learned.

4. Public and PRP Participation

Several commenters voiced opinions about the opportunity for public and PRP participation in the assessment process. Some commenters thought that additional opportunities for public input were necessary while others stated that the existing opportunities for public participation were excessive. Several commenters thought that the Department should encourage earlier involvement of PRPs in assessments to

avoid duplication of effort. NOAA's proposed OPA rule includes a model memorandum of understanding for trustee officials and PRPs to use when conducting joint assessments. 59 FR 1187.

With regard to public participation, the Department's regulations require that the public be given an opportunity to review and comment on the Assessment Plan, including the Restoration and Compensation Determination Plan, as well as the post-assessment Restoration Plan. See 43 CFR 11.32(c), 11.81(d)(2), and 11.93(a), as amended by 59 FR 14283, and 14287.

With regard to PRP participation, the Department's regulations require that trustee officials provide PRPs with a Notice of Intent to Perform an Assessment before beginning an assessment and invite the participation of the PRPs. See 43 CFR 11.32(a)(2), as amended by 59 FR 14282. Trustee officials are also required to make the Assessment Plan available to PRPs for review and comment. See 43 CFR 11.32(c). Finally, trustee officials are authorized to allow PRPs to perform assessment work. See 43 CFR 11.32(d).

Determining the appropriate level of public and PRP participation in the natural resource damage assessment process requires balancing the interests of the public, the PRPs, and the trustee officials. The Department solicits comment on whether the regulations strike the appropriate balance and, if not, how the regulations could be revised to strike a more appropriate balance.

5. Optional Nature of Regulations

The Department's regulations are not mandatory but must be followed in order to obtain a rebuttable presumption. 43 CFR 11.10. Some commenters have questioned the decision to make the regulations optional. For example, one commenter suggested that Federal trustee agencies be required to use the regulations unless all affected trustees agree otherwise. The Department solicits additional comment on whether to require trustee officials to use the regulations when they pursue a claim for natural resource damages under CERCLA.

6. Settlement Procedures

Several commenters have requested that the regulations address settlement procedures. For example, when trustee officials use type B procedures, they must develop a preliminary estimate of damages to help scope the range of work appropriate during the Assessment Phase. See 43 CFR 11.35(a), as amended by 59 FR 14282. Some commenters have suggested that trustee officials be encouraged to use the preliminary estimate of damages to initiate settlement discussions. Other commenters have suggested that trustee officials be encouraged to perform separate assessments for each affected resource to facilitate settlement. NOAA's proposed OPA rule includes guidance on settlement procedures. 59 FR 1171.

The Department strongly supports and encourages the use of the regulations as a framework for negotiated resolutions of natural resource damage claims. The Department is concerned that establishment of specific settlement procedures in the regulations might unduly restrict the flexibility of negotiating parties. However, the Department solicits comment on the need for and possible nature of settlement guidance.

7. Assessment Plan

There have been several comments about the Assessment Plan. The regulations require trustee officials to develop a quality assurance and quality control (QA/QC) plan that satisfies the requirements listed in guidance developed by the Environmental Protection Agency (EPA), if that guidance is applicable. See 43 CFR 11.31(c)(2), as amended by 59 FR 14281. Some commenters thought that the reference to EPA guidance was inappropriate.

The Department notes that EPA's QA/QC guidance is a well-established standard. Moreover, the Department's regulations provide that EPA guidance need only be followed if applicable. The Department solicits comment on specific areas of concern with EPA's QA/QC guidance.

Some commenters questioned whether the requirement that the Assessment Plan include information on sampling size, design, and location and estimated recovery period was necessary. One commenter stated that the Assessment Plan should include a summary of the nature and extent of contamination to ensure that the approach used to assess damages is commensurate with the potential impact on resources.

The purpose of the Assessment Plan is to provide the public with a description of, and to organize, the work that will be performed during the Assessment Phase. Inclusion of information about sampling size, design, and location and estimated recovery periods seems appropriate to fulfill that purpose. On the other hand, since a natural resource damage assessment focuses on the actual injuries to resources rather than the level of chemical present, inclusion of information about the nature and extent of contamination may not be essential. However, the Department solicits additional comment on the appropriate scope and level of detail of the Assessment Plan.

Several commenters stated that the Department should take precautions to ensure that trustee officials do not undertake basic research when performing damage assessments. These commenters suggested that the Department provide a list of sources of existing scientific data and prohibit trustee officials from performing new research unless there are no existing data regarding the effect of the particular substance on the particular natural resources involved.

The Department agrees that trustee officials should not undertake unnecessary basic research and one of the purposes of requiring a publicly available Assessment Plan is to protect against such research. A master list of existing data sources across the full range of potentially affected resources would be costly and time-consuming to compile, virtually impossible to keep up to date, and might also stifle development of new approaches. However, the Department solicits comment on alternative ways of guarding against the performance of unnecessary basic research.

8. Post-Assessment Phase

Several commenters sought additional guidance on post-assessment activities. The Department's regulations already provide some guidance on post-assessment activities. See 43 CFR 11.90–11.93, as amended by 59 FR 14287. The Department notes that developing guidance requires balancing increased predictability against reduced flexibility to respond to the unique features of the broad range of potential natural resource damage cases. Thus, there is a limit to the level of specificity that can be appropriately provided in the regulations. With this in mind, the Department solicits comment on specific aspects of the Post-assessment Phase that warrant additional guidance. The Department also solicits comment on whether the guidance should be incorporated in the regulations or in a separate guidance document.

Commenters have sought additional clarification of the requirements related to the establishment of a restoration account for recovered damages. One commenter thought that the regulations should require trustee officials to hold any collected damages in interest-

bearing accounts. Other commenters have asked whether joint damage recoveries by co-trustee agencies can be placed in a single restoration account. Trustee officials' authority to open various forms of accounts is determined by applicable Federal, State, and tribal fiscal law. Therefore, although nothing in the Department's regulations prevents trustee officials from placing damage recoveries in an interest-bearing account, the regulations do not require trustee officials to do so. Instead, the regulations provide that when trustee officials do not have the authority to place damage recoveries in an interest-bearing account, they should adjust their damage claim to account for inflation. 43 CFR 11.92(b), as amended by 59 FR 14287. Also, the regulations neither prohibit nor require the opening of joint accounts. The Department solicits comment on whether additional clarification of the appropriate form of restoration accounts should be provided.

9. Assessment Costs

Many commenters sought additional clarification on the scope of recoverable assessment costs. CERCLA provides that trustee officials may only recover "reasonable" assessment costs. CERCLA sec. 107(f)(1). The Department's regulations include a definition of "reasonable cost." See 43 CFR 11.14(ee). Among other things, this definition requires that the anticipated cost of the assessment be expected to be less than the anticipated damage amount. Some commenters have stated that this definition should be revised so that the reasonableness of assessment costs is determined by comparing the cost of each component of the assessment to the anticipated damages to be determined by that component. NOAA's proposed OPA rule defines "reasonable cost of an assessment" as those costs incurred in performing an assessment in accordance with the OPA rule. 59 FR 1169. The Department solicits comment on whether any revision of its definition of "reasonable cost" is appropriate.

The Department's regulations provide that trustee officials may recover the "reasonable and necessary" costs of an assessment. See 43 CFR 11.15(a)(3)(ii), as amended by 59 FR 14281. Some commenters have questioned whether this provision would require trustee officials to demonstrate not only that their assessment costs were reasonable but also that they were necessary. These commenters noted that CERCLA merely requires trustee officials to demonstrate that their assessment costs were reasonable.

The reference to "necessary" assessment costs was not intended to require trustee officials to make an additional demonstration beyond that required by CERCLA. Therefore, the Department is considering deleting the reference to "necessary" assessment costs.

The Department's regulations provide examples of recoverable assessment costs. See 43 CFR 11.15(a)(3)(ii), as amended by 59 FR 14281. Some commenters have suggested that the regulations be amended to include a list of specific practices that would render assessment costs unreasonable. The Department questions whether addition of such a list would be workable or necessary.

Several commenters questioned whether attorneys' fees were recoverable assessment costs. The Department believes that trustee officials will generally need the assistance of an interdisciplinary team of experts when performing natural resource damage assessments. The regulations do not restrict recoverable assessment costs to the expenses of particular types of professionals. The Department's regulations provide that recoverable assessment costs are "limited to those costs incurred or anticipated by the authorized official for, and specifically allocable to, site-specific efforts taken in the assessment of damages." 43 CFR 11.60(d)(2). Therefore, if attorneys are involved in work specifically allocable to an assessment, the resulting attorneys' fees are recoverable as assessment costs under the regulations. The Department solicits comment on whether additional guidance on the recoverability of attorneys' fees is warranted.

B. Injury

Some commenters have indicated that the injury definitions contained in the Department's regulations should be relaxed. Several commenters thought that trustee officials should be allowed to document injury by measuring the mere presence of the oil or hazardous substance in a natural resource. Other commenters have felt that the Department should allow injury to be documented through a risk analysis.

On the other hand, some commenters have advocated the development of more restrictive injury definitions. Several commenters have contended that trustee officials should be required to link the specific substance found in a natural resource to that of the discharge or release in question. Other commenters have suggested that injuries should be limited to lost public uses of the natural resources.

The regulations establish acceptance criteria for the development of biological injury definitions. 43 CFR 11.62(f)(2). Some commenters have stated that these criteria should be applied not only when a new injury definition is developed but also each time trustee officials document incident-specific injuries under existing injury definitions. Others felt that the acceptance criteria should be applied to each hazardous substance for which a particular biological injury definition was to apply.

NOAA has proposed standards for determining injury under OPA that differ from those in the Department's regulations. See 59 FR 1178–1180.

The Department intends to carefully examine the type B standards and methods for determining injury during this review. The Department encourages commenters to provide suggestions on injury determination and quantification.

C. Economics

1. Compensable Value

Several commenters sought clarification on the economic values that are included in compensable value. Some commenters questioned when lost economic rent constitutes a compensable value. The Department's regulations provide that compensable value includes "any economic rent accruing to a private party because the Federal or State agency or Indian tribe does not charge a fee or price for the use of the resources." 43 CFR 11.83(c)(1), as amended by 59 FR 14286. The Department's regulations also provide that compensable value includes changes in consumer surplus. Some commenters requested clarification of what constituted consumer surplus. The Department solicits comment on whether the regulations should provide additional guidance on the assessment of damages for lost economic rent and consumer surplus.

A couple of commenters stated that compensable value should include not only the value of services lost to humans but also the value of services lost to other resources as a result of the injuries. Under the Department's regulations, trustee officials may consider not only the reduction in services to humans but also the reduction in services to other resources when selecting appropriate restoration, rehabilitation, replacement, and/or acquisition measures and estimating their costs. However, compensable value may be calculated only for the resource services lost to the public pending completion of restoration, rehabilitation, replacement, and/or

acquisition of equivalent resources. See 43 CFR 11.83(c)(1), as amended by 59 FR 14286. The Department notes that compensable value does account indirectly for certain services lost to other resources. For example, compensable value for lost fishing opportunities may reflect the results of food web losses. If commenters think that additional values should be included in compensable value, they should specify the values of interest, explain the legal basis for including such values, and provide specific suggestions on how those values should be measured.

The Department's regulations provide that in assessments where the scope of economic analysis is at the State level, only the compensable value to the State should be counted. 43 CFR 11.84(h)(3), as amended by 59 FR 14287. Several commenters suggested that this provision be revised to allow State trustee officials to assess and recover compensable value for all individuals, not just those within the State. The Department solicits comment on the appropriate scope of economic analysis for all trustee officials.

2. Guidance on Methodologies

There were numerous requests for additional guidance on implementation of the cost-estimating and valuation methodologies listed in the regulations. With regard to cost-estimating methodologies, some commenters have stated that the guidance provided on the incorporation of uncertainty into cost estimates is inadequate. See 43 CFR § 11.84(d), as amended by 59 FR 14286–87. Other commenters requested additional guidance on selection and use of cost-estimating methodologies.

With regard to valuation methodologies, commenters raised concerns about the possibility of double counting if a hedonic pricing methodology is used. One commenter noted that the regulations state, "When regional travel cost models exist, they may be used if appropriate." 43 CFR 11.83(c)(2)(iv), as amended by 59 FR 14286. This commenter stated that this statement incorrectly implied that regional cost models were more appropriate than other models. Another commenter stated that use of the travel cost methodology should not be allowed because the results of a travel cost model can be skewed by the actions of one unusually avid traveler.

The Department solicits comment on the need for and possible content of guidance on implementation of cost-estimating methodologies. The Department also solicits comment on the need for and possible content of guidance on implementation of methodologies for valuing lost use values. Commenters should restrict their remarks to the calculation of lost use values, because, as noted above, the Department is addressing the estimation of lost nonuse values in a separate rulemaking. See 59 FR 23097.

3. Willingness to Accept

Several commenters suggested that trustee officials be allowed to calculate compensable value by estimating the minimum amount of money an individual would require once an injury occurred in order to be as well off as before the injury occurred (willingness to accept). The Department agrees that, since natural resources are held in trust for the public, willingness to accept is the correct theoretical measure of compensable value. However, because of the practical difficulties entailed in reliably measuring willingness to accept, the Department's regulations require the use of methodologies that measure the amount of money an individual would be willing to pay to prevent a natural resource injury (willingness to pay). 43 CFR 11.83(c)(2), as amended by 59 FR 14286. The Department solicits comment on whether reliable methods exist for measuring willingness to accept. The Department also solicits comment on the conditions under which willingness to accept rather than willingness to pay would, in theory, result in significantly different estimates of compensable value.

4. Discount Rate

The Department's regulations provide that trustee officials should discount the value of future costs and losses using the discount rate specified in the Office of Management and Budget Circular A–94 (OMB Circular A–94), dated March 27, 1972, which was ten percent. 43 CFR 11.84(e)(2). OMB Circular A–94 has been revised. The current version, dated October 29, 1992, indicates that the discount rate for public investment is 7 percent.

The Department is soliciting comment on whether use of a seven percent discount rate (the current value in Circular A–94) is appropriate or whether trustee officials should be allowed to use a different discount rate. A possible alternative discount rate for future public losses of natural resources is the consumer rate of time preference, which is the rate of interest at which an individual would be indifferent between consuming goods now and postponing consumption to a later date. Interest rates on investments with little or no default risk, such as U.S. Treasury bonds, provide an estimate of the consumer rate of time preference. The Department solicits comment on whether trustee officials should be allowed to use a discount rate based on the U.S. Treasury borrowing rate on marketable securities with maturities comparable to the period over which future losses will occur. Such an approach would be consistent with that proposed by NOAA under OPA. See 59 FR 1184. Information on U.S. Treasury borrowing rates on marketable securities is provided in Appendix C of OMB Circular A–94.

5. Cost-Effectiveness

The Department's regulations define "cost-effectiveness" to mean that "when two or more activities provide the same or a similar level of benefits, the least costly activity providing that level of benefits will be selected." 43 CFR § 11.14(j). Commenters have expressed confusion over the difference between cost effectiveness and maximization of net benefits. Consideration of cost effectiveness involves comparing activities that provide the same or a similar level of benefits. In contrast, consideration of net benefits can be used to compare activities that provide substantially different levels of benefits.

Another commenter stated that the definition of "cost-effectiveness" should be changed to delete the reference to "similar" levels of benefits, in order to ensure full restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

Use of the phrase "same or similar" was not intended to force trustee officials into using methods that produce lower benefits. Instead, the term merely reflects the fact that in the damage assessment context trustee officials will often be comparing methods that do not produce exactly the same benefits.

The Department solicits comment on whether additional clarification is warranted.

D. Legal Topics

1. Judicial Review

One significant area of discussion has been judicial review of damage assessments. CERCLA provides that any determination or assessment of damages performed "in accordance with" the natural resource damage assessment regulations "shall have the force and effect of a rebuttable presumption on behalf of the trustee." CERCLA sec. 107(f)(2)(C). This provision is incorporated into the Department's regulations without further clarification. See 43 CFR § 11.91(c). Commenters have

asked the Department to define the term "rebuttable presumption" and clarify when and to which aspects of the assessment the rebuttable presumption applies. Some commenters have questioned whether the phrase "in accordance with" the regulations allows trustee officials to obtain a rebuttable presumption for any portion of an assessment that complies with the regulations or whether it restricts the rebuttable presumption to those assessments that follow all portions of the regulations.

The Department's regulations provide both an administrative process for development and review of documentation as well as a range of alternative methodologies for the actual determination of injuries and damages. The Department believes that in order to obtain a rebuttable presumption, a trustee official must follow the entire administrative process set forth in the regulations. If the trustee official has followed the administrative process, the rebuttable presumption attaches to those components of the damage claim that were calculated through the appropriate use of any of the methodologies described in the regulations. However, trustee officials are not required to use all of the listed methodologies in order to obtain a rebuttable presumption. The Department solicits comment on this interpretation and on whether additional clarification of the effect of the rebuttable presumption is warranted.

There have been comments about whether judicial review of an assessment should be limited to an administrative record. Under NOAA's proposed OPA rule, judicial review of assessment costs and estimated costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources would be conducted on an administrative record. 59 FR 1185. The Department solicits comment on whether a similar provision should be included in its regulations. The Department also solicits comment on whether judicial review of compensable value should be conducted on an administrative record.

2. Effect of Amendments

Commenters have expressed confusion over the applicability of amendments of the natural resource damage assessment regulations to ongoing damage assessments that were started before the amendments became effective. The Department solicits comment on whether it should clarify that trustee officials are entitled to a rebuttable presumption so long as their assessments are in accordance with the regulations as they were in effect at the time that the assessments began.

3. Limits of Liability

Some commenters have sought clarification of various statutory limitations on liability, including the ceilings set forth in section 107(c) of CERCLA and the provision in section 107(f)(1) that excludes natural resource damages if those damages and the release that caused those damages occurred wholly before the enactment of CERCLA. The Department's regulations incorporate the statutory limitations on liability but do not provide any clarification of those limitations. 43 CFR 11.15(b) and 11.24(b)(1). The Department will consider the development of additional guidance if commenters identify specific areas of concern.

4. Double Recovery

Some commenters have sought clarification of the prohibition against "double recovery" of damages contained in section 107(f)(1) of CERCLA. The Department's regulations incorporate this prohibition. 43 CFR §§ 11.15(d) and 11.84(c). Double recovery refers to the recovery of two or more damage amounts to restore, rehabilitate, replace, and/or acquire the equivalent of the same injured resource or lost service or to compensate for the same lost public value. The Department will consider the development of additional guidance if commenters identify specific areas of concern.

5. Threatened Releases and Discharges

Another area of discussion has been the recovery of natural resource damages caused by the threat of a release or discharge. Section 107(a)(4) of CERCLA refers to liability for "a release or a threatened release." However, section 107(a)(4)(C) refers to damages for injury to, destruction of, or loss of natural resources "resulting from such a release." Also, section 301(c) of CERCLA authorizes the Department to develop regulations for assessment of "damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance."

The Department's regulations address only damages resulting from an actual release or discharge. NOAA's proposed rule, relying on section 1002(a) of OPA, would allow for the assessment of diminished use of a resource resulting from the threat of a discharge. 59 FR 1169. The Department solicits comment on whether CERCLA allows for recovery of damages resulting from a threatened release and whether the Department's regulations should be revised to allow for the assessment of damages resulting from a threatened release or discharge. The Department also solicits examples of the types of damages that might be assessed in the case of a threatened discharge or release.

6. Archaeological and Cultural Resources

Several commenters have questioned whether CERCLA authorizes the recovery of damages for injury of archaeological and cultural resources. The Department believes that "archaeological" and "cultural" resources do not constitute "natural resources" as defined by CERCLA. However, the Department's regulations do permit trustee officials to include the loss of archaeological and cultural services provided by a natural resource in a natural resource damage assessment.

7. Unused Damage Awards

Some commenters have suggested that the statutory requirement that damages be spent to restore, rehabilitate, replace, and/or acquire the equivalent of the injured resources dictates that any sums not used in this manner be returned to the PRPs. The Department's regulations provide that collected damages may only be used to fund actions described in the Restoration Plan and do not address the disposition of any "excess" funds. See 43 CFR 11.92(c).

The Department notes that CERCLA requires all collected damages to be spent on restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, which includes mitigation of the public loss of services during the recovery period. Therefore, all funds should be used for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources.

8. NEPA

Several commenters sought clarification of whether the National Environmental Policy Act (NEPA) applies to assessments or restorations performed in accordance with the regulations. The Department does not anticipate addressing the applicability of NEPA in the damage assessment regulations. However, the Department believes that the information needed for the Restoration and Compensation Determination Plan should fulfill the requirements of NEPA, with equivalent opportunities for public input. Thus if NEPA were applicable to an assessment or restoration activity, the Department believes that appropriate and timely information would be available.

9. Consideration of Benefits

Some commenters stated that the Department's regulations should be revised to require trustee officials to offset any damages resulting from the discharge or release with any benefits produced by the discharge or release. The Department solicits additional comment.

10. Tribal Trustees

A number of commenters have sought to ensure that the interests of tribal entities are adequately addressed in the Department's regulations. A number of commenters expressed concern over the treatment of tribal values, including the values associated with tribal cultural resources. As noted above, the Department believes that "cultural" resources, including tribal cultural resources, do not constitute "natural resources" as defined by CERCLA. However, the Department's regulations do permit trustee officials to include the loss of cultural services provided by a natural resource in a natural resource damage assessment.

Other commenters suggested that the Department's fiduciary responsibility to Indian tribes extends to financing natural resource damage assessments involving tribal resources. Although the Department exercises a fiduciary responsibility as trustee for Indian resources, the Department believes that discussion of funding mechanisms for damage assessment activities conducted by Indian tribes is not appropriate for this rulemaking, except as addressed in the law and regulation regarding the liability of PRPs and use of recovered sums.

One commenter stated that CERCLA grants a rebuttable presumption to assessments performed by tribal trustee officials. This commenter stated that when CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA), Congress intended to grant tribes the same authority as States in the area of natural resource trustee activities. The commenter further noted that under established case law concerning the Federal government's fiduciary responsibility to tribes, any ambiguity in the statute concerning tribes' right to the rebuttable presumption must be construed in favor of the tribes.

The Department notes that the regulations were revised in 1988 to reflect the SARA amendment to CERCLA granting a rebuttable presumption to natural resource damage assessments performed by State trustee officials. See 43 CFR 11.91(c). At that time and in subsequent **Federal Register** notices, the Department has taken the position that SARA did not extend the rebuttable presumption to assessments performed by tribal trustee officials and that granting a rebuttable presumption to tribes will require a legislative change.

E. Restoration, Rehabilitation, Replacement, and/or Acquisition of Equivalent Resources

1. Types of Alternatives

Some commenters have suggested that the regulations should encourage trustee officials to select restoration and rehabilitation alternatives rather than replacement or acquisition alternatives. The Department's regulations do not indicate a preference for any particular type of restoration, rehabilitation, replacement, or acquisition alternative. The Department solicits comment on whether it has the authority, and whether it is appropriate, to develop and require adherence to a priority system for selecting a restoration, rehabilitation, replacement, and/or acquisition alternative.

The Department's regulations provide that Federal trustee officials may not select an alternative that requires acquisition of land for Federal management, unless restoration, rehabilitation and replacement are not possible. 43 CFR 11.82(e), as amended by 59 FR 14285. Some commenters supported this restriction and requested that it be extended to State and tribal natural resource trustees. Other commenters thought that the restriction should be eliminated altogether. The Department is interested in comments on this issue.

Some commenters stated that the regulations should clearly authorize trustee officials to choose a natural recovery alternative when selecting a restoration, rehabilitation, replacement, and/or acquisition alternative. The Department believes that the regulations already authorize trustee officials to select a natural recovery alternative when appropriate. The Department's regulations explicitly require trustee officials to consider a "No Action-Natural Recovery" alternative. 43 CFR 11.82(c)(2), as amended by 59 FR 14284.

2. Guidance on Selection of an Alternative

Several commenters have requested guidance on selection of a restoration, rehabilitation, replacement, and/or acquisition alternative. In particular, some commenters thought that the Department should provide guidance on how trustee officials could maximize the opportunities for natural recovery.

The Department's regulations already provide some guidance on the selection of a restoration, rehabilitation, replacement, and/or acquisition alternative. See 43 CFR 11.82, as amended by 59 FR 14284–85. The Department's regulations require trustee officials to evaluate a reasonable number of restoration, rehabilitation, replacement, and/or acquisition alternatives, including natural recovery. The Department's regulations also provide a number of factors that trustee officials must consider when selecting an alternative. NOAA's proposed OPA rule includes a similar list of factors and contains guidance on determining when to select an alternative that relies on natural recovery. 59 FR 1181. NOAA has developed a draft guidance document on restoration activities. 59 FR 1065.

The Department notes that developing guidance requires balancing increased predictability against reduced flexibility to respond to the unique features of the broad range of potential natural resource damage cases. Thus, there is a limit to the level of specificity that can be appropriately provided in the regulations. With this in mind, the Department solicits comment on specific aspects of the selection process that warrant additional guidance. The Department solicits comment on whether the guidance should be incorporated in the regulations or in a separate guidance document. The Department also intends to consider the appropriateness of offering guidance on available restoration and rehabilitation techniques and would appreciate information on appropriate case studies demonstrating successful application of restoration and rehabilitation measures.

3. Specific Selection Factors

Under the Department's regulations, one of the factors that trustee officials must consider when selecting a restoration, rehabilitation, replacement, and/or acquisition alternative is the relationship between estimated costs and estimated benefits. 43 CFR 11.82(d)(2), as amended by 59 FR 14285. Total damages will depend on the sum of compensable value and restoration, rehabilitation, replacement, and/or acquisition costs. Often there will be tradeoffs between compensable value and restoration, rehabilitation, replacement, and/or acquisition costs. For example, a fast-paced restoration, rehabilitation, replacement, and/or acquisition alternative may result in a lower level of interim lost use, and thus reduce associated compensable values. However, implementation of such an alternative may result in significantly

higher restoration, rehabilitation, replacement, and/or acquisition costs. In some cases, there may be sufficient data to demonstrate that some restoration, rehabilitation, replacement, and/or acquisition alternatives result in substantially lower total damages than others.

NOAA has solicited comment on whether, under OPA, trustee officials should be required to explain their rationale if they select a restoration, rehabilitation, replacement, and/or acquisition alternative that does not minimize total damages. 59 FR 1134. The Department solicits comment on whether a similar requirement should be added to the Department's regulations.

A commenter suggested that socioeconomic effects of restoration, rehabilitation, replacement, and/or acquisition alternatives might be added to the list of factors that trustee officials are to consider in making their selection among alternatives. The Department's regulations provide that trustee officials may consider all relevant considerations when selecting a restoration, rehabilitation, replacement, and/or acquisition alternative. 43 CFR 11.82(d), as amended by 59 FR 14284–85. Therefore, trustee officials already have the ability to consider socioeconomic effects if relevant.

4. Services Versus Resources

Several commenters expressed confusion over whether the Department intended restoration, rehabilitation, replacement, and/or acquisition of the equivalent to be measured in terms of the services provided by a resource, the resource itself, or both. Several commenters noted apparent inconsistencies in the regulations.

Some commenters stated that restoration, rehabilitation, replacement, and/or acquisition of the equivalent should be strictly limited to the services provided by the resource. For example, some commenters believed that if an injured stream was used for fishing and nothing else, PRPs should only be liable for the cost of cleaning that stream to the point where fishing opportunities are returned to baseline. These commenters thought that requiring restoration, rehabilitation, replacement, and/or acquisition of the equivalent of both services and the resource itself would create economic inefficiencies and would constitute double counting.

Other commenters indicated that measuring restoration, rehabilitation, replacement, and/or acquisition of the equivalent in terms of services only would fail to fully compensate the public. These commenters expressed concern that using services alone as a measurement could prevent trustee officials from attaining complete restoration, rehabilitation, replacement, and/or acquisition of the equivalent.

The Department intends to carefully review the use of the terms "resources" and "services" in this biennial review. The Department solicits comment on whether restoration, rehabilitation, replacement, and/or acquisition should be measured in terms of services, resources, or both. The Department also solicits comment on the definition of "services" and whether it should be modified or additional concepts should be developed or defined to further clarify this issue.

5. Committed Use

One commenter stated that the concept of committed use should not apply to restoration, rehabilitation, replacement, and/or acquisition of equivalent resources, in the sense that restoration of a resource or service to a level of environmental quality beyond that needed to support existing committed uses should not be required.

"Committed use" is defined as a current or planned public use for which there is a documented commitment established. 43 CFR 11.14(h). Under the Department's regulations, the concept of committed use applies only to the calculation of compensable value and does not affect the appropriate level of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources. See 43 CFR 11.84(b)(2).

The committed use requirement was designed to prevent trustee officials from assessing compensable value for purely speculative uses of a resource. When measuring restoration, rehabilitation, replacement, and/or acquisition, the guiding concept is whether baseline conditions have been reestablished, irrespective of consideration of compensable values. Failure to account for potential services when measuring restoration, rehabilitation, replacement, and/or acquisition of equivalent resources could violate *Ohio* v. *Interior*, which stated:

> Our decision to uphold the "committed use" requirement is premised on our interpretation of the regulation to mean that a trustee is not prohibited from recovering costs of restoring or replacing a natural resource even when that resource has no documented "committed use." 880 F.2d at 462.

6. Implementation of an Alternative

A commenter said there should be provisions for starting restoration, rehabilitation, replacement, and/or acquisition activities while the damage assessment is still under way. The Department's regulations provide for implementation of emergency restorations in appropriate circumstances, generally limited to actions necessary to abate an emergency situation. 43 CFR 11.21. Other than for emergency restorations, starting restoration, rehabilitation, replacement, and/or acquisition activities while damage assessment is underway, while not precluded, is not expressly discussed in the regulations. However, trustee officials may not expend funds received for restoration, rehabilitation, replacement, and/or acquisition of equivalent resources prior to developing a Restoration Plan and making it available for public comment and review. 43 CFR 11.92(c); CERCLA sec. 111(i).

The assessment process is designed, in part, to ensure that appropriate and efficient measures to accomplish restoration, rehabilitation, replacement, and/or acquisition of equivalent resources are adopted. Unless there is a compelling reason for early initiation of restoration, rehabilitation, replacement, and/or acquisition activities, the Department believes that the administrative process established under the regulations should be followed. This approach is similar to that provided under other existing legislation and regulation (e.g., NEPA and the Administrative Procedure Act) whereby there are general and specific constraints on taking certain actions or making irrevocable decisions or irretrievable commitments of resources prior to completion of appropriate planning and public involvement. However, if initiation of certain restoration, rehabilitation, replacement, and/or acquisition actions would not constrain decisionmaking following completion of the assessment process, and if the public was given adequate opportunity to comment on the proposed actions consistent with CERCLA section 111(i), such actions could be appropriate.

Commenters have also sought clarification of 43 CFR 11.21 (b) and (c), which provide that a trustee official may undertake emergency restoration actions "consistent with its existing authority." Existing 43 CFR 11.21 was developed in recognition of section 111(i) of CERCLA, which provides that trustee officials need not develop a restoration plan subject to public comment prior to taking emergency actions. The Department does not believe that section 111(i) of CERCLA provides trustee agencies with independent authority to take action they would not

otherwise have authority to take. The Department solicits comment on whether additional clarification is warranted.

One commenter asked the Department to recognize the right of co-trustees to spend collected damages on implementation of different Restoration Plans. While the Department's regulations require trustee coordination and encourage joint development and implementation of restoration, rehabilitation, replacement, and/or acquisition actions, nothing in the regulations prohibits co-trustees from implementing different Restoration Plans. The Department solicits further comment on this issue.

A few commenters requested guidance on determining when restoration, rehabilitation, replacement, and/or acquisition of equivalent resources is complete. Some commenters suggested that trustee officials provide PRPs with a certification when restoration, rehabilitation, replacement, and/or acquisition of equivalent resources is essentially completed so that PRPs will not remain liable indefinitely.

The Department's regulations provide that the recovery period is the time until baseline conditions have been reestablished. 43 CFR 11.73(a), as amended by 59 FR 14283. It is up to the trustee officials, and in the case of settlements the joint agreement of the trustee officials and the PRPs, whether a site-specific definition of completeness should be included in the Restoration Plan. The Department has not considered it necessary to require trustee officials to provide PRPs with a certification when restoration, rehabilitation, replacement, and/or acquisition of equivalent resources is essentially completed. The extent of a PRP's continuing liability after damages have been recovered by the trustee officials depends on the terms of the judgment or settlement agreement.

Dated: September 21, 1994.

Bonnie R. Cohen,

Assistant Secretary—Policy, Management, and Budget.

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Notices

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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 94–109–1]

Availability of Environmental Assessment and Finding of No Significant Impact

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment and a finding of no significant impact for the shipment of an unlicensed veterinary biological product for field testing. A risk analysis, which forms the basis for the environmental assessment, has led us to conclude that shipment of the unlicensed veterinary biological product for field testing will not have a significant impact on the quality of the human environment. Based on our finding of no significant impact, we have determined that an environmental impact statement need not be prepared.

ADDRESSES: Copies of the environmental assessment and finding of no significant impact may be obtained by writing to the person listed under **FOR FURTHER INFORMATION CONTACT.** Please refer to the docket number of this notice when requesting copies. Copies of the environmental assessment and finding of no significant impact (as well as the risk analysis with confidential business information removed) are also available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect those documents are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room.

FOR FURTHER INFORMATION CONTACT: Dr. Jeanette Greenberg, Veterinary Biologics, BBEP, APHIS, USDA, room 571, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782; telephone (301) 436–5390; fax (301) 436–8669.

SUPPLEMENTARY INFORMATION: A veterinary biological product regulated under the Virus-Serum Toxin Act (21 U.S.C. 151 *et seq.*) must be shown to be pure, safe, potent, and efficacious before a veterinary biological product license may be issued. A field test is generally necessary to satisfy prelicensing requirements for veterinary biological products. In order to ship an unlicensed product for the purpose of conducting a proposed field test, a person must receive authorization from the Animal and Plant Health Inspection Service (APHIS).

In determining whether to authorize shipment for field testing of the unlicensed veterinary biological product referenced in this notice, APHIS conducted a risk analysis to assess the product's potential effects on the safety of animals, public health, and the environment. Based on that risk analysis, APHIS has prepared an environmental assessment. APHIS has concluded that shipment of the unlicensed veterinary biological product for field testing will not significantly affect the quality of the human environment. Based on this finding of no significant impact, we have determined that there is no need to prepare an environmental impact statement.

An environmental assessment and finding of no significant impact have been prepared for the shipment of the following unlicensed veterinary biological product for field testing:

Requester(s)	Product	Field test location(s)
New York State Departments of Health, Environmental Conservation, and Agriculture and Markets; Rhone Merieux, Inc.; and the Centers for Disease Control and Prevention.	A live, genetically engineered, vaccinia-vectored rabies vaccine that expresses the rabies virus surface glycoprotein; the vaccine is enclosed in raccoon baits.	Albany and Rensselaer Counties, NY.

The environmental assessment and finding of no significant impact have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321 *et seq.*), (2) Regulations of the Council on Environmental Quality for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), (3) USDA Regulations Implementing NEPA (7 CFR part 1b), and (4) APHIS Guidelines Implementing NEPA (44 FR 50381–50384, August 28, 1979, and 44 FR 51272–51274, August 31, 1979).

Done in Washington, DC, this 14th day of October 1994.

Terry L. Medley,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 94–25968 Filed 10–17–94; 9:57 am]

BILLING CODE 3410–34–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

Democracy Fellows Program; Announcing Request for Applications

On or about October 25, 1994 a Request for Applications (RFA) will be issued by the Office of Democracy and Governance of the U.S. Agency for International Development. The RFA will request cooperative agreement applications for not-for-profit U.S. NGOs, U.S. PVOs, or U.S. colleges and universities to develop a Democracy Fellows Program. The United States Agency for International Development will seek to establish a 5 year cooperative agreement. The goal of the program is to establish a cadre of field experienced technical experts committed to careers in democracy and governance. The grantee will be required to identify, place, and supervise junior and mid-level experts in assignments that will contribute to

democracy programs in developing countries, as well as to the career development and commitment of the experts themselves. It is envisioned that the project will include the following activities: (1) Identification of suitable assignments for Fellows; (2) Recruitment, review and selection of Fellows; (3) Orientation, supervision and support of Fellows; (4) Counterpart development; and (5) establishment of an Advisory Board.

Interested not-for-profit U.S. NGOs, U.S. PVOs, U.S. colleges, and universities, or a consortium thereof, should send a letter referencing RFA number OP/B/AEP–95–001 along with *three (3) self-addressed mailing labels* to U.S. Agency for International Development, Office of Procurement, M/OP/B/AEP, Room 1577, SA–14, Washington, DC 20523–1429, Attention: Mercedes E. Stukes. Telephone or facsimile requests for the RFA will not be honored.

FOR FURTHER INFORMATION CONTACT: Mercedes E. Stukes, (703) 875–1215. The corresponding CBD notice can be viewed and downloaded using the Agency Gopher. The RFA can be downloaded from the Agency Gopher. The Gopher address is GOPHER.INFO.USAID.GOV.

Selected USAID Procurement and Business Opportunities from the Gopher menu. The RFA text can be downloaded via Anonymous File Transfer Protocol (FTP). The FTP address is FTP.INFO.USAID.GOV. Logon using the user identification of "anonymous" and the password is your e-mail address. Look under the following directory for the RFA: pub/OP/RFA/95–001/BAEP501/baep501.rfa.

Receipt of this RFA through INTERNET must be confirmed by written notification to the contact person above. It is the responsibility of the recipient of this request for application document to ensure that it has been received from INTERNET in its entirety and USAID bears no responsibility for data errors resulting from transmission or conversion processes.

Dated: October 6, 1994.

Anne T. Quinlan,

USAID Grant Officer, M/OP/B/AEP.

[FR Doc. 94–25803 Filed 10–18–94; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Telecommunications Equipment Technical Advisory Committee; Partially Closed Meeting

A meeting of the Telecommunications Equipment Technical Advisory Committee will be held November 17, 1994, 9:30 a.m., in the Herbert C. Hoover Building, Room 1617M(2), 14th & Pennsylvania Avenue, N.W., Washington, D.C. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to telecommunications and related equipment and technology.

Agenda

General Session

1. Opening remarks by the Chairman.
2. Presentation of papers or comments by the public.
3. Election of Chairman.
4. Update on BXA reorganization.

Executive Session

5. Discussion of matters properly classified under Executive Order 12356, dealing with the U.S. export control program and strategic criteria related thereto.

The General Session of the meeting will be open to the public and a limited number of seats will be available. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Lee Ann Carpenter, TAC Unit/OAS/EA Room 3886C, Bureau of Export Administration, U.S. Department of Commerce, Washington, DC 20230.

The Assistant Secretary for Administration, with the Concurrence of the General Counsel, formally determined on January 6, 1994, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings of the Committee and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C., 552b(c)(1) shall be exempt from the provisions relating to public meetings found in section 10(a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, Room 6020, U.S. Department of Commerce, Washington, D.C. 20230. For further information or copies of the minutes, contact Lee Ann Carpenter on (202) 482-2583.

Dated: October 13, 1994.

Lee Ann Carpenter,

Director, Technical Advisory Committee Unit.

[FR Doc. 94–25841 Filed 10–18–94; 845 am]

BILLING CODE 3510–DT–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in the Arab Republic of Egypt

October 13, 1994.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: October 20, 1994.

FOR FURTHER INFORMATION CONTACT: Jennifer Aldrich, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–5850. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limit for Category 448 is being increased by application of swing, reducing the limits for Category 224 and the Fabric Group.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 58 FR 62645, published on November 29, 1993). Also see 58 FR 55046, published on October 25, 1993.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

October 13, 1994.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on October 19, 1993, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textile products, produced or manufactured in the Arab Republic of Egypt and exported during the twelve-month period beginning on January 1, 1994 and extending through December 31, 1994.

Effective on October 20, 1994, you are directed to adjust the limits for the following categories, pursuant to the current bilateral agreement between the Governments of the United States and the Arab Republic of Egypt:

Category	Adjusted limit [1]
224	18,396,815 square meters.
448	19,250 dozen.
Fabric Group 218–220, 224–227, 313–317 and 326, as a group.	78,245,069 square meters.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1993.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 94–25890 Filed 10–18–94; 8:45 am]

BILLING CODE 3510–DR–F

Adjustment of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Taiwan

October 14, 1994.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: October 17, 1994.

FOR FURTHER INFORMATION CONTACT: Jennifer Aldrich, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–6719. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for certain categories are being adjusted, variously, for swing, special shift and carryover.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 58 FR 62645, published on November 29, 1993). Also see 58 FR 65347, published on December 14, 1993.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

October 14, 1994.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on December 8, 1993, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Taiwan and exported during the twelve-month period which began on January 1, 1994 and extends through December 31, 1994.

Effective on October 17, 1994, you are directed to amend the directive dated December 8, 1993 to adjust the limits for the following categories, as provided under the terms of the current bilateral agreement, effected by exchange of notes dated August 21, 1990 and September 28, 1991, as amended:

Category	Adjusted twelve-month limit [1]
Group I 200–224, 225/317/326, 226, 227, 229, 300/301/607, 313–315, 360–363, 369–L/670–L/870 [2], 369–S [3], 369–O [4], 400–414, 464–469, 600–606, 611, 613/614/615/617, 618, 619/620, 621–624, 625/626/627/628/629, 665, 666, 669–P [5], 669–T [6], 669–O [7], 670–H [8] and 670–O [9], as a group.	578,224,445 square meters equivalent.
Sublevels in Group I	
218	20,485,061 square meters.
225/317/326	35,790,058 square meters.
363	12,543,336 numbers.
613/614/615/617	18,312,351 square meters.
625/626/627/628/629.	17,514,459 square meters.
Within Group I subgroup	
200	661,912 kilograms.
604	225,198 kilograms.
Group II 237, 239, 330–332, 333/334/335, 336, 338/339, 340–345, 347/348, 349, 350/650, 351, 352/652, 353, 354, 359–C/659–C [10], 359–H/659–H [11], 359–O [12], 431–444, 445/446, 447/448, 459, 630–632, 633/634/635, 636, 638/639, 640, 641–644, 645/646, 647/648, 649, 651, 653, 654, 659–S [13], 659–O [14], 831–844 and 846–859, as a group.	735,015,503 square meters equivalent.
Sublevels in Group II	
239	5,625,227 kilograms.
331	407,665 dozen pairs.
336	125,570 dozen.
340	1,276,004 dozen.
345	108,668 dozen.

Category	Adjusted twelve-month limit [1]
347/348	1,514,317 dozen of which not more than 1,235,320 dozen shall be in Categories 347–W/348–W [15].
352/652	2,923,151 dozen.
359–H/659–H	4,982,744 kilograms.
433	13,635 dozen.
435	24,061 dozen.
442	42,671 dozen.
443	53,172 numbers.
444	76,106 numbers.
445/446	140,711 dozen.
631	4,926,294 dozen pairs.
633/634/645	1,667,128 dozen of which not more than 978,503 dozen shall be in Categories 633/634 and not more than 867,079 dozen shall be in Category 635.
638/639	6,701,445 dozen.
640	958,053 dozen of which not more than 284,527 dozen shall be in Category 640–Y [16].
642	896,817 dozen.
647/648	5,307,935 dozen of which not more than 5,044,758 dozen shall be in Categories 647–W/648–W [17].
659–S	1,617,719 kilograms.
835	17,402 dozen.
Group II subgroup 333/334/335, 341, 342, 350/650, 351, 447/448, 636, 641 and 651, as a group.	74,013,473 square meters equivalent.
Within Group II subgroup	
333/334/335	283,459 dozen of which not more than 153,541 dozen shall be in Category 335.
342	156,332 dozen.
350/650	131,377 dozen.
351	448,837 dozen.
447/448	20,137 dozen.
636	379,731 dozen.
651	378,454 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1993.

[2] Category 870; Category 369–L: only HTS numbers 4202.12.4000, 4202.12.8020, 4202.12.8060, 4202.92.1500, 4202.92.3015 and 4202.92.6090; Category 670–L: only HTS numbers 4202.12.8030, 4202.12.8070, 4202.92.3020, 4202.92.3030 and 4202.92.9025.

[3] Category 369–S: only HTS number 6307.10.2005.

[4] Category 369–O: all HTS numbers except 4202.12.4000, 4202.12.8020, 4202.12.8060, 4202.92.1500, 4202.92.3015, 4202.92.6090 (Category 369–L); and 6307.10.2005 (Category 369–S).

[5] Category 669–P: only HTS numbers 6305.31.0010, 6305.31.0020 and 6305.39.0000.

[6] Category 669–T: only HTS numbers 6306.12.0000, 6306.19.0010 and 6306.22.9030.

[7] Category 669–O: all HTS numbers except 6305.31.0010, 6305.31.0020, 6305.39.0000 (Category 669–P); 6306.12.0000, 6306.19.0010 and 6306.22.9030 (Category 669–T).

[8] Category 670–H: only HTS numbers 4202.22.4030 and 4202.22.8050.

[9] Category 670–O: all HTS numbers except 4202.22.4030 4202.22.8050 (Category 670–H); 4202.12.8030, 4202.12.8070, 4202.92.3020, 4202.92.3030 and 4202.92.9025 (Category 670–L).

[10] Category 359–C: only HTS numbers 6103.42.2025, 6103.49.3034, 6104.62.1020, 6104.69.3010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010; Category 659–C: only HTS numbers 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.3038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.3014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.4015, 6211.33.0010, 6211.33.0017 and 6211.43.0010.

[11] Category 359–H: only HTS numbers 6505.90.1540 and 6505.90.2060; Category 659–H: only HTS numbers 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5090, 6505.90.6090, 6505.90.7090 and 6505.90.8090.

[12] Category 359–O: all HTS numbers except 6103.42.2025, 6103.49.3034, 6104.62.1020, 6104.69.3010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025, 6211.42.0010 (Category 359–C); 6505.90.1540 and 6505.90.2060 (Category 359–H).

[13] Category 659–S: only HTS numbers 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020.

[14] Category 659–O: all HTS numbers except 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.3038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.3014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.4015, 6211.33.0010, 6211.33.0017, 6211.43.0010 (Category 659–C); 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5090, 6505.90.6090, 6505.90.7090, 6505.90.8090 (Category 659–H); 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020 (Category 659–S).

[15] Category 347–W: only HTS numbers 6203.19.1020, 6203.19.4020, 6203.22.3020, 6203.22.3030, 6203.42.4005, 6203.42.4010, 6203.42.4015, 6203.42.4025, 6203.42.4035, 6203.42.4045, 6203.42.4050, 6203.42.4060, 6203.49.3020, 6210.40.2033, 6211.20.1520, 6211.20.3010 and 6211.32.0040; Category 348–W: only HTS numbers 6204.12.0030, 6204.19.3030, 6204.22.3040, 6204.22.3050, 6204.29.4034, 6204.62.3000, 6204.62.4005, 6204.62.4010, 6204.62.4020, 6204.62.4030, 6204.62.4040, 6204.62.4050, 6204.62.4055, 6204.62.4065, 6204.69.3010, 6204.69.9010, 6210.50.2033, 6211.20.1550, 6211.20.6010, 6211.42.0030 and 6217.90.0050.

[16] Category 640–Y: only HTS numbers 6205.30.2010, 6205.30.2020, 6205.30.2050 and 6205.30.2060.

[17] Category 647–W: only HTS numbers 6203.23.0060, 6203.23.0070, 6203.29.2030, 6203.29.2035, 6203.43.2500, 6203.43.3500, 6203.43.4010, 6203.43.4020, 6203.43.4030, 6203.43.4040, 6203.49.1500, 6203.49.2010, 6203.49.2030, 6203.49.2040, 6203.49.2060, 6203.49.3030, 6210.40.1035, 6211.20.1525, 6211.20.3030 and 6211.33.0030; Category 648–W: only HTS numbers 6204.23.0040, 6204.23.0045, 6204.29.2020, 6204.29.2025, 6204.29.4038, 6204.63.2000, 6204.63.3000, 6204.63.3510, 6204.63.3530, 6204.63.3532, 6204.63.3540, 6204.69.2510, 6204.69.2530, 6204.69.2540, 6204.69.2560, 6204.69.3030, 6204.69.9030, 6210.50.1035, 6211.20.1555, 6211.20.6030, 6211.43.0040 and 6217.90.0060.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 94–25891 Filed 10–18–94; 8:45 am]

BILLING CODE 3510–DR–F

Establishment, Amendment and Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Turkey

October 14, 1994.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing, amending and adjusting limits.

EFFECTIVE DATE: October 19, 1994.

FOR FURTHER INFORMATION CONTACT: Anne Novak, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–6718. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

In a Memorandum of Understanding (MOU) dated October 5, 1994 between the Governments of the United States and the Republic of Turkey, agreement was reached to amend further their Bilateral Textile Agreement, effected by exchange of notes dated July 29 and August 6, 1991.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to establish a

1994 limit for Category 611 and newly merged Categories 625/626/627/628/629 and to amend the 1994 base level for sublimit 338–S/339–S/638–S/639–S. The amended level for 338–S/339–S/638–S/639–S includes an increase for swing. The current limits for Categories 350 and 351/651 are being increased by special shift, reducing the limits for Categories 335 and 341/641, respectively.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 58 FR 62645, published on November 29, 1993). Also see 59 FR 5394, published on February 4, 1994.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the MOU and bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

October 14, 1994.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on January 31, 1994, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton and man-made fiber textile products, produced or manufactured in Turkey and exported during the twelve-month period which began on January 1, 1994 and extends through December 31, 1994.

Effective on October 19, 1994, you are directed, pursuant to the Memorandum of Understanding (MOU) dated October 5, 1994 between the Governments of the United States and the Republic of Turkey, to establish a limit of 20,000,000 square meters[1] for Category 611 for the six-month period beginning on July 1, 1994 and extending through December 31, 1994. For the January 1, 1994 through December 31, 1994 restraint period, you are directed to amend the Fabric Group to include merged Categories 625/626/627/628/629.

Also, you are directed to establish and amend the limits for the following categories for the January 1, 1994 through December 31, 1994 restraint period, pursuant to the October 5, 1994 MOU and the current bilateral agreement between the Governments of the United States and the Republic of Turkey:

Category	Adjusted twelve-month limit[a]
Sublevel within the Fabric Group 625/626/627/628/629.	13,600,000 square meters of which not more than 5,440,000 square meters shall be in Category 625, not more than 5,440,000 square meters shall be in Category 626, not more than 5,440,000 square meters shall be in Category 627, not more than 5,440,000 square meters shall be in Category 628, and not more than 5,440,000 square meters shall be in Category 629.
Limits not in a group 338/339/638/639	4,637,817 dozen of which not more than 2,656,450 dozen shall be in Categories 338–S/339–S/638–S/639–S[b].
335	194,162 dozen.
341/641	933,875 dozen.
350	509,196 dozen.
351/651	777,377 dozen.

[a] The limits have not been adjusted to account for any imports exported after December 31, 1993.

[b] Category 338–S: only HTS numbers 6103.22.0050, 6105.10.0010, 6105.10.0030, 6105.90.3010, 6109.10.0027, 6110.20.1025, 6110.20.2040, 6110.20.2065, 6110.90.0068, 6112.11.0030 and 6114.20.0005; Category 339–S: only HTS numbers 6104.22.0060, 6104.29.2049, 6106.10.0010, 6106.10.0030, 6106.90.2010, 6106.90.3010, 6109.10.0070, 6110.20.1030, 6110.20.2045, 6110.20.2075, 6110.90.0070, 6112.11.0040, 6114.20.0010 and 6117.90.0022; Category 638–S: all HTS numbers except 6109.90.1007, 6109.90.1009, 6109.90.1013 and 6109.90.1025; Category 639–S: all HTS numbers except 6109.90.1050, 6109.90.1060, 6109.90.1065 and 6109.90.1070.

Textile products in Categories 611 and 629 which have been exported to the United States prior to July 1, 1994, in the case of Category 611, and January 1, 1994, in the case of Category 629, shall not be subject to this directive.

Textile products in Categories 611 and 629 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1) prior to the effective date of this directive shall not be denied entry under this directive.

Import charges for Categories 611 and 629 will be provided at a later date.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 94–25892 Filed 10–18–94; 8:45 am]

BILLING CODE 3510–DR–F

[1] The limit has not been adjusted to account for any imports exported after June 30, 1994.

COMMODITY FUTURES TRADING COMMISSION

Chicago Mercantile Exchange Proposed Transfer of Spot for Futures Rule Amendments

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rule amendments of the Chicago Mercantile Exchange to restrict the transfer of spot commodities for futures contracts for the Eurodollar futures contract.

SUMMARY: The Chicago Mercantile Exchange ("CME") has submitted proposed rule amendments and other materials which would limit the permissibility of the transfer of spot commodities for futures contracts, also known as exchange for physical transactions, for the Eurodollar futures contract.[1] Acting pursuant to the authority delegated by Commission Regulation 140.96, the Division of Trading and Markets has determined to publish the CME proposal for public comment. The Division believes that publication of the CME proposal is in the public interest and will assist the Commission in considering the views of interested persons.

DATES: Comments must be received on or before November 18, 1994.

FOR FURTHER INFORMATION CONTACT: John C. Lawton, Associate Director, or Clarence Sanders, Attorney, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW, Washington, DC 20581. Telephone: (202) 254–8955.

SUPPLEMENTARY INFORMATION:

I. Description of Proposed Rules and Rule Amendments

By a letter dated September 12, 1994, the CME submitted proposed rule amendments pursuant to Section 5a(a)(12)(A) of the Commodity Exchange Act ("Act") and Commission Regulation 1.41(b). The proposed amendments would limit the permissibility of exchange for physical ("EFP") transactions for the Eurodollar futures contract.

[1] The CME proposal includes proposed amendments to existing Rules 538 and 3904.

Under the proposal, EFP transactions would no longer be permitted for any contract month beyond the second listed quarterly month in the March quarterly cycle.[2] Such EFP transactions would continue to be permitted for those months not extending beyond the second listed quarterly month in the March quarterly cycle.

Pursuant to the proposal's implementation plan, the amendments would be made effective for all applicable contract months. Thus, under the proposal, the rule amendments would be implemented to apply to existing as well as newly listed contract months.

According to the CME, the proposal is intended to support liquidity and price-discovery in deferred months of the Eurodollar futures contract. In this respect, it appears that the proposal at least partially represents a response to efforts to develop a new method for trading U.S. Treasury securities versus Eurodollar futures contracts (i.e., "TED spreads"). This approach involves acquiring both legs of the spread position in a single transaction.

II. Request for Comments

The Commission requests comments on any aspect of the CME's proposed rule amendments that members of the public believe may raise issues under the Act or Commission regulations.

Copies of the proposed rule amendments and related materials are available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581. Copies also may be obtained through the Office of the Secretariat at the above address or by telephoning (202) 254–6314. Some materials may be subject to confidential treatment pursuant to 17 CFR 145.5 or 145.9.

Any person interested in submitting written data, views, or arguments on the proposed rule amendments should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 2033 K Street NW., Washington, DC 20581, by the specified date.

Issued in Washington, DC, on October 13, 1994.

Alan L. Seifert,

Deputy Director.

[FR Doc. 94–25850 Filed 10–18–94; 8:45 am]

BILLING CODE 6351–01–P

[2] For the Eurodollar futures contract the CME currently lists contract months extending ten years.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Information Collection Request Submitted to the Office of Management and Budget for Review

AGENCY: Corporation for National and Community Service.

ACTION: Information Collection Request Submitted to the Federal Office of Management and Budget (FOMB) for Review.

SUMMARY: This notice provides information about an information collection proposal by AmeriCorps*NCCC, currently under review by the Office of Management and Budget (OMB).

DATES: OMB and AmeriCorps*NCCC will consider comments on the proposed collection of information and recordkeeping requirements received by November 18, 1994. Copies of the proposed forms and supporting documents may be obtained by contacting AmeriCorps*NCCC.

ADDRESSES: Send comments to both—

Donald L. Scott, Director, AmeriCorps*NCCC, 1100 Vermont Avenue NW., Washington, DC 20525

Steve Semenuk, Desk Officer for CNCS, Office of Management and Budget, 3002 New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT:

Sherry Squire (202) 606–5000x122 or Jolene Harrellx105.

SUPPLEMENTARY INFORMATION:

Office of Action Issuing Proposal: AmeriCorps*NCCC.

Title of Forms: Corps Member Application Packet.

Need and Use: AmeriCorps*NCCC is requesting information to meet requirements of federal law. This information is used for program management, planning, and required recordkeeping.

Type of Request: Submisison of revised collection.

Respondent's Obligation to Reply: Required to receive benefits.

Frequency of Collection: On occasion.

Estimated Number of Responses: 30,000.

Average Burden Hours per Response: 4 hours (reporting and recordkeeping).

Estimated Annual Reporting or Disclosure Burden: 90,000 hours.

Regulatory Authority: Division E of the National Service Act as amended.

Dated: October 11, 1994.

Donald L. Scott,

*Vice President, Corporation for National Service and Director, AmeriCorps*National Civilian Community Corps.*

[FR Doc. 94–25910 Filed 10–18–94; 8:45 am]

BILLING CODE 6050–28–M

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to the Office of Management and Budget (OMB) for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Applicable Form, and OMB Control Number: Home Health Care Demonstration, Inpatient Costs vs. Home Health Care Costs; DD Form 2534; OMB Control Number 0704–0265.

Type of Request: Revision.

Number of Respondents: 3,000.

Responses Per Respondent: 2.

Annual Responses: 6,000.

Average Burden Per Response: 30 minutes.

Annual Burden Hours: 3,000

Needs and Uses: Congress mandated (FY 1988 DoD Appropriations Act, Section 8071) that CHAMPUS continue the Home Health Care (HHC) Demonstration. The purpose of this demonstration is to provide beneficiaries with an alternative to hospitalization and to identify the most cost-effective means for health care coverage to be provided by the government. The collection instrument requests specific data on impatient costs versus home health care costs. This data is used by Home Health Care Managers in determining which is more cost-effective. The Act also authorized an expansion of the Home Health Care Demonstration that permits OCHAMPUS to broaden the criteria for accepting patients, and to include all CHAMPUS beneficiaries—military retirees and their family members, as well as active duty family members. The Home Health Care—Case Management Demonstration represents that expansion. Data collected under the demonstration will assist in developing a coordinated plan of care that meets patients' needs at less cost to the government.

Affected Public: Individuals or households, Businesses or other for-profit.
Frequency: On occasion and Semiannually.
Respondent's Obligation: Required to obtain or retain a benefit.
OMB Desk Officer: Ms. Shannah Koss. Written comments and recommendations on the proposed information collection should be sent to Ms. Koss at the Office of Management and Budget, Desk Officer for DoD, Room 10235, New Executive Office Building, Washington, DC 20503.
DOD Clearance Officer: Mr. William Pearce. Written requests for copies of the information collection proposal should be sent to Mr. Pearce, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302.

Dated: October 11, 1994.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94-25794 Filed 10-18-94; 8:45 am]

BILLING CODE 5000-04-M

Office of the Secretary

Defense Information School Board of Visitors Meeting

AGENCY: Department of Defense, Office of the Assistant to the Secretary of Defense for Public Affairs, American Forces Information Service.

ACTION: Notice of meeting.

SUMMARY: The Defense Information School Board of Visitors will hold its semi-annual meeting at the Defense Photography School, Pensacola, FL. Board members will review issues related to the status of the Defense Information School consolidation and joint-Service training facility under development. The meeting is open to the public.

Dates and Times: November 3, 1994—9 a.m. to 11:15 a.m. (first session); 1:00 p.m. to 3:00 p.m. (second session); 3:30 p.m. to 4:45 p.m. (third session); November 4, 1994—8:30 a.m. to 12 noon (fourth session).

ADDRESSES: All sessions will be conducted in the main conference room, Defense Photograph School, 150 Hase Road, Naval Air Station, Pensacola, FL 32508-1049.

FOR FURTHER INFORMATION CONTACT: Mr. Wallace N. Guthrie, Jr., Training Directorate, American Forces Information Service, 601 North Fairfax Street, Room 370, Alexandria, VA 22314. Telephone (703) 274-4897.

Dated: October 13, 1994.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94-25795 Filed 10-18-94; 8:45 am]

BILLING CODE 5000-04-M

Defense Science Board Task Force on Cost Reduction Strategies for V-22

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Defense Science Board Task Force on Cost Reduction Strategies for V-22 will meet in closed session on November 1-2 at the Boeing Helicopters Defense and Space Group, Ridley Park, Pennsylvania; on November 15-16 at Bell Helicopter Textron, Ft. Worth, Texas; on November 29-30 and December 7-8, 1994 at the Pentagon, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense through the Under Secretary of Defense for Acquisition and Technology on scientific and technical matters as they affect the perceived need of the Department of Defense. At these meetings the Task Force will address promising cost reduction strategies and their impact on our cost estimating methodologies. The V-22 will be the model and initial focus of this review.

In accordance with Section 10(d) of the Federal Advisory Committee Act, P.L. No. 92-463, as amended (5 U.S.C. App. II, (1988)), it has been determined that these DSB Task Force meetings, concerns matters listed in 5 U.S.C. § 552b(c) (1) & (4) (1988), and that accordingly these meetings will be closed to the public.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94-25796 Filed 10-18-94; 8:45 am]

BILLING CODE 5000-04-M

Defense Science Board Task Force on Joint Technology Issues

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Defense Science Board Task Force on Joint Technology Issues will meet in closed session on November 3, 1994 at the Pentagon, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense through the Under Secretary of Defense for Acquisition and Technology on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting the Task Force will work with the JCS Chairman and Vice Chairman in support of the Expanded JROC activities. The Task Force should place special emphasis on the application of technology to enhance the effectiveness of the evolving force structure within tight fiscal constraints and should also place a special focus on issues dealing with operations other than war.

In accordance with Section 10(d) of the Federal Advisory Committee Act, P.L. No. 92-463, as amended (5 U.S.C. App. II, (1988)), it has been determined that this DSB Task Force meeting, concerns matters listed in 5 U.S.C. 552b(c)(1) (1988), and that accordingly this meeting will be closed to the public.

Dated: October 12, 1994.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94-25797 Filed 10-18-94; 8:45 am]

BILLING CODE 5000-04-M

Defense Science Board Task Force on Environmental Security

ACTION: Notice of Advisory Committee Meeting.

SUMMARY: The Defense Science Board Task Force on Environmental Security will meet in open session on October 24-25, November 29-30, and December 12-13, 1994 at Strategic Analysis, Inc., 4001 N. Fairfax Drive, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition and Technology on scientific and technical matters as they affect the perceived needs of the Department of Defense.

Persons interested in further information should call Mr. Ed Dyckman at (703) 697-9107.

Dated: October 12, 1994.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94-25799 Filed 10-18-94; 8:45 am]

BILLING CODE 5000-04-M

DELAWARE RIVER BASIN COMMISSION

Notice of Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission will hold a public hearing on Wednesday, October 26, 1994. The hearing will be part of the Commission's regular

business meeting which is open to the public and scheduled to begin at 1:00 p.m. in the Goddard Conference Room of the Commission's offices at 25 State Police Drive, West Trenton, New Jersey. The hearing on proposed amendments to the Basin Regulations—Water Supply Charges will be held at 3:00 p.m.

An informal conference among the Commissioners and staff will be open for public observation at 10:30 a.m. at the same location and will include a presentation on New Jersey's management of the Potomac-Raritan-Magothy Aquifer and a status report on the Upper Delaware ice diversion project.

The subjects of the hearing will be as follows:

Proposed Amendments to Comprehensive Plan and Basin Regulations—Water Supply Charges

Notice was given in the August 5, 1994 **Federal Register**, Vol. 59, No. 150 p. 39991, that the Commission would hold a public hearing on October 26, 1994 to receive comments on proposed amendments to its Comprehensive Plan and Basin Regulations—Water Supply Charges concerning the transfer of Certificates of Entitlement. Holders of Certificates of Entitlement are exempted from the payment of water charges until such certificates are transferred. The amendments would (1) define "transfer"; (2) delete two categories of exemptions from the existing general rule that terminates Certificates of Entitlement upon transfer and (3) revise a third such category. Commission regulations require upon transfer, the termination of Certificates of Entitlement which permit the withdrawal of water from the basin without charge. The U.S. Court of Appeals has confirmed the Commission's power under its Compact to terminate Certificates of Entitlement when a transfer has occurred. The court also ruled that the Commission's interpretation of its existing regulation that limited the extent to which certain transfers were exempt from termination was not consistent with the specific wording of the regulations. Pursuant to the court ruling, the Commission proposes to amend its Basin Regulations—Water Supply Charges, so that transfer exceptions are consistent with existing Commission policy to terminate Certificates of Entitlement when a transfer of ownership and/or control of a water using facility occurs. The amendments inter alia define a transfer to include the sale of corporate stock. They also delete existing exceptions to the transfer rule for corporate merger transactions and certain transactions under the Internal Revenue Code.

Current Expense and Capital Budgets. A proposed current expense budget for the fiscal year beginning July 1, 1995, in the aggregate amount of $3,326,500 and a capital budget for the same period in the amount of $1,937,500 in revenue and $1,481,500 in expenditures. Copies of the current expense and capital budget are available from the Commission on request by contacting Richard C. Gore.

A Proposal to Adopt the 1994–1995 Water Resources Program. A proposal that the 1994–1995 Water Resources Program and the activities, programs, initiatives, concerns, projections and proposals identified and set forth therein be accepted and adopted, in accordance with the requirements of Section 13.2 of the Delaware River Basin Compact.

Applications for Approval of the Following Projects Pursuant to Article 10.3, Article 11 and/or Section 3.8 of the Compact

1. *Olde Colonial Greene Property Owners Association D–73–20 CP (Revised) RENEWAL–2.* An application for the renewal of a ground water withdrawal project to supply up to 2.43 million gallons (mg)/30 days of water to the applicant's residential development from Well Nos. 1 and 2. Commission approval on September 27, 1989 was limited to five years. The applicant requests that the total withdrawal from all wells remain limited to 2.43 mg/30 days. The project is located in Doylestown Township, Bucks County, in the Southeastern Pennsylvania Ground Water Protected Area.

2. *Newton Country Club D–92–25.* A withdrawal project that provides up to 6.17 mg/30 days (0.21 million gallons per day (mgd)) of combined surface water and ground water for golf course irrigation at the Newton Country Club located in Andover Township, Sussex County, New Jersey. Well Nos. 1 and 2 supplement two ponds, located on an unnamed headwater tributary to Paulins Kill, from which water is diverted to the irrigation facilities.

3. *Hampton Lakes Water Company D–92–42 CP.* An application for approval of a ground water withdrawal project to supply up to 18.4 mg/30 days of water to the applicant's distribution system from new Well No. 4, and to reduce the existing withdrawal limit of all wells from 49.6 mg/30 days to 37 mg/30 days. The project is located in Southampton Township, Burlington County, New Jersey.

4. *Boeing Defense and Space Group D–94–30.* A project to upgrade the applicant's existing industrial wastewater treatment plant (IWTP) which discharges to a tidal portion of Crum Creek in Water Quality Zone 4, after mixing with boiler blowdown, noncontact cooling water, cooling tower blowdown, and condensate, at a rate of 234,000 gallons per day (gpd). The IWTP will continue to serve the applicant's military and commercial aircraft manufacturing operation and is located in Ridley Township, Delaware County, Pennsylvania, just northeast of the State Route 291 bridge over Crum Creek.

5. *Washington Township Municipal Authority D–94–42 CP.* A project to construct a 250,000 gpd sewage treatment plant (STP) to serve a portion of Washington Township. The STP will be located just east of Route 100 and approximately 2000 feet south of the Borough of Bally, in Washington Township, Berks County, Pennsylvania. The proposed secondary activated sludge plant will discharge treated effluent, after disinfection, to West Branch Perkiomen Creek.

6. *Upper Frederick Township D–94–57 CP.* An application for inclusion in the Comprehensive Plan of a ground water withdrawal project to supply up to 2.01 mg/30 days of water to the applicant's distribution system from existing Well Nos. P–1 and P–2, previously issued a Protected Area Permit under Section 10.3 for G.I.D.A., Inc. The project is located in Upper Frederick Township, Montgomery County, in the Southeastern Pennsylvania Ground Water Protected Area.

Documents relating to these items may be examined at the Commission's offices. Preliminary dockets are available in single copies upon request. Please contact George C. Elias concerning docket-related questions. Copies of the full text of the proposed amendments to the Basin Regulations—Water Supply Charges and a staff statement in support of the amendments may be obtained by contacting Susan M. Weisman. Persons wishing to testify at this hearing are requested to register with the Secretary prior to the hearing.

Dated: October 11, 1994.

Susan M. Weisman,

Secretary.

[FR Doc. 94–25818 Filed 10–18–94; 8:45 am]

BILLING CODE 6360–01–P

DEPARTMENT OF EDUCATION

[CFDA No.: 84.159]

Office of Special Education and Rehabilitative Services; Special Studies Program

ACTION: Notice of Revised Grant Competitions

PURPOSE: On June 10, 1994, the Secretary published in the **Federal Register** (59 FR 30190) a combined application notice (CAN) inviting applications for new awards for fiscal year 1995 under a number of the Department's direct grant and fellowship programs. Included in the CAN were three competitions under the Special Studies Program. The purpose of this notice is to withdraw the State Agency—Federal Evaluation Studies Projects competition, CFDA No. 84.159A. This action is taken to increase the estimated number of awards under the CFDA 84.159F competition from one to four, and to change the estimated range of awards (per year) from $50,000 to $40,000–$60,000.

FOR FURTHER INFORMATION CONTACT: Susan Sanchez, U.S. Department of Education, 600 Independence Avenue, SW., Washington, DC 20202–2641. Telephone: (202) 205–8998. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m. Eastern time, Monday through Friday.

Program Authority: 20 U.S.C. 1418.

Dated: October 13, 1994.

Judith E. Heumann,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 94–25829 Filed 10–18–94; 8:45 am]

BILLING CODE 4000–01–P

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Acting Director, Information Resources Management Service, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before November 18, 1994.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok: Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 400 Maryland Avenue, SW., Room 5624, Regional Office Building 3, Washington, DC 20202–4651.

FOR FURTHER INFORMATION CONTACT: Patrick J. Sherrill (202) 708–9915. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U. S. C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director of the Information Resources Management Service, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

Dated: October 12, 1994.

Ingrid Kolb,

Acting Director, Information Resources Management Service.

Office of Educational Research and Improvement

Type of Review: Extension.
Title: Final Performance Report for Library Services and Construction Act.
Frequency: Annually.
Affected Public: State or local governments.
Reporting Burden:
Responses: 250.
Burden Hours: 1,000.
Recordkeeping Burden:
Recordkeepers: 250.
Burden Hours: 250.
Abstract: This report form is needed to obtain information on expenditures of grant funds and to evaluate project performances of grantees under the Library Literacy Program, Title VI of the Library Services and Construction Act.

[FR Doc. 94–25826 Filed 10–18–94; 8:45 am]

BILLING CODE 4000–01–P

National Assessment Governing Board Meeting

AGENCY: National Assessment Governing Board; Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Executive Committee of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

DATE: November 3, 1994.

TIME: 4 p.m. (et).

LOCATION: National Assessment Governing Board, Suite 825, 800 North Capitol Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mary Ann Wilmer, Operations Officer, National Assessment Governing Board, Suite 825, 800 North Capitol Street, NW., Washington, DC 20002–4233, Telephone: (202) 357–6938.

SUPPLEMENTARY INFORMATION: The National Assessment Governing Board is established under section 406(i) of the General Education Provisions Act (GEPA) as amended by Section 3403 of the National Assessment of Educational Progress Improvement Act (NAEP Improvement Act), Title III–C of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. 100–297), (20 USC 1221e–1).

The Board is established to formulate policy guidelines for the National Assessment of Educational Progress. The Board is responsible for selecting subject areas to be assessed, developing assessment objectives, identifying appropriate achievement goals for each grade and subject tested, and establishing standards and procedures for interstate and national comparisons.

The Executive Committee of the National Assessment Governing Board

will meet November 3, 1994 from 4 p.m. until 5 p.m. Because this is a teleconference meeting, facilities will be provided so the public will have access to the Committee's deliberations. The agenda includes review and approval of the November 17–19, 1994 meeting agenda and discussions on the NAEP/NAGB reauthorization.

Records are kept of all Board proceedings and are available for public inspection at the U.S. Department of Education, National Assessment Governing Board, Suite 825, 800 North Capitol Street, NW., Washington, DC, from 8:30 a.m. to 5 p.m.

Date: October 13, 1994.

Roy Truby,

Exedutive Director, National Assessment Governing Board.

[FR Doc. 94–25830 Filed 10–18–94; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Financial Assistance Award (GRANT)

AGENCY: U.S. Department of Energy (DOE).

ACTION: Grant Solicitation Awards for Laser Fusion Research Applications.

SUMMARY: Pursuant to 10 CFR 600.15, The U.S. DOE announces that it plans to conduct a technically competitive solicitation for basic research experiments in high energy density studies at the National Laser's User's Facility (NLUF) located at the University of Rochester Laboratory for Laser Energetics (UR/LLE). Grant Solicitation No. DE–PS03–95SF20539. Universities or other higher education institutions, private sector not-for-profit organizations, or other entities are invited to submit grant applications. The total amount of funding expected to be available for the Fiscal Year 1995 (FY95) program cycle is $450,000. Multiple awards are anticipated.

FOR FURTHER INFORMATION CONTACT: Hank Jones, DOE Oakland Operations Office, 1301 Clay Street, Room 700N, Oakland, CA 94612–5208, (510) 637–1868.

SUPPLEMENTARY INFORMATION: Interested parties can obtain a 3½" computer floppy disk of the solicitation document by submitting a written request; specify WordPerfect 5.0 for DOS or Microsoft Word 5.0 for Macintosh. The solicitation document contains all the information relative to this action for prospective applicants. The solicitation is targeted for release in October 1994. The actual work to be accomplished will be determined by the experiments and diagnostic techniques that are selected for award.

Proposed experiments and diagnostic techniques will be evaluated through scientific peer review against predetermined, published and available criteria. Final selection will be made by the DOE. It is anticipated that multiple grants will be awarded within available funding. The unique resources of the NLUF are available to scientists for state-of-the-art experiments primarily in the area of inertial fusion and related plasma physics. Other areas such as spectroscopy of high ionized atoms, laboratory astrophysics, fundamental physics, materials science, and biology and chemistry will be considered on a secondary basis.

The LLE was established in 1970 to investigate the interaction of high power lasers with matter. Available at the LLE for NLUF researchers is the upgraded OMEGA LASER, A 30 Kj uv, 24-beam laser system (at 0.35um) suitable for direct-drive ICC implosions, and the Glass Development Laser (GDL), a 250 billion watt, single beam prototype for the variety of experiments including laser-plasma interactions and atomic spectroscopy. The NLUF program for FY95 is to concentrate on experiments than can be done with the OMEGA laser at the University of Rochester and development of diagnostic techniques suitable for the upgraded OMEGA system. Measurements of the laser coupling, laser-plasma interactions, core temperature, and core density are needed to determine the characteristics of the target implosions. Diagnostic techniques could include either new instrumentation, development of analysis tools, or development of targets that are applicable for 30 kJ direct-drive implosions. Additional technical information about the facilities and potential collaboration at NLUF can be obtained from: Dr. James Knauer, Manager, National Laser User's Facility, University of Rochester/LLE, 250 East River Road, Rochester, NY 14623.

Issued in Oakland, CA September 23, 1994.

Joan Macrusky,

Chief, Energy Research Branch.

[FR Doc. 94–25899 Filed 10–18–94; 8:45 am]

BILLING CODE 6450–1–M

Richland Operations Office; Notice

AGENCY: U.S. Department of Energy, Richland Operations Office.

ACTION: Notice of Noncompetitive Financial Assistance Award.

SUMMARY: The Department of Energy, Richland Operations Office, announces that pursuant to Paragraph C of 10 CFR 600.7(b)(2)(i), it intends to issue a noncompetitive grant award to the State of Washington Department of Community, Trade, and Economic Development. The award is planned for an initial three (3) year project cycle, consisting of three (3) separately funded one (1) year budget periods. The initial budget is estimated at $1,100,000.

FOR FURTHER INFORMATION CONTACT: Melanie P. Fletcher, U.S. Department of Energy, Richland Operations Office, P.O. Box 550, Richland, Washington 99352, Telephone: (509) 376–4828.

SUPPLEMENTARY INFORMATION:

Grant Award Number: DE–FG06–94RL12995.

Scope of Project: The proposed financial assistance award is a grant Washington State to fund an Environmental Technology Partnership Initiative. The partnership will establish a cooperative approach to: (1) Private sector participation in cleanup activities at Hanford and other sites, and (2) contributing to local sustainable economic development. The partnership between DOE and the State of Washington will be designed to accomplish these goals through the application of advanced technology. The State and DOE will create or designate a non-profit entity to act as a facilitator between governmental agencies and private partners. This entity will establish connections to academic institutions, industry, and other research institutions to encourage the development, exchange, and commercialization of environmental technologies.

DOE has determined that award on a noncompetitive basis is appropriate because the recipient is a unit of government and the activities to be supported are related to the performance of governmental functions within the jurisdiction of that unit, thereby precluding DOE provision of support of another entity. It has been determined that a grant instrument is appropriate since the Department of Energy anticipates limited direct involvement with the program.

Dated: September 26, 1994.

P.E. Rasmussen,

Acting Director, Procurement Division, Richland Operations Office.

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Office of Policy

Guidelines for Voluntary Reporting of Greenhouse Gas Emissions and Reductions, and Carbon Sequestration

AGENCY: Department of Energy (DOE).

ACTION: Notice of availability of guidelines.

SUMMARY: Pursuant to Section 1605(b) of the Energy Policy Act of 1992, the Department of Energy has developed guidelines for the voluntary reporting of greenhouse gas emissions, their reduction, and carbon fixation achieved through any measure. The data will be reported on forms to be developed by the Energy Information Agency (EIA) and entered into an EIA database.

The guidelines provide for the voluntary reporting of greenhouse gas emissions and reductions, and of carbon sequestration. The guidelines and supporting materials will assist parties in analyzing activities and determining emissions and reductions in order to voluntarily report this data. The EIA reporting forms will be consistent with the guidelines. The guidelines and supporting material are finalized and will be available for distribution on or before October 31, 1994.

DATES: The Guidelines for the Voluntary Reporting of Greenhouse Gases under Section 1605(b) of the Energy Policy Act of 1992 will be available for distribution on or before October 31, 1994.

ADDRESSES: Copies of the guidelines and supporting documents are available in hard copy or on 3½" diskette. Copies may be obtained by telephone request to (202) 586–3660, by facsimile request to (202) 586–2062 or (202) 586–3047, or by writing to the Office of Global Environment (PO–63), U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585. Please request publication DOE/PO–0028, and indicate hard copy or diskette version.

A docket (Docket PO–VR–94–101) containing information related to development of the guidelines and a copy of the guidelines and supporting documents is available for public inspection in the DOE Freedom of Information Reading Room, Room 1E–090, at the address listed above, between the hours of 9 a.m. and 4 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Jean Vernet, Office of Global Environment (PO–63), U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585, phone (202) 586–4755; or Elmer Holt, Office of Global Environment (PO–63), at the same address, phone (202) 586–0714.

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I. Statutory Authority and Background

Under Section 1605(b) of the Energy Policy Act of 1992 (EPAct; Pub. L. 102–486), the Secretary of Energy with the Energy Information Administration, and in consultation with the Environmental Protection Agency (EPA), is required to establish a voluntary reporting system and database on emissions of greenhouse gases (GHGs), reductions of these gases, and carbon fixation. DOE is required to publish, after public comment, guidelines setting procedures for the accurate voluntary reporting of information on: (1) Greenhouse gas emissions on an annual basis for the baseline period 1987 through 1990, and for subsequent calendar years; (2) annual reductions of greenhouse gases and carbon fixation achieved through any measure; and (3) reductions in greenhouse gas emissions achieved voluntarily, or as a result of plant or facility closings, or as a result of State or Federal requirements.

The guidelines and supporting materials finalized today will assist those who wish to participate in determining or developing information capable of being reported. The reporting forms and database system required under Section 1605(b) are to be developed by EIA and must be consistent with the guidelines.

Draft guidelines and supporting materials were made available for public comment on June 1, 1994 (59 FR 28345); that notice discusses the draft guidelines. A public hearing on the draft guidelines was held on June 29, 1994. The draft supporting document for the agricultural sector was made available June 30, 1994 (59 FR 33733). Comments were provided by individuals and associations representing: public interest environmental and land use groups; investor-owned and publicly-owned utilities; independent power producers; oil production and use; coal production and use; motor vehicle manufacturing and use; chemical manufacturing; and academic, commercial, and public interest forestry interests.

II. Discussion of Final Guidelines and Comments Received

A. Organization of the Final Guidelines and Supporting Materials

In response to comments, the final guidelines and supporting materials have been re-organized from that presented in the draft. The coverage of each sector-specific supporting Part, however, is the same as that contained in the parallel Part of the draft documents. The final guidelines and supporting documents, DOE/PO–0028, are organized in three volumes:

Volume 1—General Guidelines
Volume 2—Sector-Specific Issues and Reporting Methodologies Supporting the General Guidelines
Part 1—Electricity Supply Sector
Part 2—Residential and Commercial Buildings Sector
Part 3—Industrial Sector
Volume 3—Sector-Specific Issues and Reporting Methodologies Supporting the General Guidelines
Part 4—Transportation Sector
Part 5—Forestry Sector
Part 6—Agricultural Sector

The material provided in the draft supporting document, Part 7, dealing with Global Warming Potentials, has been revised as discussed below, and now appears as Appendix E to each supporting volume.

B. Purpose of the Guidelines and Design Principles

The final guidelines and supporting materials have been developed to reflect the goal of maximizing participation without compromising the usefulness of the data voluntarily submitted. Commenters on the draft guidelines generally supported the appropriateness of this goal, although some did not agree on how to strike a balance between maximizing participation and establishing a meaningful data reporting system. The flexibility provided by the draft guidelines, which takes into account the reporter's ability to use existing information and select appropriate quantification methods, was supported by many commenters as necessary to encourage participation.

However, some comments from environmental public interest groups and forestry public interest groups urged that the final guidelines include requirements for verification of emissions reductions and carbon sequestration data. These commenters believe that the flexibility provided by the program made data verification essential to the credibility of the information entered into the database. Many of these comments acknowledged that the statute directed neither DOE nor reporters to obtain verification of data reported, but suggested that third party verification could provide users of the database with better assurances of its accuracy.

Some of these commenters indicated that, in the alternative, the program should direct reporters to indicate the basis for the data submitted based on a categorization system, and that the database should be designed to allow sorting of data on the basis of this categorization. For example, a report would indicate that data was based on measurement, estimation, or use of default tables, and whether emissions reductions project reports were accompanied by historic or entity-wide emissions data. A database user would be able to retrieve reported data on the basis of these categories.

In order to provide the flexibility necessary to encourage reporting, the guidelines do not provide prescriptive features such as verification. Rather, the guidelines indicate that a reporter will be asked to categorize the data submitted. This categorization will include third party verification as well as whether the data was measured or estimated. Segregation of data by categories will be possible.

DOE believes the approach of requesting the identification of data derivation, and of any data verification performed, accommodates both the need to maximize participation by providing flexibility, and the need to create a useful and accessible database.

C. Changes to Draft Guidelines for Final Guidelines

After reviewing the comments received, DOE revised several provisions of the draft general guidelines and some provisions of the sector-specific supporting documents. The changes to the draft guidelines include: the addition of gases to the list of those reportable under the program, with delayed implementation for some of those gases not covered in the draft guidelines; a limitation on reporting project activities to those that achieved new emission reductions or carbon sequestration beginning with January 1, 1991; revision of the discussions about distinctions between primary and secondary effects, and between direct and indirect emissions; and guidance on amending a previous year's report.

A discussion of responses to significant comments on issues in the draft general guidelines appears below. Significant changes as a result of comments received on the sector-specific documents are discussed below by sector document.

1. Gases Covered

The legislation does not define "greenhouse gases." The draft guidelines covered emissions of carbon dioxide, methane, nitrous oxide, as well as many of the halogenated substances. The final guidelines add two halogenated substances, halon 1211 and halon 2402, to the list of gases and substances covered. In addition, DOE announces the delayed addition of three greenhouse gases, nitrogen oxides, nonmethane hydrocarbons, and carbon monoxide, to the reporting program starting with the third reporting cycle of the program which is expected in 1997.

a. Additional Gases to be Covered—Conventional Pollutants

Comments on the gases and substances covered by the draft guidelines supported expansion of the program to a more comprehensive list of greenhouse gases, especially some conventional, or "criteria," pollutants regulated under the Clean Air Act for which emissions data is collected by EPA and State agencies under various air quality programs. These gases are nitrogen oxides, nonmethane hydrocarbons, and carbon monoxide. Although these gases are not direct greenhouse gases, they contribute to the formation of carbon dioxide and/or tropospheric ozone.

The international scientific community has been unable to quantify the differential radiative activity of these gases, and thus has not provided an index of the climate change effects of these gases relative to carbon dioxide. Because emissions data reported under the program will be reported in units of weight, and not reduced by any common index of comparative radiative effects, it is unnecessary to exclude gases from the program solely on the basis that a quantification of comparative effects is not available.

DOE agrees that a more comprehensive 1605(b) reporting program should cover these indirect gases, and has expanded the gases covered by the voluntary reporting program to include nitrogen oxides, nonmethane hydrocarbons, and carbon monoxide. However, for the reasons discussed below, DOE is delaying the programmatic acceptance of voluntarily reported data on emissions and emissions reductions of these gases for a period of two years. Thus, reports of data related to these gases will first be accepted by EIA during the third reporting cycle of the program, *i.e.* with reports filed in 1997. These reports may include the results of activities beginning January 1, 1991, as well as historic emissions data on these gases for the period 1987 to 1990.

The primary reason for delaying the addition of these gases is to aid in the efficient administration of this new program. Neither DOE nor EIA has sufficient experience in voluntary reporting to predict the volume of participation in this program or the difficulties that may arise in its implementation. EIA expects that experience gained in the first two years of the program will enhance its ability to smoothly accommodate this expansion of the reporting program.

b. Additional Gases to be Covered—Halogenated Substances

Comments were also received on the list of halogenated substances for which emissions and reductions will be reportable. In response to these comments, the final guidelines add two halogenated substances, halon 1211 and halon 2402, to the list of reportable gases. Given the limited amount of reporting anticipated on these substances, initial coverage of the program includes these gases.

As explained in the June 1994 notice of availability for the draft guidelines, the inclusion of some halogenated substances in the voluntary reporting program is based on the language of Section 1605(b)(1)(B), referring to the reportability of reductions in greenhouse gas emissions achieved through "chlorofluorocarbon capture and replacement." Without this language, DOE might have limited the voluntary reporting program to those gases covered by the United Nations Framework Convention on Climate Change, thus excluding the chlorofluorocarbons (CFCs) and other halogenated substances, including the two halons now covered, from the reporting program.

One comment noted that the draft guidelines' failure to list halon 1211 and halon 2402 as reportable gases was inconsistent with the listing of halon 1301. The draft guidelines and supporting materials listed only those halogenated substances for which the Intergovernmental Panel on Climate Change (IPCC) had published an index

of global warming potential (GWP) relative to carbon dioxide. While there are internationally accepted indices of stratospheric ozone depletion potential for halogenated and bromide substances in addition to those listed in the draft guidelines and supporting documents, the IPCC published a GWP for halon 1301, but not for any other halon.

Based on stratospheric ozone depletion characteristics, the halogenated substances are covered by an international agreement, the Montreal Protocol on Substances Depleting the Stratospheric Ozone, and under U.S. law are regulated under Title VI of the Clean Air Act Amendments of 1990. These gases are greenhouse gases, although they also have the antagonistic characteristic of destroying tropospheric ozone, which tends to indirectly produce global cooling. These antagonistic effects complicate the analysis of their impact on the global climate, and have divided the scientific community over whether the net effect of some of these gases will be global warming or cooling.

This division in the scientific community has made it difficult to determine the quantitative global warming potential of these gases. Because emissions data reported under the program will be reported in units of weight, and not reduced to a standard measure by application of a common index of comparative radiative effects, and to be consistent with the decision discussed above on conventional pollutants, halon 1211 and halon 2401 are added to the list of gases for which emissions may be reported under the program. Based on the limited amount of activity in production and use of these substances, and on the similarity in emissions of these substances to other halogenated substances, DOE has determined that there is no administrative need to delay acceptance of submissions on these gases.

2. Limitation on Vintage of Reportable Projects

The General Guidelines include a new section, discussing the limitation on reporting projects which resulted in a reduction in emissions, but on which activity commenced before 1991. The final guidelines permit reporting as projects only new (post-1990) emissions reductions and carbon sequestration. Pre-1991 emissions reductions will be reflected in emissions reporting only. Thus, the results of all emission reduction activities which are first achieved in 1991 are reportable as projects, even if the activity commenced before 1991. For example, in the case of an ongoing demand side management program, emissions changes arising from energy savings through appliance replacement in 1991 can be reported as project results, but the effects of appliance replacements before 1991 are not reportable as emissions reduction projects. Rather, these effects are subsumed in emissions reporting for the baseline period of 1987 through 1990.

The draft guidelines had no comparable discussion. Some commenters maintained that a time limitation on reportable emissions reduction projects was necessary, particularly because under the guidelines reporters may separately report emissions and emissions reductions. These comments indicated that the statutory language of section 1605(b)(1)(A)(i) providing for 1987 through 1990 as baseline years for emissions reporting implied that emissions reductions reporting under section 1605(b)(1)(B) was limited to reductions occurring after 1990. Reductions occurring before 1991 would be reportable only for their effect on emissions reported for the baseline years, rather than separately as emissions reductions projects.

Since the statutory language on reporting emissions reductions is not explicitly tied to any specific year or years, and the years 1987 through 1990 are referred to as the baseline period, DOE is persuaded that goals of the reporting program are best served by limiting reports of emission reduction projects to new emissions reductions after 1990. Many emission reduction projects have multi-year or multi-decade lives; without a time limitation, the database would include the emissions reductions results of older activities more appropriately reflected within emissions reporting rather than highlighted separately as emissions reduction projects.

3. Direct and Indirect Emissions

The reporting program covers activities which directly or indirectly result in greenhouse gas emissions or emissions reductions. DOE has revised the text of the General Guidelines to clarify the distinction between direct and indirect emissions in order to assist reporters in identifying the distinction.

Some commenters supported limiting the program to submissions of data on direct emissions, and to activities that directly produce or reduce emissions, in order to provide clarity in the program's database. Other comments supported the draft's inclusion of activities that indirectly impact greenhouse gas emissions, based on the statutory listing in Section 1605(b)(1)(B) of activities which indirectly affect, or may indirectly affect, emissions or reductions. Additionally, many comments evidenced confusion over the draft's discussion of direct and indirect emissions.

DOE agrees that the statutory listing of activities which indirectly affect emissions, as well as activities that directly affect emissions, supports the inclusion of both direct and indirect emissions in the reporting program. DOE also agrees that these concepts are potentially confusing. To assist reporters in identifying direct and indirect emissions, DOE has revised the text of the General Guidelines. It is apparent from many of the comments that this confusion was largely created by intertwining the concepts of primary and secondary effects of an activity with the concepts of resulting direct and indirect emissions.

In response, DOE has eliminated the distinction between primary and secondary effects of a project, leaving a single concept of "effects".

4. Primary and Secondary Effects

Based on comments expressing confusion over the concepts and the draft guidance for the inclusion of both primary and secondary effects in project analysis, the final guidelines have eliminated the distinction. While the concepts are still presented in Section GG–5.9, the reporter is urged to consider and report the known and quantifiable "effects" of a project without regard to whether they are primary or secondary. To provide additional clarity, the final guidelines also present examples of different types of effects.

5. Amending a Previous Year's Report

The final guidelines add a provision which allows reporters to amend any previous year's report. The program will, for example, accept reports based on estimated and default data, which will be identified as such by the reporter. (See discussion at II.B., above.) Where a reporter subsequently develops better data, for example through field measurements or utility-specific emissions factors, the original report may be modified based on information developed using the later-acquired data. The amended report will include the reason for the revision and a comparison of the amended report's changes to the original report.

The primary reason for adding this provision is to encourage reporters to develop their own activity-specific data, without discouraging reporting based on less-specific estimation or default data.

6. Radiative Forcing of Greenhouse Gases

The language of Section 1605(b)(1) provides that the reporting guidelines are "to establish procedures for taking into account the differential radiative activity and atmospheric lifetimes of each greenhouse gas." The draft guidelines and the supporting materials included as Part 7, "Global Warming Potentials" (GWPs), describing the GWP index developed by the IPCC as a simple method for representing the relative effects on climate resulting from a unit mass of a greenhouse gas.

Comments unanimously supported DOE's decision to require that emissions data be reported only in units of greenhouse gases emitted, and not to require reporters to convert these data to the effects of the gases reported relative to carbon dioxide. The final guidelines continue to direct that reported data will be in units of gas emitted. Commenters expressed concerns that (1) the concept of GWPs was too complex to be useful to most reporters in developing GHG mitigation options; (2) the discussion in draft Part 7 of the scientific basis of GWPs was flawed; and (3) use of scientific work not yet formally adopted by the IPCC was inappropriate.

In response to comments, draft Part 7 has been substantially condensed and appears as Appendix E in the two supporting volumes. The expansion of draft Part 7 to clarify fully the many complex and evolving scientific issues was deemed outside the scope of the voluntary reporting program. A brief discussion of the concept, together with a chart of the latest quantitative GWP index developed by the international scientific community, is provided in the Appendix. The reader/user is referred to other sources for additional information.

DOE agrees that the scientific concepts involved in GWPs, such as time horizons, carbon cycle models, and integration time scales, may not be clearly understood by many in the general reporting population. The ongoing improvements in our understanding of the complex global climate system and analytic models developed are evidenced, as discussed in the Notice of Inquiry preceding the draft guidelines, by the 1992 revision of the 1990 IPCC report on GWPs. Further, revisions to the 1992 report have been approved by an IPCC subsidiary body, Working Group I, and will be published later this year. It is from this anticipated publication that the GWPs provided in the draft and final guidelines are taken.

The IPCC, an international body charged with reaching international consensus on the complex scientific matters in climate change, is supported by the United States. IPCC work will ultimately be a factor in both domestic and international analyses on climate change mitigation options. It would thus be imprudent for the DOE reporting guidelines to address differential radiative forcing in a manner inconsistent with the IPCC. The 1994 revisions to the IPCC GWP index have been approved by Working Group I and are expected to be formally accepted by the full IPCC soon after publication of the final guidelines. DOE is using this material in advance of its formal acceptance for administrative ease.

7. Editorial and Minor Revisions

In response to various comments, editorial revisions were made throughout the General Guidelines and the supporting documents as follows.

Case studies and examples. Case studies and examples are provided for the purpose of illustrating the process of project analysis in light of a reporter's purpose and sector-specific circumstances and conditions. Some commenters suggested that some of the case studies and examples provided were unrealistic, that they suggest a greater reporting burden for reporters in some sectors than in others, or that they appear to require the use of certain approaches and methods for some activities.

To address these comments, the following text has been added to all case study and example presentations:

Note: This example illustrates only one approach in analyzing a project; your analysis, methods, and calculations will vary depending on your particular circumstances, the geographic location of the project, and other factors.

Examples are intended to provide, in an educational manner, illustrations of various approaches to project and emissions analysis permitted within the guidelines. They are not intended to imply any additional directions or restrictions on reporting over and above that provided by the Guidelines. The case studies and examples do, however, suggest to potential reporters different ways in which existing data and resources may be used to develop a report. The illustrated cases thus differ in detail based on the stated purpose of the hypothetical reporter for reporting, and the individual circumstances surrounding the project and the reporter. Consistent with the goal of maximum participation in the program, the flexibility of the reporting program is not bound by any particular case study or example discussion on any issue.

Subjective Terminology

Comments were made that the use in the guidelines and the supporting materials of certain descriptive terms, relative to a reporter's decisions regarding the data developed and reported, were inappropriate within a voluntary program. The program's flexibility allows reporters to select among various approaches in developing a report. These selections do not encompass comparative value of the reporter's activities. No value judgments are intended by the use of subjective terms in any description of the reporter's choice of approaches. Accordingly, the final guidelines and supporting materials have been revised to minimize use of these terms, and to better reflect that judgments on the quality of the data reported are to be made by the reporter and database user, and not by the reporting program. Where these terms remain in the guidelines and supporting documents, they are intended to reflect differing perspectives of both reporters and database users on choices permitted by the reporting program.

D. Changes to Draft Sector-Specific Supporting Documents for Final Sector-Specific Documents

Comments were received on all draft sector specific supporting documents. Revisions to the draft guidelines in response to comments on less significant technical, mathematical, or editorial errors in the draft sector specific supporting documents are not individually discussed in this notice, but were considered and addressed where appropriate.

Most comments fall into several categories of issues, including those that have been addressed in the final General Guidelines and discussed above in section II.C. of this notice. These categories include: failure to discuss all emissions reduction or carbon sequestration activities applicable to the sector; criticism of the case studies' use of unrealistic circumstances; the accuracy, completeness, and degree of conservativeness of default tables; and the lack of balance among sector documents indicating differing reporting burdens.

The program is expressly intended to provide reporters with the flexibility to report on the achievements of all emissions reduction and carbon sequestration activities. The failure of the draft guidelines and supporting materials to discuss or list any particular activity does not indicate that

its achievements are not reportable under the 1605(b) program.

In response to comments, the final supporting documents add discussions of some additional emissions reduction and carbon sequestration approaches, and provide more emphasis to some of the approaches discussed in the draft. Nevertheless, the guidelines and supporting documents are not intended to provide an exclusive list of all activities that may be reported. The guidelines could not, for example, provide identification and quantification of achievements from the novel, innovative actions for which the information sharing function of the voluntary reporting program is paramount.

As discussed above in C.7., the guidelines and supporting documents use case studies and examples to illustrate the application of concepts and varied approaches to project analysis and reporting. Reporters are not bound by the particulars of any presentation. Rather, the guidelines provide reporters the flexibility needed to adapt project analysis approaches to particular circumstances, including the type of project, the availability of necessary data, and the purpose for reporting.

Thus, while revisions have been made in many case studies and examples throughout the documents in response to comments regarding realism, these study examples are not intended to be exhaustive of the range of appropriate approaches that reporters may develop and use to determine the data to report under this program.

Significant comments were received on the accuracy, completeness, and degree of conservativeness of the default tables provided in the supporting documents. Based on DOE's technical judgment on individual comments, errors have been corrected. Responses to these comments on specific sector default tables appear below in the discussion of the relevant sector.

In keeping with the flexibility of the program, reporters are encouraged to use and develop data specific to the project being reported to accommodate their individual circumstances. The continued inclusion of default tables is, however, in keeping with the goal of maximum participation, where the wide disparity among potential reporting populations supports the need to provide some "lookup" tables for use at the discretion of the reporter.

Default tables, by their nature, may provide an easy way for reporters to estimate the quantity of certain factors they may need in order to report. By virtue of their ease of use, these tables cannot accommodate all variables involved; rather, they are based on judgments on appropriate methodologies and available data. In some fields of endeavor, there is no apparent consensus on methodologies and the quality and quantity of data needed either to develop default tables or to definitively judge their conservativeness. The default tables provided are, in DOE's judgment, generally conservative.

Some commenters asked that DOE add default tables covering additional data quantification areas. While DOE agrees that the addition of tables in these documents could be helpful to reporters, their development did not warrant a delay in issuing the final guidelines and supporting documents. In many instances, measurement and other methodologies are in their relative infancy. DOE expects that data and methodologies will evolve as national and international interest continue in the areas of greenhouse gas emissions reduction and carbon sequestration. Since reporters are permitted to develop their own data and submit it to the voluntary reporting program, the program itself may aid in the development of methodologies and the accumulation of data to advance knowledge in these areas. DOE acknowledges that sector-specific documents appear to differ greatly in the detail with which applicable concepts and approaches are discussed. This distinction was especially noted in comments on the Electricity Supply Sector, Residential and Commercial Buildings Sector, Industrial Sector and Forestry Sector documents, expressing concern that the differences may indicate a higher reporting burden for these sectors.

The differences in focus and depth are based primarily on the breadth of technical knowledge of each sector's greenhouse gas and emissions reduction or carbon sequestration features, including the knowledge held by each sector's population and the degree to which reporters will have or can develop sufficient data necessary for a report. These differences in focus and depth do not direct any additional or supplementary requirements for these sectors. Minimum reporting requirements, set forth in section GG–6 of the final General Guidelines, are identical for all reporters and projects, regardless of sector.

1. Electricity Supply

In addition to the revisions discussed above, in response to comments on the draft Electricity Supply Sector document, the final Electricity Supply Sector document includes more prominent mention of: (1) The possible use of Integrated Resource Planning data and data development methods; (2) the role of least-cost or other dispatching modes; (3) the role of hydroelectric power in renewable energy; and (4) emissions reduction projects in electrotechnologies. The discussion of relevant electrotechnologies has been augmented in the Industrial and Transportation Sector documents as well.

Comments were received on requiring reporters in this sector to use certain existing Federal or State requirements, or other existing protocols in developing reporting data. One example of a Federal protocol is the EPA's Conservation and Verification Protocol, 40 CFR Part 73, which is used in the acid rain program under title IV of the Clean Air Act Amendments of 1990 to determine the distribution of bonus sulfur dioxide allowances based on electricity conservation programs. Another example under the Federal acid rain program is EPA regulations providing for monitoring or estimating and reporting carbon dioxide emissions from certain boilers. Many States also have protocols dealing with estimating energy savings from demand side management (DSM) programs.

While activities in this sector are characterized by an extensive array of measurement and estimation methodologies and protocols, many of which are mentioned in the guidelines and supporting documents, DOE does not require their use for the reporting program. Consistent with the flexibility of the program, reporters may choose to use appropriate protocols and data developed for other reasons, including compliance with Federal and State requirements.

Significant revisions to some of the examples for this sector were made in response to comments that the scenarios and quantification specifics provided were unrealistic. In addition to these revisions, the language of the caveat discussed in section II.C.7., above, has been added to the presentation of all examples for the purpose of indicating that the example is meant to illustrate concepts, not to prescribe the use of specific approaches.

2. Residential and Commercial Buildings

Comments on the supporting document for the Residential and Commercial Buildings Sector reflect similar concerns to those raised on the Electricity Supply Sector document. In response to comments, DOE has added discussions of electrotechnologies

specific to this sector and identified additional conservation techniques. DOE has clarified that the ability to report the results of an activity is not dependent on whether that technology or technique is mentioned in the guidelines or supporting documents.

Activities in this sector are characterized by an array of measurement and estimation methodologies, some of which are mentioned in the document. Comments were received on requiring reporters to use specific protocols available for this sector. For the same reasons as discussed in section D.1., above, the guidelines do not prescribe the use of specific methodologies or protocols for measurement or estimation.

3. Industrial

In response to comments, DOE has modified discussions on the appropriate consideration of the obsolescence of equipment in determining the reference case for reportable projects. Biomass emissions factors have been clarified, and the distinction between temporary and permanent fuel switching has been eliminated.

Similar to other sector-specific documents, the final Industrial Sector supporting document has expanded discussions of electrotechnologies specific to this sector and identified additional conservation techniques. The ability to report the results of an activity is not dependent on whether a technology or technique is mentioned in the guidelines or supporting documents.

4. Transportation

In addition to the general revisions discussed above, DOE has expanded the discussion on electric vehicles in the Transportation Sector supporting document. Activities in the transportation sector are characterized by an extensive array of measurement and estimation methodologies, some of which are mentioned in the document. The use of some of these methodologies is required under various Federal regulatory and funding programs, such as those which regulate vehicle air pollutant emissions or award highway construction funds. For the reasons discussed above, reporters are not limited to using these protocols.

5. Forestry

Comments on the Forestry Sector document related to its apparent emphasis on carbon sequestration activity from new or replacement forestation, together with a corresponding lack of emphasis on forest preservation, forest management, and urban forestry. The varying treatment of types of carbon sequestration activity is not meant to imply a preference by DOE, or by the reporting program, for any particular type of forestry activity. It is, rather, based primarily on the state of the knowledge in these areas of forest carbon sequestration. Similar to other sector documents, reporting is not limited to the activities discussed.

Comments on the limited tree species and associated reference cases provided for standard forestry projects suggested that the table be expanded to include additional species. These data were developed with the assistance of U.S. Forest Service staff, and the tables are based on the availability of sufficient information to generalize carbon sequestration effects of certain activities. While such information is available for the major commercial species which are addressed in the tables, DOE believes that there is insufficient information available to develop adequate default tables on other species or reference cases. For additional species and reference cases, as well as for other forestry activities, the reporter will need to develop specific project data.

Other commenters stated that field measurements for projects in this sector were particularly essential to assure the accuracy of the data submitted. Consistent with the flexibility necessary to encourage reporting in this and all other sectors, the guidelines do not provide prescriptive features such as requiring field measurements. Rather, the guidelines indicate that a reporter will be asked to categorize the data submitted, including whether it is based on measurement.

6. Agricultural

Comments received on the draft document for the Agricultural Sector were indicative of the complexity of the sector, and its unique characteristic of including reportable activities that contribute both to greenhouse gas emissions and to carbon sequestration.

Comments were received on the failure to include any discussion of certain emissions reduction or carbon sequestration approaches specifically applicable to the agricultural sector. In response to these comments, additional text has been added on windbreaks and shelterbelts, changes to grazing land, and the production of biomass for fuel. The failure of the document to address other agricultural activities which affect greenhouse gases or carbon sequestration is not intended to preclude data submissions on those activities, including energy efficiency improvements.

7. Adjusted Electricity Emissions Factors by State

Substantial and detailed comment was received on the draft Appendix C, "Adjusted Electricity Emissions by State," which appeared in all draft sector supporting documents. After consideration of the comments received, Appendix C has been revised to employ a simpler methodology and the inclusion of nonutility generation emissions. A summary of the methodology used for the table appears together with the table in Appendix C. The published data on fuel use and technologies used are identified.

In response to comments that the draft failed to include nonutility generation, emissions factors for nonutility generation have been added, together with weighted combined emissions factors for utility and nonutility generation. Where the reporter utilizing the table knows whether the power is utility or nonutility generated, the appropriate factor should be used. The combined factor is intended for use when the reporter is unable to make this identification.

In keeping with the flexibility of the program, reporters are encouraged to use emissions factors specifically applicable to the project being reported. Where a utility-specific factor is available, for example, it will incorporate actual fuel mix and dispatching modes which are not differentiated within a State factor provided in Appendix C. The inclusion of revised Appendix C is in keeping with the programmatic goal of maximum participation, by providing a method for estimating emissions and reductions when other data are not easily available.

III. Administrative Requirements

A. Regulatory Review

DOE has determined that this is not a significant regulatory action because it does not meet the criteria which define such actions under Executive Order 12866, 58 FR 51735, and is therefore not subject to regulatory review. Accordingly, the Office of Management and Budget (OMB) has informed DOE that no clearance of the guidelines and supporting materials is required.

B. Issues Under the Paperwork Reduction Act

The provisions of section 1605(b) direct EIA to develop the reporting forms and database for the reporting program, consistent with the guidelines issued today. Separate administrative requirements apply to the development of EIA reporting forms.

Any information collection requirements proposed for the voluntary reporting program are subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and will be submitted to the Office of Management and Budget for review and approval of paperwork requirements. EIA anticipates the availability of draft reporting forms for public comment within 30 days. A notice on the availability of the draft reporting forms will appear in the **Federal Register.**

Issued in Washington, DC on October 13, 1994.

Susan F. Tierney,

Assistant Secretary, Office of Policy.

[FR Doc. 94–25901 Filed 10–18–94; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. EC95–1–000, et al.]

Central Maine Power Company, et al.; Electric Rate and Corporate Regulation Filings

October 11, 1994.

Take notice that the following filings have been made with the Commission:

1. Central Maine Power Company and Fairfield Energy Venture, L.P.

[Docket No. EC95–1–000]

Take notice that on October 7, 1994, Central Maine Power Company ("CMP") and Fairfield Energy Venture, L.P. ("FEV") jointly tendered for filing an application for approval of the acquisition and sale of a certain described step-up transformer and related books and records ("Public Utility Facilities") pursuant to a Purchase, Sale and Termination Agreement between CMP and FEV related to the acquisition by CMP and sale by FEV of all of FEV's right, title and interest in the 32 megawatt (net) biomass electric generating plant located in the Town of Fort Fairfield, Maine.

Comment date: October 21, 1994, in accordance with Standard Paragraph E at the end of this notice.

2. Public Service Electric and Gas Company

[Docket No. ER93–500–000]

Take notice that on October 3, 1994, Public Service Electric and Gas Company (PSE&G) of Newark, New Jersey, tendered for filing a Second Supplement to the Agreement for the Sale of Energy and Capacity to Central Hudson Gas and Electric Corporation (CHG&E) developed in part to provide replacement power for damaged generating units. The Second Supplement addresses Staff inquiries and establishes floor and ceiling cost caps as requested by the FERC.

Copies of the Second Supplement have been served upon CHG&E and interested state commissions.

Comment date: October 25, 1994, in accordance with Standard Paragraph E at the end of this notice.

3. Central Illinois Public Service Company

[Docket No. ER94–1602–000]

Take notice that on October 5, 1994, Central Illinois Public Service Company (CIPS), tendered for filing an amendment to an executed Interchange Agreement between CIPS and Louis Dreyfus Electric Power, Inc. (Dreyfus) that was previously filed on August 26, 1994. The amendment was filed at the request of Commission staff.

CIPS renews its request for an effective date of August 27, 1994, but states that no transactions have occurred to date under the tendered agreement.

CIPS states that a copy of the amendment was served upon Dreyfus and the Illinois Commerce Commission.

Comment date: October 25, 1994, in accordance with Standard Paragraph E at the end of this notice.

4. Public Service Company of New Mexico

[Docket No. ER94–1648–000]

Take notice that on September 14, 1994, Public Service Company of New Mexico (PNM), tendered for filing an Amendment No. 1 to Contract No. 14–06–500–1605 between Western Area Power Administration (Western), Texas-New Mexico Power Company (TNP), El Paso Electric Company (EPE), Plains Electric Generation & Transmission Cooperative, Inc. (Plains) and PNM (which contract is commonly referred to as the New Mexico Power Pool Agreement). The purpose of Amendment No. 1 is to extend the term of the New Mexico Power Pool Agreement for an additional twenty months from the date of execution of the Amendment.

PNM requests waiver of the applicable notice requirements to permit the Amendment to be effective as of November 1, 1994.

Copies of the filing have been served upon Western, TNP, EPE, Plains and the New Mexico Public Utility Commission.

Comment date: October 25, 1994, in accordance with Standard Paragraph E at the end of this notice.

5. Montaup Electric Company

[Docket No. ER94–1696–000]

Take notice that on September 30, 1994, Montaup Electric Company filed an Exhibit A under the service agreement for Montaup's transmission service to the City of Taunton, Massachusetts, under Montaup's FERC Electric Tariff, Original Volume No. 2. The Exhibit A is for the transmission beginning October 1, 1994. Montaup requests that the Exhibit A be permitted to become effective on that date.

Comment date: October 25, 1994, in accordance with Standard Paragraph E at the end of this notice.

6. Florida Power & Light Company

[Docket No. ER94–1697–000]

Take notice that on September 30, 1994, Florida Power & Light Company (FPL), tendered for filing pursuant to section 205 of the Federal Power Act and part 35 of the Commission's Regulations, a Short-Term Agreement to Provide Capacity and Energy Between Florida Power & Light Company and the Utilities Commission, City of New Smyrna Beach, Florida, dated August 10, 1994 (Agreement). FPL has requested an effective date of December 1, 1994.

Comment date: October 25, 1994, in accordance with Standard Paragraph E at the end of this notice.

7. Kentucky Utilities Company

[Docket No. ER94–1698–000]

Take notice that on September 30, 1994, Kentucky Utilities Company (KU) filed a transmission services tariff and a power sales services tariff and several revisions to its interconnection agreements. KU states that the purpose of the filings is to authorize transmission services over the KU transmission system and to effect market-based rates for its off-system power and energy sales.

Comment date: October 25, 1994, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be

taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94–25877 Filed 10–18–94; 8:45 am]

BILLING CODE 6717–01–P

[Project No. 2456–009–NH]

Public Service Company of New Hampshire; Intent To Hold a Public Meeting for Discussion of Draft Environmental Impact Statement (DEIS) for the Ayers Island Hydroelectric Project

October 13, 1994.

On October 3, 1994, the Commission staff mailed the Ayers Island DEIS to the Environmental Protection Agency, resource and land management agencies, and interested organizations and individuals. This document evaluates the environmental consequences of continuing the operation and maintenance of the existing Ayers Island Hydroelectric Project, located on the Pemigewasset River in Belknap and Grafton Counties, New Hampshire.

The applicant is not proposing any new development. However, it is proposing to modify the peaking operation between May 15th to August 31st and to implement new ramping rate schedules. The applicant estimates the average annual generation for this project would be 44.228 gigawatthours. The dam and existing project facilities are owned by the applicant. Project power would be utilized by the applicant for sale to its customers.

The subject DEIS also evaluates the environmental effects of: implementing applicant's proposal supplemented with staff's recommended mitigative measures; and the no-action alternative (license denial).

The public meeting, which will be recorded by an official stenographer, is scheduled on Wednesday, October 26, 1994, from 2:00 p.m. to 4:00 p.m. at the Bristol Town Office Building, P.O. Box 297, 71 Lake Street, Bristol, New Hampshire 03222.

At the subject meeting, resource agency personnel and other interested persons will have the opportunity to provide oral and written comments and recommendations regarding the subject DEIS for the Commission's public record.

For further information, please contact Ed Lee or Rich Takacs at (202) 219–2840.

Lois D. Cashell,

Secretary.

[FR Doc. 94–25835 Filed 10–18–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP95–10–000, et al.]

ANR Pipeline Company, et al.; Natural Gas Certificate Filings

October 12, 1994.

Take notice that the following filings have been made with the Commission:

1. ANR Pipeline Company

[Docket No. CP95–10–000]

Take notice that on October 5, 1994, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed an application pursuant to Section 7(b) of the Natural Gas Act and Part 157 of the Commission's Regulations requesting permission and approval to abandon two transportation and storage services performed for Natural Gas Pipeline Company of America (Natural), effective February 28, 1995. ANR's application is on file with the Commission and open to public inspection.

ANR states that it proposes to abandon its transportation and storage service authorized in Docket No. CP72–185,[1] designed as Rate Schedule X–14, and its transportation and storage service authorized in Docket No. CP74–316, et al. (Opinion No. 810),[2] designated as Rate Schedule X–60, both under Original Volume No. 2 of ANR's FERC Gas Tariff. No facilities are proposed to be abandoned. Natural notified ANR by August 27, 1993, letter that it wished to cancel both services.

Comment date: November 2, 1994, in accordance with Standard Paragraph F at the end of this notice.

2. Williams Natural Gas Company

[Docket No. CP95–11–000]

Take notice that on October 5, 1994, Williams Natural Gas Company (Applicant), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP95–11–000 an application to abandon by conveyance to Williams Gas Processing—Kansas-Hugoton Company (WGP–KHC), an affiliated company, its Kansas-Hugoton gathering system facilities, all as more fully set forth in the application on file with the Commission and open to public inspection.

Specifically, Applicant seeks authority to abandon by conveyance to WGP–KHC approximately 1719.2 miles of various diameter pipeline, 43,980 horsepower of compression, measuring and appurtenant facilities in the Kansas-Hugoton gathering system, all used to gather gas from approximately 2,200 wells in Finney, Grant, Hamilton, Haskell, Kearny, Seward, Stanton and Stevens Counties, Kansas.

WGP–KHC intends to assume ownership and control of the subject facilities as a non-regulated, independent, and separately managed business and concurrently herewith, in Docket No. CP95–12–000, is seeking a Commission declaratory order to confirm the non-jurisdictional status of the subject facilities. Applicant also states that the Amoco Production Company, the largest producer in the Kansas-Hugoton field will operate the Kansas Hugoton gathering system as an independent contractor, subject to a long-term operating agreement including, inter alia, an obligation to operate the facilities in an open access and non-discriminatory manner.

Applicant states that some of the facilities subject to this application include certain direct-service "taps" whereby WNG currently provides a direct delivery service to certain residential and/or agricultural customers pursuant to right-of-way agreements. Upon conveyance of the facilities, Applicant claims all of these direct deliveries will be assigned to, and served by Williams Gas Marketing Company (WGM), so as to continue the identical service previously provided by WNG.

Comment date: November 14, 1994, in accordance with Standard Paragraph F at the end of this notice.

3. Koch Gateway Pipeline Company

[Docket No. CP95–13–000]

Take notice that on October 6, 1994, Koch Gateway Pipeline Company (Koch Gateway), P. O. Box 1478, Houston, Texas 77251–1478, filed in Docket No. CP95–13–000 a request pursuant to Sections 157.205 and 157.211(a)(2) of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.212) for authorization to construct and operate facilities to enable Koch Gateway to serve Koch Gas Services (KGS) under Koch Gateway's ITS Rate Schedule for ultimate delivery to Atlas Production Services, Inc., (Atlas) in Terrebonne Parish, Louisiana. Koch Gateway makes such request under its blanket certificate issued in Docket No. CP82–430–000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

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[1] *See*, 48 FPC 133 (1972).

[2] *See*, 59 FPC 533 (1977).

Specifically, Koch Gateway states that Atlas requests revision and addition of metering facilities at an existing receipt tap to facilitate delivery of natural gas from KGS for gas lift operations. Koch Gateway states that it is authorized to provide natural gas transportation service to KGS under its transportation agreement for such service dated November 1, 1993. Koch Gateway further states that the service provided to KGS would be interruptible and therefore have no impact on its curtailment plan. Koch Gateway further states that it will revise and install the facilities in compliance with 18 CFR, Part 157, Subpart F, and that the proposed activities will not effect Koch Gateway's ability to serve its other existing customers. Comment date: November 28, 1994, 1994, in accordance with Standard Paragraph G at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or to make any protest with reference to said application should on or before the comment date, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate and/or permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 94–25876 Filed 10–18–94; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. ES95–1–000]

Canal Electric Company; Application

October 13, 1994.

Take notice that on October 7, 1994, Canal Electric Company filed an application under Section 204 of the Federal Power Act seeking authorization to issue not more than $60 million of short-term debt during a two-year period commencing on the effective authorization date and maturing less than one year after the date of issuance.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before November 7, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94–25831 Filed 10–18–94; 8:45 am]

BILLING CODE 6717–01–M

[Project No. 11482–000–ME]

Consolidated Hydro Maine, Inc., Notice To Conduct Site Visits for the Projects on the Little Androscoggin River

October 13, 1994.

The Federal Energy Regulatory Commission (Commission) is reviewing the application for an original license for the continued operation of the Marcal Project on the Little Androscoggin River, Maine. These Projects are being included in the Lower Androscoggin River Environmental Impact Statement.

The applicants and Commission staff will conduct project site visits of the Marcal, Hackett Mills, Upper Barkers Mill, and Lower Barkers Mill Projects. The site visits will be on October 27, 1994, starting with Marcal at 9:00 AM, Hackett Mills at 10:30 AM, Upper Barkers Mill at 1:00 PM, and Lower Barkers Mill at 2:30 PM. All interested individuals, organizations, and agencies are invited to attend. All participants are responsible for their own transportation to the sites. For more details, interested parties should contact Mr. Wayne Nelson of Consolidated Hydro Maine, Inc. at (508) 681–1900, and Mr. Mike Chmielewski of Hackett Mills at (617) 926–7680 prior to the site visit date.

For further information, please contact Robert Bell, Federal Energy Regulatory Commission, Office of Hydropower Licensing, 825 North Capitol Street, N.E., Washington, D.C., 20426 (Telephone 202–219–2806), or Allan Creamer (Telephone 202–219–0365).

Lois D. Cashell,

Secretary.

[FR Doc. 94–25836 Filed 10–18–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ES95–2–000]

Louisville Gas & Electric Co.; Application

October 13, 1994.

Take notice that on October 7, 1994, Louisville Gas and Electric Company filed an application under section 204 of the Federal Power Act seeking authorization to issue not more $200 million of short-term debt securities on or before December 31, 1996, with a final maturity date no later than December 31, 1997.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 in accordance with Rules 211

and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before November 7, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 94–25832 Filed 10–18–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP94–693–000]

National Fuel Gas Supply Corporation; Motion to Vacate

October 13, 1994.

Take notice that on October 6, 1994, National Fuel Gas Supply Corporation (National Fuel), 10 Lafayette Square, Buffalo, New York 14203, filed in Docket No. CP94–693–000 a "Notice of Withdrawal of Pleading" seeking to withdraw its "Request for Authorization Under the Notice Procedures of § 157.205" which was filed August 1, 1994, in Docket No. CP94–693–000 (prior notice filing). National Fuel states that its Notice of Withdrawal is filed in compliance with Condition C of the Commission's Order on Rehearing issued in Docket Nos. CP94–112–001 and CP88–94–009 on September 1, 1994 (68 FERC ¶ 61,278).

National Fuel's prior notice filing involved a request for authorization to construct and operate a new point of delivery in the town of Grand Island, Erie County, New York to provide service to an existing customer, National fuel Gas Distribution Corporation (Distribution), under National Fuel's blanket certificate issued in Docket No. CP83–4–000. The prior notice filing was noticed August 4, 1994, and no protests were filed during the notice period which expired September 19, 1994.

In its prior notice filing, National Fuel noted that it had previously applied for approval under Section 7(c) of the Natural Gas Act for the acquisition and construction of certain facilities, including the delivery point described in the prior notice filing. National Fuel explained that it had received conditional approval of the proposal by order issued June 1, 1994, in Docket Nos. CP94–112–000 and CP88–94–008 (67 FERC ¶ 61,270 (1994)). National Fuel stated that it was unable to commence acquisition and construction because it could not satisfy all the conditions included in the June 1 order and therefore it had filed for rehearing of the June 1 order. National Fuel asserted that it urgently needed to commence construction of the Grand Island station in order to have the station in operation by November 1.

National Fuel has now accepted the certificate issued in Docket No. CP94–112–000, et al., in the June 1 order, as amended by the Commission's September 1, 1994, order on rehearing. However, Paragraph (C) of the order on rehearing provided that before National fuel may begin construction of the facilities authorized in Docket No. CP94–112–000, it must withdraw its prior notice request filed in Docket No. CP94–693–000.

The Commission will treat National Fuel's Notice of Withdrawal as a motion to vacate the authorization granted pursuant to §§ 157.205 and 157.212 in Docket No. CP94–693–000.

Any person desiring to be heard or to make any protest with reference to said motion to vacate should on or before November 3, 1994, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules. All persons who have hereto filed need not file again.

Lois D. Cashell,

Secretary.

[FR Doc. 94–25833 Filed 10–18–94; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP95–8–000]

Questar Pipeline Company; Request Under Blanket Authorization

October 13, 1994.

Take notice that on October 5, 1994, Questar Pipeline Company (Questar), 79 South State Street, Salt Lake City, Utah 84111, filed a prior notice request with the Commission in Docket No. CP95–8–000 pursuant to §§ 157.205 and 157.216(b) of the Commission's Regulations under the Natural Gas Act (NGA) for authorization to abandon a regulator station and appurtenant facilities under the blanket certificate issued in Docket No. CP82–491–000, all as more fully set forth in the request on file with the Commission and open to public inspection.

Questar proposes to abandon and remove their Debenham District Regulator Station (Debenham DRS) and appurtenant facilities located in Summit County, Utah. The Debanham DRS was previously utilized to deliver natural gas to Mountain Fuel Supply Company (Mountain Fuel), an affiliate of Questar. Mountain Fuel has installed and is currently operating a new intermediate high-pressure (IHP) distribution line adjacent to the Debenham DRS, to serve a new residential subdivision and additionally receives natural gas through Questar's DRS WA0388, located west of the Debenham DRS, to serve its remaining customers. Questar states that the Debanham DRS consists of two ¾-inch taps, approximately 105 feet of ¾-inch pipeline, a can-type regulator set and appurtenant facilities. Questar further states that the total investment associated with the DRS facilities proposed to be abandoned is $788.

Any person or the Commission's staff may, within 45 days after the Commission has issued this notice, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the NGA (18 CFR 157.205) a protest to the request. If no protest is filed within the allowed time, 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 NGA.

Lois D. Cashell,

Secretary.

[FR Doc. 94–25834 Filed 10–18–94; 8:45 am]

BILLING CODE 6717–01–M

Office of Hearings and Appeals

Cases Filed; Week of July 8 Through July 15, 1994

During the week of July 8 through July 15, 1994, the appeals and applications for exception or other relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Under DOE procedural regulations, 10 CFR part 205, any person who will be

aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments will be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585.

Dated: October 12, 1994.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of July 8 through July 15, 1994]

Date	Name and location of applicant	Case No.	Type of submission
July 8, 1994	Beulah B. Carney, Herrin, IL	LFA-0401	Appeal of an information request denial. If Granted: The June 3, 1994 Freedom of Information Request Denial issued by the Office of Oak Ridge Operations would be rescinded, and Beulah B. Carney would receive access to copies of the personnel and medical records of John Joseph Carney.
Do	J.J. Ferguson Sand & Gravel, Los Angeles, CA.	RR272-149	Request for modification/rescission in the crude oil refund proceeding. If Granted: The February 24, 1992 Dismissal Letter (Case No. RF272-9456) issued to J.J. Ferguson Sand & Gravel would be modified regarding the firm's application for refund submitted in the Crude Oil Refund Proceeding.
July 11, 1994	Gulf/Winston C. Bresett, Barre, VT	RR300-258	Request for modification/rescission in the Gulf Refund Proceeding. If Granted: The June 6, 1994 Decision and Order (Case No. RR300-254) issued to Winston C. Bresett would be modified regarding the firm's application for refund submitted in the Crude Oil Refund Proceeding.
July 12, 1994	Home Oil Company, Inc., Ashford, AL	LEE-0135	Exception to the reporting requirements. If Granted: Home Oil Company, Inc. would not be required to file Form EIA-782B, "Resellers'/Retailers' Monthly Petroleum Product Sales Report."
July 13, 1994	Hy-C-Tane Corporation, San Pedro, CA	LEE-0136	Exception to the reporting requirements. If Granted: Hy-C-Tane Corporation would not be required to file Form EIA-782B, "Resellers'/Retailers' Monthly Petroleum Product Sales Report."
Do	S.C. Johnson & Son, Inc., Los Angeles, CA.	RR272-150	Request for modification/rescission in the crude oil refund proceeding. If Granted: The May 3, 1991 Dismissal Letter (Case No. RF272-70908) issued to S.C. Johnson & Son, Inc. would be modified regarding the firm's application for refund submitted in the Crude Oil Refund Proceeding.
July 14, 1994	National Security News Service, Washington, DC.	LFA-0402	Appeal of an information request denial. If Granted: National Security News Service would receive complete records relating to "Exercise Midnight Trail (91)".
Do	Smith Bros. Gas Company, Magnolia, NC.	LEE-0137	Exception to the reporting requirement. If Granted: Smith Bros. Gas Co. would not be required to file Form EIA-782B, "Resellers'/Retailers' Monthly Petroleum Product Sales Report."

REFUND APPLICATIONS RECEIVED

[Week of July 8 to July 15, 1994]

Date received	Name of refund proceeding/name of refund applicant	Case No.
07/05/94	Farmers Oil Co., Inc	RF346-114
07/13/94	DST Properties, Inc	RC272-238
07/13/94	Superior Sealants, Inc	RF351-24
07/13/94	Consolidated Gas Supply Corp	RF340-198
07/13/94	Public Service Co. of NC, Inc	RF340-199
07/13/94	Michael Campanile	RF349-13
07/13/94	Manuel Machads	RF349-14
07/14/94	U.S. Reduction	RF300-21793
07/08/94 thru 07/15/94	Crude Oil Refund Applications	RF272-97708 thru RF272-99132
07/08/94 thru 07/15/94	Texaco Refund Applications	RF321-21009 thru RF321-21011

[FR Doc. 94-25904 Filed 10-18-94; 8:45 am]

BILLING CODE 6450-01-P

Notice of Cases Filed; Week of August 19 Through August 26, 1994

During the week of August 19 through August 26, 1994, the appeals and applications for exception or other relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy. Submissions inadvertently

omitted from earlier lists have also been included.

Under DOE procedural regulations, 10 CFR part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585.

Dated: October 12, 1994.

George B. Breznay,

Director, Office of Hearings and Appeals.

SUBMISSION OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of August 19 through August 26, 1994]

Date	Name and location of applicant	Case No.	Type of submission
August 8, 1994	American Cyanamid Co., Gladwyne, Pennsylvania.	RR272–159	Request for modification/rescission in the crude oil refund proceeding. If Granted: The March 2, 1990 Decision and Order in Case No. RF272–45535 issued to American Cyanamid Co. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	Boise Cascade Corp., Gladwyne, Pennsylvania.	RR272–157	Request for modification/rescission in the crude oil refund proceeding. If Granted: The May 4, 1989 Decision and Order in Case No. RF272–67314 issued to Boise Cascade Corp. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	Burlington Industries, Inc., Gladwyne, Pennsylvania.	RR272–158	Request for modification/rescission in the crude oil refund proceeding. If Granted: The May 4, 1989 Decision and Order in Case No. RF272–72747 issued to Burlington Industries, Inc. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	Campbell Soup Co., Gladwyne, Pennsylvania.	RR272–163	Request for modification/rescission in the crude oil refund proceeding. If Granted: The October 31, 1990 Decision and Order in Case No. RF272–499 issued to Campbell Soup Co. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	Celanese Fibers, Inc., Gladwyne, Pennsylvania.	RR272–153	Request for modification/rescission in the crude oil refund proceeding. If Granted: The March 4, 1992 Decision and Order in Case No. RF272–67327 issued to Celanese Fibers, Inc. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	Gilman Paper Company, Gladwyne, Pennsylvania.	RR272–160	Request for modification/rescission in the crude oil refund proceeding. If Granted: The April 26, 1993 Decision and Order in Case No. RF272–65876 issued to Gilman Paper Company would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	Hoechst Celanese Chemical, Gladwyne, Pennsylvania.	RR272–152	Request for modification/rescission in the crude oil refund proceeding. If Granted: The March 4, 1992 Decision and Order in Case No. RF272–67330 issued to Hoechst Celanese Chemical would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	Inland Steel Co., Gladwyne, Pennsylvania.	RR272–154	Request for modification/rescission in the crude oil refund proceeding. If Granted: The January 8, 1992 Decision and Order in Case No. RF272–66565 issued to Inland Steel Co. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	Inland Steel Co., Gladwyne, Pennsylvania.	RR272–156	Request for modification/rescission in the crude oil refund proceeding. If Granted: The January 8, 1992 Decision and Order in Case No. RF272–69981 issued to Inland Steel Co. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	Inland Steel Mining Co., Gladwyne, Pennsylvania.	RR272–155	Request for modification/rescission in the crude oil refund proceeding. If Granted: The January 8, 1992 Decision and Order in Case No. RF272–66566 issued to Inland Steel Mining Co. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.

SUBMISSION OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS—Continued

[Week of August 19 through August 26, 1994]

Date	Name and location of applicant	Case No.	Type of submission
Do	J.P. Stevens & Co., Inc., Gladwyne, Pennsylvania.	RR272–161	Request for modification/rescission in the crude oil refund proceeding. If Granted: The April 25, 1990 Decision and Order in Case No. RF272–4531 issued to J.P. Stevens & Co., Inc. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Do	West Point-Pepperell, Inc., Gladwyne, Pennsylvania.	RR272–162	Request for modification/rescission in the crude oil refund proceeding. If Granted: The January 31, 1991 Decision and Order in Case No. RF272–23786 issued to West Point-Pepperell Inc. would be modified regarding the firm's application for refund submitted in the Crude Oil refund proceeding.
Aug. 22, 1994	Leonard Wall Oil Company, Mackay, Idaho.	LEE–0155	Exception to the reporting requirements. If Granted: Leonard Wall Oil Company would not be required to file Form EIA–782B (Resellers'/Retailers' Monthly Petroleum Product Sales Report).
Do	Quint Cities Petroleum Co., Moline, Illinois.	LEE–0154	Exception to the reporting requirements. If Granted: Quint Cities Petroleum Company would not be required to file Form EIA–782B (Resellers'/Retailers' Monthly Petroleum Product Sales Report).

WEEK OF AUGUST 19 THROUGH AUGUST 26, 1994

Date received	Name of refund proceeding/name of refund application	Case No.
8/19/94 thru 8/26/94	Texaco Refund Applications	RF321–21026 thru RF321–21029
8/23/94	Farmers Coop Elevator	RF272–99148
8/23/94	Keesling Supply, Inc.	RC272–250
8/23/94	Southside Farm Supply	RC272–251

[FR Doc. 94–25905 Filed 10–18–94; 8:45 am]

BILLING CODE 6450–01–P

Cases Filed; Week of September 2 Through September 9, 1994

During the week of September 2 through September 9, 1994, the applications for exception or other relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Under DOE procedural regulations, 10 CFR part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585.

Dated: October 12, 1994.

George B. Breznay,

Director, Office of Hearings and Appeals.

LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of September 2 to September 9, 1994]

Date	Name and location of applicant	Case No.	Type of submission
09/07/94	Ram Corporation, San Antonio, Texas	LEE–0159	Exception to the Reporting Requirements. If granted: Ram Corporation would receive an extension of time in which to file Form EIA–782B, "Resellers'/Retailers'" Monthly Petroleum Product Sales Report.

REFUND APPLICATIONS RECEIVED

[Week of September 2 to September 9, 1994]

Date received	Name of refund proceeding/name of refund applicant	Case No.
09/02/94	Texaco Refund Application	RF321–21031 thru RF321–21034
09/06/94	Barnhill Contracting Co.	RC272–253
09/06/94	Philip Beamer Distributor	RF351–29
09/06/94	Tenneco, Inc.	RF339–21
09/08/94	Ida Pearl Mann & Hopeton	RF349–18

[FR Doc. 94–25906 Filed 10–18–94; 8:45 am]
BILLING CODE 6450–01–P

Issuance of Proposed Decisions and Orders; Week of August 1 Through August 5, 1994

During the week of August 1 through August 5, 1994, the proposed decisions and orders summarized below were issued by the Office of Hearings and Appeals of the Department of Energy with regard to applications for exception.

Under the procedural regulations that apply to exception proceedings (10 CFR part 205, Subpart D), any person who will be aggrieved by the issuance of a proposed decision and order in final form may file a written notice of objection within ten days of service. For purposes of the procedural regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date an aggrieved person receives actual notice, whichever occurs first.

The procedural regulations provide that an aggrieved party who fail to file a Notice of Objection within the time period specified in the regulations will be deemed to consent to the issuance of the proposed decision and order in final form. An aggrieved party who wishes to contest a determination made in a proposed decision and order must also file a detailed statement of objections within 30 days of the date of service of the proposed decision and order. In the statement of objections, the aggrieved party must specify each issue of fact or law that it intends to contest in any further proceeding involving the exception matter.

Copies of the full text of these proposed decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, room 1E–234, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, Monday through Friday, between the hours of 1 p.m. and 5 p.m., except federal holidays.

Dated: October 12, 1994.

George B. Breznay,

Director, Office of Hearings and Appeals.

Buchanan Oil Corporation, Abington, VA; LEE–0114, Reporting Requirements

Buchanan Oil Corporation (Buchanan) filed an Application for Exception from the requirement of filing Form EIA–782B, entitled "Resellers/Retailers' Monthly Petroleum Product Sales Report." The exception request, if granted, would permit Buchanan to be exempted from filing Form EIA–782B. On August 1, 1994, the Department of Energy issued a Proposed Decision and Order which determined that the exception request be denied.

Galaxie Oil Ltd., Rensselaer, NY, LEE–0110, Reporting Requestments

Galaxie Oil Ltd. (Galaxie) filed an Application for Exception from the requirement of filing Form EIA–782B, entitled "Resellers/Retailers' Monthly Petroleum Product Sales Report." The exception request, if granted, would permit Galaxie to be exempted from filing Form EIA–782B. On August 1, 1994, the Department of Energy issued a Proposed Decision and Order which determined that the exception request be denied.

[FR Doc. 94–25903 Filed 10–18–94; 8:45 am]
BILLING CODE 6450–01–M

Notice of Issuance of Decisions and Orders During the Week of August 29 Through September 2, 1994

During the week of August 29 through September 2, 1994 the decisions and orders summarized below were issued with respect to applications for relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Whistleblower Proceeding

Helen Gaidine Oglesbee, 9/2/94, LWA–0006

Helen Gaidine Oglesbee (Oglesbee) filed a request for a hearing on February 28, 1994 under the Department of Energy's Contractor Employee Protection Program, 10 CFR part 708. Oglesbee had been and is currently an employee of Westinghouse Hanford Company (WHC). She alleged that she made health and safety complaints to her immediate supervisor from December 1990 to August 1991, and that beginning in October or November 1991, she elevated these concerns to higher management officials at WHC. Oglesbee maintained that WHC took the following reprisals against her: Failing to respond to her health-related issues and denying her access to reports and analyses of those issues; removing her designation as "lead" secretary; issuing her a performance improvement plan; transferring her involuntarily to another WHC office; issuing her a performance expectations letter; issuing her written reprimands, and delaying promotions to Level IV Secretary and to permanent Plant Engineer. The DOE's Office of Contractor Employee Protection investigated the complaint and found that no reprisals had been taken against Oglesbee that would entitle her to relief under part 708. Oglesbee requested a hearing before the OHA, reasserting her claim that reprisals were taken against her for raising health and safety concerns. The Hearing Officer in the OHA determined that with regard to certain of the allegations raised, Oglesbee failed to meet her burden of proving by a preponderance of the evidence that she made substantial and specific disclosures concerning health and safety to WHC. In those instances where Oglesbee made protected disclosures under part 708 followed closely in time by adverse personnel actions, the Hearing Officer found that WHC had proven by clear and convincing evidence that it would have taken the same actions absent Oglesbee's disclosures, or that Oglesbee had already been provided an adequate remedy for the actions taken against her. Accordingly, the Hearing Officer concluded that Oglesbee failed to establish the existence of any violations of the DOE Contractor Employee Protection Program for which relief was warranted under § 708.10.

Refund Applications

Enron Corporation/Dow Hydrocarbons and Resources, Inc., 8/29/94, RF340–172

Dow Hydrocarbons and Resources, Inc. (Dow) submitted an application for refund in the Enron Corporation refund proceeding. The DOE determined that Dow used Enron propane as a feedstock to produce certain olefins, primarily ethylene, and therefore was entitled to a refund under the presumption of injury for end-users of Enron products. The total refund granted to Dow, including interest, is $409,726.

Estate Of Midway Airlines 9/1/94 RF272–92455

The DOE issued a Decision and Order concerning the Application for Refund of a claimant in the subpart V crude oil overcharge refund proceeding. The Application for Refund was based on purchases of petroleum products the applicant used in its jet airliners. The DOE determined that the applicant had waived its right to receive money from the Crude Oil Subpart V Special Refund Proceeding. Accordingly, the Application for Refund was denied.

Koppers Company, Inc., et al., 9/1/94 RC272–241, et al.

The DOE issued a Decision and Order concerning Applications for Refund submitted in the Subpart V crude oil refund proceeding by Koppers Company, Inc. and eight of its subsidiaries. All nine of these

Applications were previously granted. All of the applicants, however, were subsequently found to have been affiliated with Kaiser Sand & Gravel (Kaiser) on August 7, 1986. Kaiser had filed in the Surface Transporters Stripper Well proceeding, and in doing so, Kaiser had executed a waiver and release waiving its rights and the rights of all its affiliates on August 7, 1986, to receive a crude oil overcharge refund. Accordingly, this Decision rescinded the original refunds granted to the nine applicants.

Texaco Inc./Inter City Texaco, 8/30/94 RR321–139

The DOE issued a Decision and Order granting a Motion for Resconsideration filed on behalf of Inter City Texaco in the Texaco Inc. special refund proceeding. The DOE had previously rescinded a refund granted erroneously to Inter City (Case Nos. RF321–16561 and RF321–19481). Inter City had been granted a refund based on a schedule of purchases provided by Texaco, but the OHA later discovered that Inter City was supplied indirectly for the entire price control period. Inter City then filed a motion for reconsideration estimating its gallonage based on contemporaneous records referring to gallonage purchases from its supplier, Kenny Larson Oil. We therefore found that Inter City satisfied all the requirements necessary to obtain a refund in the Texaco proceeding and accordingly, Inter City's Motion for Reconsideration was granted.

Texaco Inc./Kenny Larson Oil Company, 8/29/94 RF321–20034

Kenneth Larson filed an Application for Refund on behalf of Kenny Larson Oil Company (Larson) requesting a refund based on purchases of Texaco petroleum products. The DOE approved the application but, because Larson was in default in its obligations pursuant to a consent order, determined that the refund should be used to fund the firm's escrow account. Accordingly, the DOE issued a Decision and Order granting the Application and ordering that the refund amount be transferred from the Texaco Inc. escrow account to the Kenny Larson Oil Company escrow account.

Refund Applications

The Office of Hearings and Appeals issued the following Decisions and Orders concerning refund applications, which are not summarized. Copies of the full texts of the Decisions and Orders are available in the Public Reference Room of the Office of Hearings and Appeals.

Atlantic Richfield Company/Blue Valley Fuel Service et al	RF304–13627	08/29/94
Barnhill Contracting Co	RF272–83436	09/02/94
E.L. Garner, Inc	RF272–68015	09/02/94
East Texas Motor Freight	RF272–93633	09/01/94
Enron Corp./Celanese Chemical Co., Inc	RF340–131	09/02/94
Enron Corp./Thomas Butane Company	RF340–180	08/29/94
Raymond Oil, Inc	RF340–190	
IBP, Inc	RF340–197	
Etowah County	RR272–114	08/30/94
Gladieux Refinery, Inc	RF272–93003	09/02/94
Gulf Oil Corporation/Arkansas Electric Cooperative Corp	RF300–20737	08/29/94
Gulf Oil Corporation/Jim's Gulf Station et al	RF300–16025	08/30/94
Gulf Oil Corporation/M&A Corporation et al	RF300–15257	09/01/94
Gulf Oil Corporation/White Grocery & Station	RF300–18424	08/30/94
Keesling Construction	RC272–250	09/01/94
J.W. Finley, Inc	RC272–252	
Lambert Oil Company, Inc	RF272–97063	08/29/94
New Prague School District et al	RF272–97000	09/02/94
R.B. Little, Inc. et al	RF272–85026	09/02/94
Sutton's Steel & Supply, Inc. et al	RF272–93613	09/02/94
Texaco Inc./A. Giordano & Sons, Inc. et al	RF321–7422	09/02/94
Texaco Inc./Lard's Texaco et al	RF321–582	09/02/94
Texaco Inc./Majewski's Texaco et al	RF321–20419	08/31/94
Texaco Inc./North Star Mall Texaco et al	RF321–5424	08/31/94
Texaco Inc./Roy's Texaco et al	RF321–6147	09/02/94
W.R. Grace & Co.—Conn. Davison Chemical Division	RF272–93691	09/01/94
Whitewater School District et al	RF272–80868	09/02/94

Dismissals

The following submissions were dismissed:

Name	Case No.
1st Colony Corp	RF272–95129
200 Haven Avenue	RF272–95341
552 Riverside Drive	RF272–95328
Antley's Texaco	RF321–19686
Augusta Roofing & Metal	RF272–93633
Ben Hill Griffin, Inc	RF272–95163
Bob's Texaco Service	RF321–19663
Clyde's Texaco Service Station	RF321–20046
Colby's Texaco	RF321–19627
Deer Lodge Elementary Schools	RF272–95401
Dixie Electric, Inc	RF272–95225
East Bernard Independent School District	RF272–97114
Felix Street Texaco	RF321–20430
Fife's Texaco Service	RF321–19678
H.B. Powell Texaco Service	RF321–20045
J.O. Ramsey Trucking Co., Inc	RF272–95204
Jackson Sand & Gravel, Inc	RF272–95196

Name	Case No.
John Tinney Delivery Service	RF304–15130
Metro Area Transit	RF272–91565
Motor Freight Express, Inc	RF272–78669
Orv's Texaco	RF321–19637
Pennsylvania Turnpike Commission	RF272–86602
Smith Brothers Gas Co	LEE–0137
Swift Cooperative Oil Co	RF272–95041
The Reedy Company	LEE–0106
Westside Gas	RF321–19684
Winston Limousine Service	RF272–95200

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E–234, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, Monday through Friday, between the hours of 1 p.m. and 5 p.m., except federal holidays. They are also available in Energy Management: Federal Energy Guidelines, a commercially published loose leaf reporter system.

Dated: October 12, 1994.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 94–25907 Filed 10–18–94; 8:45 am]

BILLING CODE 6450–01–P

Notice of Issuance of Decisions and Orders During the Week of September 5 Through September 9, 1994

During the week of September 5 through September 9, 1994 the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Appeals

Pioneer Press, 09/09/94, LFA–4066

Pioneer Press filed an Appeal from a determination issued to it on June 20, 1994, by the Chief of the FOI and Privacy Acts Branch of the Reference and Information Management Division (Chief) of the Department of Energy (DOE). In that determination, the Chief stated that the DOE did not find any documents responsive to the appellant's information request under the Freedom of Information Act (FOIA). In considering the Appeal, the DOE confirmed that the Chief followed procedures which were reasonably calculated to uncover the requested information, and had therefore undertaken an adequate search. Accordingly, the DOE denied the Pioneer Press request.

Refund Applications

The Office of Hearings and Appeals issued the following Decisions and Orders concerning refund applications, which are not summarized. Copies of the full texts of the Decisions and Orders are available in the Public Reference Room of the Office of Hearings and Appeals.

Brown County Schools et al	RF272–79642	09/08/94
Inman Freight Systems, Inc	RF272–78469	09/06/94
American Farm Lines, Inc	RF272–78667	
Lake Hope Asphalt, Inc. et al	RF272–94140	09/09/94
Pacificorp Electric Corp	RC272–240	09/06/94
Pearland Independent School District et al	RC272–80799	09/06/94
Reynolds School District et al	RF272–80764	09/08/94
Salem Leasing Corp	RF272–59176	09/08/94
Texaco Inc./Airkaman of Jacksonville, Inc. et al	RF321–19006	09/09/94

Dismissals

The following submissions were dismissed:

Name	Case No.
Ash Grove Cement Co	RF321–20288
Boise Paving & Asphalt Company	RF321–20425
Border States Paving, Inc	RF321–20286
Brecksville Center Shell	RF315–8730
Bucheit's Texaco	RF321–20421
Dark Shell	RF315–8729
Franklin C. Minton, Sr	RF272–91279
Highland Shell	RF315–8734
KLM, Inc	RF321–20287
Leroy Davis Truck Service	RF272–97186
North Hiland Shell	RF315–8728
Rockside Shell	RF315–8733

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E–234, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585, Monday through Friday, between the hours of 1 p.m. and 5 p.m, except federal holidays. They are also available in Energy Management: Federal Energy Guidelines, a commercially published loose leaf reporter system.

Dated: October 12, 1994.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 94-25902 Filed 10-18-94; 8:45 am]

BILLING CODE 6450-01-P

ENVIRONMENTAL PROTECTION AGENCY

[OPP-300358; FRL-4909-6]

Dimethipin; Request for Comment on Petition To Revoke Certain Feed Additive Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; receipt and availability of petition.

SUMMARY: This document announces the receipt of, and solicits comment on, a petition proposing the revocation of the section 409 feed additive regulation established under the Federal Food, Drug and Cosmetic Act (FFDCA) for dimethipin on cottonseed hulls. This notice sets forth the basis for the petitioner's proposal and provides opportunity for public comment.

DATES: Written comments, identified by the document control number [OPP-300358], must be received on or before November 18, 1994.

ADDRESSES: By mail, submit written comments to: Public Response and Program Resources Branch, Field Operations Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Copies of the petition will be available for public inspection from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays in: Information Services Branch, Program Management and Support Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 1132, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, 703-305-5805. In person, bring comments to: Rm. 1132, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Information submitted and any comment(s) concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment(s) that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice to the submitter. All written comments will be available for public inspection at the address and hours given above.

FOR FURTHER INFORMATION CONTACT: By mail: Niloufar Nazmi, Special Review and Reregistration Division (7508W), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. WF32C5, CS #1, 1921 Jefferson Davis Hwy., Arlington, VA, (703)-308-8028.

SUPPLEMENTARY INFORMATION:

I. Introduction

Statutory Framework

Section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA) (21 U.S.C. 346a) authorizes establishment of tolerances and exemptions from tolerances for the residues of pesticides in or on raw agricultural commodities (RAC's), and section 409 of the act authorizes promulgation of food additive regulations for pesticide residues in processed foods (21 U.S.C. 346(a), 348).

Under section 408 of the act, EPA establishes tolerances, or exemptions from tolerances when appropriate, for pesticide residues in raw agricultural commodities. Food additive regulations setting maximum permissible levels of pesticide residues in processed foods are established under section 402 of the act. Section 409 food/feed additive regulations are required, however, only for certain pesticide residues in processed food. Under section 409(a)(2) of the FFDCA, no section 409 food/feed additive regulation is required if any pesticide residues in a processed food resulting from use on a RAC has been removed to the extent possible by good manufacturing practices and is below the tolerance for that pesticide in or on that RAC. This exemption in section 402(a)(2) is commonly referred to as the "flow-through" provision because it allows the section 408 raw food tolerance to flow through to processed food. Thus, a section 409 food additive regulation is only necessary to prevent foods from being deemed adulterated when despite the use of good manufacturing practices the concentration of the pesticide residues in a processed food is greater than the tolerance prescribed for the raw agricultural commodity, or if the processed food itself is treated or comes in contact with a pesticide. Monitoring and enforcement are carried out by the Federal Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA).

The establishment of a food additive regulation under section 409 requires a finding that use of the pesticide will be "safe" (21 U.S.C. 348(c)(3)). Section 409 also contains the "Delaney Clause," which specifically provides that, with limited exceptions, no additive may be approved if it has been found to induce cancer in man or animals (21 U.S.C. 348(c)(5)).

In setting both section 408 tolerances and section 409 food/feed additive regulations, EPA reviews residue chemistry and toxicology data. To be acceptable, tolerances must be both high enough to cover residues likely to be left when the pesticide is used in accordance with its labeling and low enough to protect the public health. With respect to section 408 tolerances, EPA determines the highest levels of residues that might be present in a raw agricultural commodity based on controlled field trials conducted under the conditions allowed by the product's labeling that are expected to yield maximum residues. Generally, EPA's policy concerning whether a section 409 food additive regulation is needed depends on whether there is a possibility that the processing of a raw agricultural commodity containing pesticide residues would result in residues in the processed food at a level greater than the raw food tolerance.

II. Petition

Uniroyal Chemical Co. has submitted a petition requesting the revocation of the feed additive regulation established under section 409 of the FFDCA for dimethipin on cottonseed hulls. The following provides background information and sets forth the basis for the petitioner's request.

The section 408 tolerance for dimethipin on cottonseed is established at 0.5 part per million (ppm) (40 CFR 180.406). The section 409 feed additive regulation on cottonseed hulls has been established at 0.7 ppm (40 CFR 186.2050). In a peer review of dimethipin, dated January 5, 1990, EPA classified dimethipin as a Group C (possible human) carcinogen.

Dimethipin is the active ingredient in Harvade harvest growth regulants registered by Uniroyal. Uniroyal claims that since Harvade is applied to cotton 7 to 14 days before anticipated harvest, a high percentage of the chemical is deposited on the cotton leaf which subsequently abscises and drops to the soil surface.

Uniroyal Chemical is requesting revocation of the section 409 feed additive regulation for cottonseed hulls because, they claim, that it is not needed and that revoking it will avoid

any inconsistency with the Delaney Clause in section 409 of the FFDCA. According to Uniroyal, concentration of dimethipin in cottonseed hulls does not exceed the section 408 tolerance for cottonseed.

To support the assertion that there is no concentration in the processed commodity, the Petitioner references a processing study [MRID No. 42920902], which was submitted as a requirement of reregistration of dimethipin. Uniroyal claims that this work demonstrates that dimethipin residues do not concentrate in cottonseed hulls (a processed commodity) when compared with those in ginned cottonseed (a raw agricultural commodity) (MRID No. 42467001 and 42920901). The study results are summarized below.

In this new processed fraction study, maturing cotton was treated with an exaggerated (2X) rate, resulting in an average cottonseed residue of 0.563 ppm. Values for cottonseed hulls averaged 0.451 ppm. Only one out of four of the individual sample concentration factors (values for which are -41%, -30%, -5%, and +7%) suggest a small possibility of concentration. The mean factor of -17% indicates a net dilution of nearly one-sixth in generating cottonseed hulls from raw cottonseed. Uniroyal declares that since the 2X rate produced no residue in hulls higher than 0.53 ppm, treatment at the full labeled 1X rate will not have a reasonable probability of producing residues in cottonseed hulls higher than the RAC tolerance of 0.5 ppm.

Uniroyal submitted a critique of two previous studies addressing the magnitude of dimethipin residues in cottonseed and processed fractions. Uniroyal claims that the new study is better documented and more representative of real-world conditions. In light of new data, the Petitioner urges EPA to reconsider whether a section 409 feed additive regulation is necessary for dimethipin in cottonseed hulls.

Pursuant to 40 CFR 177.125 and 177.30, EPA may issue an order ruling on the petition or may issue a proposal in response to the petition and seek further comment. If EPA issues an order in response to the petition, any person adversely affected by the order may file written objections and a request for a hearing on those objections with EPA on or before the 30th day after the date of publication of the order (40 CFR 178.20).

Authority: 21 U.S.C. 346a and 348.

Dated: September 30, 1994.

Daniel M. Barolo,

Director, Office of Pesticide Programs.

[FR Doc. 94-25921 Filed 10-18-94; 8:45 am]

BILLING CODE 6560-50-F

[FRL-5094-1]

Proposed De Minimis Settlement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), As Amended by the Superfund Amendments and Reauthorization Act—Colorado School of Mines Research Institute Site, Golden, CO

AGENCY: Environmental Protection Agency.

ACTION: Notice and request for public comment.

SUMMARY: In accordance with the requirements of section 122(i)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA), notice is hereby given of a proposed *de minimis* settlement under section 122(g) concerning the Colorado School of Mines Research Institute site in Golden, Colorado (Site). The proposed Administrative Order on Consent (AOC) requires 47 Potentially Responsible Parties (PRPs) to pay an aggregate total of $1,340,584.29 to address their liability to the United States Environmental Protection Agency (EPA) related to response actions taken or to be taken at the Site.

DATES: Comments must be submitted by November 18, 1994.

ADDRESSES: The proposed settlement is available for public inspection at the EPA Superfund Records Center, 999 18th Street, 8th Floor, North Tower, Denver, Colorado. Comments should be addressed to Louise Gunderson, Enforcement Specialist (8 HWM-ER), U.S. Environmental Protection Agency, 999 18th Street, suite 500, Denver, Colorado 80202-2405, and should reference the Colorado School of Mines Research Institute Site.

FOR FURTHER INFORMATION CONTACT: Louise Gunderson, Enforcement Specialist, at (303) 293-1868.

SUPPLEMENTARY INFORMATION: Notice of section 122 (g) *De Minimis* Settlement: In accordance with section 122(i)(1) of CERCLA, notice is hereby given that the terms of an Administrative Order on Consent (AOC) have been agreed to by the following 47 parties, for the following amounts:

Option 1 Settlements

American Chemet Corporation ($1,744.31);
American Nuclear Corporation ($2,464.99);
Davy McKee Corporation ($70,411.58);
Lone Star Industries ($14,459.14);
Southern Peru Copper Corporation ($188,986.85);
Union Pacific Corporation ($73,677.28);
United Nuclear Corporation ($269,188.58); and,
Westinghouse/Wyoming Mine ($113,580.21).

Option 2 Settlements

AGIP Mining Company, Inc. ($252.82);
Allied Chemical Corporation ($2,476.87);
Anschutz Mining ($14,123.96);
ARCO ($7,663.58);
Atlas Minerals ($2,795.63);
Behre Dolbear and Company ($236.43);
Brown and Root Construction ($2,916.76);
Cleveland-Cliffs Iron Co. ($6,455.01);
Cominco American, Inc. ($205.01);
Continental Copper & Steel Industries ($41,183.63);
Dravo Corporation ($1,714.12);
Earth Sciences Corporation, Inc. ($220.95);
Esso Resources Canada ($9,325.69);
Fluor Utah, Inc. ($4,753.74);
French American Metals Co. ($871.22);
Gold Fields Mining ($23,063.40);
Gould, Inc. ($457.74);
Gulf Mineral Resources Company ($79,524.28);
Hazen Research, Inc. ($213.66);
Hecla Mining ($477.78);
Homestake Mining Company ($183,105.40);
Idaho Energy Resources ($494.17);
Jersey Minere Zinc ($2,772.86);
Mobil Oil Corporation ($4,465.03);
Molycorp ($41,096.20);
New Jersey Zinc Company ($17,870.78);
Noranda Research ($373.04);
Phillips Petroleum Company ($1,119.85);
Pioneer Nuclear, Inc. ($582.51);
Pioneer Uravan ($480.51);
Randolph Co. ($600.73);
Rexnord, Inc. ($209.11);
Salomon ($134,811.20);
SCM Corporation Glidden Durkee ($204.55);
Stearns Roger Engineering ($204.55);
Superior Oil Company ($2,644.90);
Tennessee Valley Authority ($12,950.46);
Urania Exploration, Inc. ($2,941.35); and,
W.R. Grace ($211.84).

By the terms of the proposed AOC, these PRPs will together pay $1,340,584.26 to the Hazardous

Substance Superfund. This payment represents approximately 13% of the total anticipated costs for the Site upon which this settlement is based.

In exchange for payment, EPA will provide the settling parties with a limited covenant not to sue for liability under sections 106 and 107(a) of CERCLA, including liability for EPA's past costs, the cost of the remedy, and future EPA oversight costs, and under section 7003 of the Solid Waste Disposal Act, as amended (also known as the Resource Conservation and Recovery Act).

The amount that each individual PRP will pay, as shown above, depends upon whether they contributed radioactive hazardous substances or non-radioactive hazardous substances to the Site. The price per pound cost for non-radioactive hazardous substances is $1.9798857. The price per pound for radioactive hazardous substances is $3.9597714. Settlement amounts are calculated by multiplying these per pound costs by the number of pounds of hazardous substances a party sent to the Site (Base Amount), adding a premium payment of either 30% or 130% of the Base Amount, as specified by each Respondent PRP in the AOC, and adding a $200 administrative fee. For parties paying a 30% premium, there is an exception to the covenant not to sue if total response costs at the Site exceed $10,000,000. For parties paying a 130% premium, there is an exception to the covenant not to sue if total response costs at the Site exceed $20,000,000.

For a period of thirty (30) days from the date of this publication, the public may submit comments to EPA relating to the proposed *de minimus* settlement.

A copy of the proposed AOC may be obtained from Louise Gunderson (8HWM-ER), U.S. Environmental Protection Agency, Region VIII, 999 18th Street, suite 500, Denver, Colorado 80202-2405, (303) 293-1868. Additional background information relating to the *de minimus* settlement is available for review at the Superfund Records Center at the above address.

It is so Agreed.

Dated: October 7, 1994.

Jack McGraw,

Acting Regional Administrator.

[FR Doc. 94-25868 Filed 10-18-94; 8:45 am]

BILLING CODE 6560-50-M

[FRL-5093-3]

Notice of Proposed Assessment of Clean Water Act Class II Administrative Penalty to Etched Circuits, Inc. and Opportunity To Comment

AGENCY: Environmental Protection Agency.

ACTION: Notice of Proposed Administrative Penalty Assessment and Opportunity to Comment.

SUMMARY: EPA is providing notice of proposed administrative penalty assessment for alleged violations of the Clean Water Act. EPA is also providing notice of opportunity to comment on the proposed assessment.

Under 33 U.S.C. 1319(g), EPA is authorized to issue orders assessing civil penalties for various violations of the Act. EPA may issue these orders after the commencement of either a Class I or Class II penalty proceeding. EPA provides public notice of the proposed assessments pursuant to 33 U.S.C. 1319(g)(4)(a).

Class II proceedings are conducted under EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation and Suspension of Permits, 40 CFR part 22. The procedures through which the public may submit written comment on a proposed Class II order or participate in a Class II proceeding, and the Procedures by which a Respondent may request a hearing, are set forth in the Consolidated Rules. The deadline for submitting public comment on a proposed Class II order is thirty days after publication of this notice.

On the date identified below, EPA commenced the following Class II proceeding for the assessment of penalties:

In the Matter of Etched Circuits, Inc., located at 1602 Tacoma Way, Redwood City, California; EPA Docket No. CWA-IX-FY94-47; filed on September 30, 1994, with Mr. Steven Armsey, Regional Hearing Clerk, USEPA, Region 9, 75 Hawthorne Street, San Francisco, California 94105, (415) 744-1389; proposed penalty of $125,000 for failure to comply with the categorical pretreatment standards and requirements for new source metal finishers (40 CFR part 433).

FOR FURTHER INFORMATION CONTACT: Persons wishing to receive a copy of EPA's Consolidated Rules, review of the complaint or other documents filed in this proceeding, comment upon a proposed assessment, or otherwise participate in the proceeding should contact the Regional Hearing Clerk identified above. The administrative record for this proceeding is located in the EPA Regional Office identified above, and the file will be open for public inspection during normal business hours. All information submitted by the respondent is available as part of the administrative record, subject to provisions of law restricting public disclosure of confidential information. In order to provide opportunity for public comment, EPA will issue no final order assessing a penalty in these proceedings prior to thirty (30) days after the date of publication of this notice.

Dated: September 30, 1994.

Alexis Strauss,

Acting Director, Water Management Division.

[FR Doc. 94-25871 Filed 10-18-94; 8:45 am]

BILLING CODE 6560-50-F

[FRL-5093-4]

Notice of Proposed Assessment of Clean Water Act Class II Administrative Penalty to Precision Plating, Inc., a Subsidiary of Precision Shooting Equipment, Inc. and Opportunity To Comment

AGENCY: Environmental Protection Agency.

ACTION: Notice of Proposed Administrative Penalty Assessment and Opportunity to Comment.

SUMMARY: EPA is providing notice of proposed administrative penalty assessment for alleged violations of the Clean Water Act. EPA is also providing notice of opportunity to comment on the proposed assessment.

Under 33 U.S.C. 1319(g), EPA is authorized to issue orders assessing civil penalties for various violations of the Act. EPA may issue these orders after the commencement of either a Class I or Class II penalty proceeding. EPA provides public notice of the proposed assessments pursuant to 33 U.S.C. 1319(g)(4)(a).

Class II proceedings are conducted under EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation and Suspension of Permits, 40 CFR part 22. The procedures through which the public may submit written comment on a proposed Class II order or participate in a Class II proceeding, and the Procedures by which a Respondent may request a hearing, are set forth in the Consolidated Rules. The deadline for submitting public comment on a proposed Class II order is thirty days after publication of this notice.

On the date identified below, EPA commenced the following Class II

proceeding for the assessment of penalties:

In the Matter of Precision Plating, Inc., a subsidiary of Precision Shooting Equipment, Inc., located at 2557 West Violet Avenue, Tucson, Arizona; EPA Docket No. CWA-IX-FY94–43; filed on September 29, 1994, with Mr. Steven Armsey, Regional Hearing Clerk, USEPA, Region 9, 75 Hawthorne Street, San Francisco, California 94105, (415) 744–1389; proposed penalty of $81,000 for failure to comply with the categorical pretreatment standards and requirements for new source metal finishers (40 CFR part 433) and the prohibition against dilution as a partial or complete substitute for treatment (40 CFR 403.6(d)).

FOR FURTHER INFORMATION CONTACT: Persons wishing to receive a copy of EPA's Consolidated Rules, review of the complaint or other documents filed in this proceeding, comment upon a proposed assessment, or otherwise participate in the proceeding should contact the Regional Hearing Clerk identified above. The administrative record for this proceeding is located in the EPA Regional Office identified above, and the file will be open for public inspection during normal business hours. All information submitted by the respondent is available as part of the administrative record, subject to provisions of law restricting public disclosure of confidential information. In order to provide opportunity for public comment, EPA will issue no final order assessing a penalty in these proceedings prior to thirty (30) days after the date of publication of this notice.

Dated: September 29, 1994.

Alexis Strauss,

Acting Director, Water Management Division.

[FR Doc. 94–25870 Filed 10–18–94; 8:45 am]

BILLING CODE 6560–50–F

[FRL–5093–9]

Notice of Proposed Assessment of Clean Water Act Class II Administrative Penalty to Phelps Dodge Morenci, Inc. and Opportunity To Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposal of a Clean Water Act Class II Administrative Penalty and Notice of Public Comment Period.

SUMMARY: Pursuant to 33 U.S.C. 1319(g), EPA is authorized to issue orders assessing civil penalties for various violations of the Act. EPA may issue such orders after the commencement of either a Class I or Class II penalty proceeding. EPA provides public notice of the proposed assessment pursuant to 33 U.S.C. 1319(g)(4)(a).

Class II proceedings are conducted under EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation and Suspension of Permits, 40 CFR part 22. The procedures through which the public may submit written comment on a proposed Class II order or participate in a Class II proceeding, and the procedures by which a Respondent may request a hearing, are set forth in the Consolidated Rules. The deadline for submitting public comment on a proposed Class II order is thirty days after publication of this notice.

On the date identified below, EPA commenced the following Class II proceeding for the assessment of penalties:

In the Matter of Phelps Dodge Morenci, Inc. (Morenci Mining), Morenci, Greenlee County, AZ 85540, Docket No. CWA-IX-FY94–34; filed on September 28, 1994 with Steven Armsey, Regional Hearing Clerk, USEPA, Region 9, 75 Hawthorne Street, San Francisco, California 94105, (415) 744–1389; proposed penalty of $60,000, for discharges of pollutants in violation of an NPDES permit.

FOR FURTHER INFORMATION CONTACT: Persons wishing to receive a copy of EPA's Consolidated Rules, review the complaint or other documents filed in this proceeding, comment upon a proposed assessment, or otherwise participate in the proceeding should contact the Regional Hearing Clerk identified above. The administrative record for this proceeding is located in the EPA Regional Office identified above, and the file will be open for public inspection during normal business hours. All information submitted by the respondent is available as part of the administrative record, subject to provisions of law restricting public disclosure of confidential information.

Dated: September 28, 1994.

Alexis Strauss,

Acting Director, Water Management Division.

[FR Doc. 94–25867 Filed 10–18–94; 8:45 am]

BILLING CODE 6560–50–F

FEDERAL COMMUNICATIONS COMMISSION

[PR Docket No. 94–105; DA 94–1115]

Commercial Mobile Radio Services; California State Petition To Retain Regulatory Authority Over Intrastate Cellular Service Rates

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; order waiving certain pleading rules and denying deferral of filing dates, and dismissing a request for issuance of public notice.

SUMMARY: The amendments to the Communications Act in the Omnibus Budget Reconciliation Act of 1993 preempted state rate and entry regulation of commercial mobile radio services. States were given the opportunity to file petitions for the authority to continue regulating these intrastate rates. Under Commission rules, this proceeding contemplates only the filing of comments and replies on the state's petition. This Order waives the prohibition on additional pleadings found in § 20.13(a)(5) of the Commission's Rules and permits additional pleadings to be filed, pursuant to the terms of § 1.45 of the Commission's Rules. The Order also denies a motion filed by Cellular Resellers Association, Inc., Cellular Service, Inc. and ComTech Mobile Telephone Company to defer filing dates for the filing of replies for reasons of efficient administration and docket management. This Order also dismisses as moot a Request for Issuance of a public notice filed by National Cellular Resellers Association.

FOR FURTHER INFORMATION CONTACT: Regina Harrison, Private Radio Bureau, Land Mobile and Microwave Division, (202) 632–7125.

SUPPLEMENTARY INFORMATION:

Order Waiving Certain Pleading Rules and Denying Deferral of Filing Dates

In the Matter of: Petition of People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates.

Adopted: October 7, 1994;
Released: October 7, 1994

By the Chief, Private Radio Bureau:

1. The Commission's rule governing the filing of pleadings in this proceeding contemplates only the filing of comments and replies on the state's petition to retain authority over intrastate cellular rates. It thus excludes

Section 1.45,[1] which governs the general filing periods for motions, from the procedural rules which may apply.[2] This proceeding, however, raises confidentiality issues that have generated the filing of several motions and requests.[3]

2. We believe that equity requires that we permit interested parties to file nonfrivolous pleadings on confidentiality and related issues. We thus waive the prohibition of § 20.13 on additional pleadings, and permit necessary additional pleadings to be filed pursuant to the terms of § 1.45 of the Commission's Rules.

3. We have also received a Motion to Defer Filing Dates.[4] Movants ask that we defer the filing of replies, due October 19, 1994, to either (1) two weeks after opposing parties file any supplemental comments based on the disclosure of confidential information or (2) two weeks after the Commission issues a decision denying access to such confidential information. Movants contend that if additional information is disclosed, this will require supplemental pleadings that will duplicate the October 19 replies and "needlessly expand the number of pleadings (and the time involved) for consideration by the Commission."[5] They argue that a grant of the Motion will expedite review by permitting the filing of a consolidated reply. They add that if additional disclosure is not made, and the Commission moves quickly in reaching that decision, the proposed procedure will result in only minimal delay.[6]

4. We deny the Motion. As we explained in a recent order granting the parties a 15-day extension to file replies, the Commission must meet a one-year statutory deadline for ruling on the state's petition and deciding any reconsideration. We stressed that, "The Commission is faced with stringent statutory deadlines in a complex and massive proceeding."[7] Although we agree with Movants that disclosure of additional information may require that we permit the parties to supplement their comments, we cannot now predict whether such additional disclosure will be necessary. We believe that efficient administration and docket management requires adherence to the October 19, 1994 deadline for filing replies in this proceeding. For the foregoing reasons, we do not believe that good cause has been shown for the requested deferral.

5. Pursuant to § 0.331 of the Commission's Rules,[8] the provisions of § 20.13(a)(5) are waived to the extent indicated herein, the Motion to Defer Filing Dates filed by Cellular Resellers Association, Inc., Cellular Service, Inc., and ComTech Mobile Telephone Company is denied, and PR Docket No. 94–105 Notice of Ex Parte Contact and Request for Issuance of a Public Notice is dismissed as moot to the extent indicated herein.

Gerald P. Vaughan,

Deputy Chief, Private Radio Bureau.

[FR Doc. 94–25865 Filed 10–18–94; 8:45 am]

BILLING CODE 6712–01–M

[1] 47 CFR 1.45.

[2] Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1522 (1994), 59 Fed. Reg. 18493 (Apr. 19, 1994) (to be codified at 47 CFR 20.13 (a)(5)).

[3] *See, e.g.*, Motion of the Cellular Carriers Association of California to Reject Petition or, Alternatively, Reject Redacted Information (Sept. 19, 1994); Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order, filed by the National Cellular Resellers Association (Sept. 19, 1994); Emergency Motion to Compel Production to the California Public Utilities Commission of Information Contained in Oppositions to California's Petition to Retain State Regulatory Authority over Intrastate Cellular Service Rates (dated Sept. 29, 1994).

We have also received PR Docket No. 94–105 Notice of Ex Parte Contact and Request for Issuance of a Public Notice (Sept. 23, 1994), filed by the National Cellular Resellers Association (NCRA), asking that the Commission issue a Public Notice permitting any interested party to participate by telephone or in person in a September 30, 1994 meeting on confidentiality issues. All parties to the proceeding were given actual notice of the meeting and permitted to participate either in person or by telephone. Moreover, on September 30, 1994, the Commission issued a Public Notice of Comment Sought on Draft Protective Order, DA 94–1083, announcing that all interested parties could comment by October 7, 1994 on a draft protective agreement that had been distributed to all parties of record. We believe that these actions have rendered the NCRA request moot and we dismiss it on that ground.

[4] Motion to Defer Filing Dates (Motion) of Cellular Resellers Association, Cellular Service, Inc. and Com Tech Mobile Telephone Co. (Oct. 4, 1994) (collectively Movants).

[5] Motion at 3.

[6] Motion at 3–4.

[7] Order Extending Time and Permitting Replies to Revised Petition, DA 94–1054 (Sept. 26, 1994) at 1–2.

[8] 47 CFR 0.331.

[Report No. 2035]

Petition for Reconsideration and Clarification of Actions in Rulemaking Proceedings

October 17, 1994.

Petition for reconsideration and clarification have been filed in the Commission rulemaking proceedings listed in this Public Notice and published pursuant to 47 CFR 1.429(e). The full text of these documents are available for viewing and copying in Room 239, 1919 M Street, N.W., Washington, D.C. or may be purchased from the Commission's copy contractor ITS, Inc. (202) 857–3800. Opposition to these petitions must be filed November 3, 1994. See § 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Expanded Interconnection with Local Telephone Company Facilities (CC Docket No. 91–141).

Number of Petitions Filed: 1

Subject: Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Service (GN Docket No. 90–314 and ET Docket No. 92–100).

Number of Petitions Filed: 4

Subject: Implementation of Section 309(j) of the Communications Act—Competitive Bidding (PP Docket No. 93–253).

Number of Petitions Filed: 3

Subject: Implementation of Section 309(j) of the Communications Act–Competitive Bidding and Narrowband PCS (PP Docket No. 93–253) Amendment of the Commission's Rules to Establish New Narrowband Personal communications Services (GN Docket No. 90–314 and ET Docket No. 92–100).

Number of Petition Filed: 1

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 94–25863 Filed 10–18–94; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL RESERVE SYSTEM

Alpha Financial Group, Inc., et al.; Notice of Applications To Engage de novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of

Governors. Interested persons may express their views in writing 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.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 8, 1994.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Alpha Financial Group, Inc., Minonk, Illinois; to engage *de novo* through its subsidiary Alpha Financial Services, Inc., Toluca, Illinois, in providing discount brokerage services, pursuant to § 225.25(b)(15) of the Board's Regulation Y.

2. Castle BancGroup, Inc., DeKalb, Illinois; to engage *de novo* in providing data processing services to others pursuant to § 225.25(b)(7) of the Board's Regulation Y.

B. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Mountain Bancshares, Inc. Newport, Minnesota; to engage *de novo* in making, acquiring or servicing loans or other extensions of credit, pursuant to § 225.25(b)(1).

C. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Riverway Holdings, Inc., Houston, Texas, and Riverway Holdings of Delaware, Inc., Wilmington, Delaware; to engage *de novo* through its subsidiary Riverway Financial Services, Inc., Houston, Texas, in advising and providing investment advice to company and providing portfolio investment advice to any other person, pursuant to § 225.25(b)(4) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, October 13, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-25858 Filed 10-18-94; 8:45 am]

BILLING CODE 6210-01-F

Boatmen's Bancshares, Inc., et al.; Formations of, Acquisitions by, and Mergers of Bank Holding Companies; and Acquisitions of Nonbanking Companies

The companies listed in this notice have applied under § 225.14 of the Board's Regulation Y (12 CFR 225.14) for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) to become a bank holding company or to acquire voting securities of a bank or bank holding company. The listed companies have also applied under § 225.23(a)(2) of Regulation Y (12 CFR 225.23(a)(2)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies, or to engage in such an activity. Unless otherwise noted, these activities will be conducted throughout the United States.

The applications are 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.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 13, 1994.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Boatmen's Bancshares, Inc., St. Louis, Missouri; to acquire 100 percent of the voting shares of Worthen Banking Corporation, Little Rock, Arkansas; and thereby indirectly acquire Worthen National Bank of Arkansas, Little Rock, Arkansas; Worthen National Bank of Batesville, Batesville, Arkansas; Worthen National Bank of Camden, Camden, Arkansas; Worthen National Bank of Conway, Conway, Arkansas; Worthen National Bank of Harrison, Harrison, Arkansas; Worthen National Bank of Hot Springs, Hot Springs, Arkansas; Worthen National Bank of Newark, Newark, Arkansas; Worthen National Bank of Northwest Arkansas, Fayetteville, Arkansas; Worthen National Bank of Pine Bluff, Pine Bluff, Arkansas; Worthen National Bank of Russellville, Russellville, Arkansas; and Worthen National Bank of Texas; Austin, Texas.

In connection with this application, Applicant has also applied to acquire Consumer Protective Life Insurance Company, Little Rock, Arkansas, and thereby engage in the sale, as agent or broker, of credit related insurance and to insure or reinsure credit life and accident and health insurance, pursuant to § 225.25(b)(8)(i) of the Board's Regulation Y.

In connection with this application, Applicant has also applied to acquire Worthen Trust Company, Little Rock, Arkansas, and thereby engage in trust administration and operations, to act as trustee, executor, administrator, guardian, custodian of any securities of the United States Government or any agency or instrumentality thereof, and in any other fiduciary capacity which is authorized by the Arkansas law for corporate fiduciaries charted in those states, pursuant to § 225.25(b)(3) of the Board's Regulation Y.

B. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. Malmo Bancorp, Inc., Malmo, Nebraska; to become a bank holding company by acquiring 100 percent of the voting shares of Malmo Agency Company, Malmo, Nebraska, and thereby indirectly acquire Security Home Bank, Malmo, Nebraska.

In connection with this application, Applicant has also applied to acquire Malmo Bancorp, Inc., Malmo, Nebraska, through the acquisition and merger with Malmo Agency Company, Malmo,

Nebraska, and thereby engage in general insurance activities in a town of less than 5,000 in population, pursuant to § 225.25(b)(8)(iii)(A) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, October 13, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-25859 Filed 10-18-94; 8:45 am]

BILLING CODE 6210-01-F

Chadwick Bancshares, Inc., et al.; Acquisitions of Companies Engaged in Permissible Nonbanking Activities

The organizations listed in this notice have 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.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing 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.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated for the application or the offices of the Board of Governors not later than November 13, 1994.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Chadwick Bancshares, Inc., Chadwick, Illinois; to acquire Community Insurance, Inc., Miles, Iowa; and thereby engage directly or indirectly in certain nonbanking activities, to acquire assets of a going concern, or to acquire direct or indirect ownership, control or power to vote at least 80 percent of the voting shares of Community Insurance, Inc., Miles, Iowa (CII). Applicant through CII, proposes to engage in insurance agency activities regarding life and health insurance (including nursing home long-term care insurance), annuities, and credit life insurance, pursuant to § 225.25(8)(i),(iii) of the Board's Regulation Y. These activities will be conducted in Miles, Iowa.

2. Northwest Financial Corp., Spencer, Iowa; to acquire James Mortgage Corporation, Des Moines, Iowa, and thereby indirectly engage in the activity of originating and selling conventional, FHA, and VA residential mortgages, pursuant to § 225.25(b)(1) of the Board's Regulation Y. Comments on this application must be received by October 31, 1994.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Boatmen's Bancshares, Inc., St. Louis, Missouri; to acquire National Mortgage Company, Memphis, Tennessee; B-M Homes, Inc., Memphis, Tennessee; Macon Homes, Inc., Memphis, Tennessee; Marbel Homes, Inc., Memphis, Tennessee; Margolin Bros., Appliance Co., Memphis, Tennessee; Margolin Bros. Realty Co., Memphis, Tennessee; National Builders, Inc., Memphis, Tennessee; Arkansas Home Loan Company, Memphis, Tennessee; and National Home Loan Company, Inc., Memphis, Tennessee, and thereby engage in making, acquiring or servicing loans or other extension of credit, pursuant to § 225.25(b)(1) of the Board's Regulation Y; acting as agent or broker for insurance (including home mortgage redemption insurance that is directly related to an extension of credit made by Applicant, and companies, and that is limited to assuring the repayment of the outstanding balance due on the extension of credit in the event of death, disability of involuntary unemployment of the debtor, pursuant to § 225.25(b)(8)(i) of the Board's Regulation Y; and acting as investment or financial advisor, and to perform appraisals of real estate and tangible and intangible personal property, including securities, pursuant to §§ 225.25(b)(4) and (b)(13) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, October 13, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-25860 Filed 10-18-94; 8:45 am]

BILLING CODE 6210-01-F

Premier Bankshares Corporation, et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than November 13, 1994.

A. Federal Reserve Bank of Richmond (Lloyd W. Bostian, Jr., Senior Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. Premier Bankshares Corporation, Tazewell, Virginia; to acquire 100 percent of the voting shares of Dickenson-Buchanan Bank, Haysi, Virginia.

B. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Coal City Corporation, Coal City, Illinois, and Manufacturers National Corporation, Chicago, Illinois; to acquire 82.35 percent of the voting shares of Peterson Bank, Chicago, Illinois.

C. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Community First Bankshares, Inc.*, Fargo, North Dakota, to acquire 24.75 percent of the voting shares of Bank of Colorado Holding Company, Vail, Colorado, and thereby indirectly acquire Vail Bank, Vail, Colorado.

2. *Norwest Corporation*, Minneapolis, Minnesota; to acquire 100 percent of the voting shares of Independent Bancorp of Arizona, Inc., Phoenix, Arizona, and thereby indirectly acquire Caliber Bank, Phoenix, Arizona.

D. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Fourth Financial Corporation*, Wichita, Kansas; to acquire 100 percent of the voting shares of Blackwell Security Bancshares, Inc., Blackwell, Oklahoma, and thereby indirectly acquire Security Bank and Trust Company, Blackwell, Oklahoma.

2. *Peoples Trust of 1987*, Ottawa, Kansas and its subsidiary Peoples, Inc., Ottawa, Kansas; to acquire 47.5 percent of the voting shares of Johnson County Bank, Overland Park, Kansas (in organization).

E. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. *Century Capital Financial, Inc.*, Kilgore, Texas; to become a bank holding company by acquiring 100 percent of the voting shares of Century Capital Financial-Delaware, Wilmington, Delaware, and thereby indirectly acquire City National Bank of Kilgore, Kilgore, Texas.

In addition, Century Capital Financial-Delaware, Inc., Wilmington, Delaware has applied to become a bank holding company by acquiring 100 percent of the voting shares of City National Bank of Kilgore, Kilgore, Texas.

2. *Falcon Bancshares, Inc.*, Laredo, Texas; to acquire 100 percent of the voting shares of Falcon National Bank, Laredo, Texas.

3. *Riverway Holdings, Inc.*, Houston, Texas; to become a bank holding company by acquiring 98.5 percent of the voting shares of Riverway Holding of Delaware Inc., Wilmington, Delaware, and thereby indirectly acquire Riverway Bank, Houston, Texas. In addition, Riverway Holdings of Delaware, Inc., Wilmington, Delaware, has applied to become a bank holding company by acquiring 100 percent of the voting shares of Riverway Holdings of Delaware, Inc., Wilmington, Delaware, and thereby indirectly acquire Riverway Bank, Houston, Texas.

Board of Governors of the Federal Reserve System, October 13, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-25861 Filed 10-18-94; 8:45 am]

BILLING CODE 6210-01-F

James E. & Margo Sweeney, 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 November 8, 1994.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *James E. & Margo Sweeney*, Allamakee, Iowa; to acquire an additional 23.53 percent, for a total of 29.41 percent, of the voting shares of WFC, Inc., Waukon, Iowa, and thereby indirectly acquire Waukon State Bank, Waukon, Iowa.

B. Federal Reserve Bank of Minneapolis (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Christopher and Jeffrey Browne*, Wadena, Minnesota; to each acquire an additional 45.24 percent, for a total of 46.04 percent, of the voting shares of Wadena Bankshares, Inc., Wadena, Minnesota, and thereby indirectly acquire Wadena State Bank, Wadena, Minnesota.

2. *The McHugh Family Trust*, Edina, Minnesota; to acquire 52.9 percent of the voting shares of Maple Lake Bancorporation, Inc., Edina, Minnesota, and thereby indirectly acquire Security State Bank of Maple Lake, Maple Lake, Minnesota.

Board of Governors of the Federal Reserve System, October 13, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94-25862 Filed 10-18-94; 8:45 am]

BILLING CODE 6210-01-F

GOVERNMENT PRINTING OFFICE

Public Meeting for Federal Depository Libraries, Federal, State and Local Agencies, and Others Interested in a Demonstration of GPO Access (Pub. L. 103–40), the New Online Federal Register, Congressional Record, and Congressional Bills

The Superintendent of Documents will hold two public meetings for Federal Depository Libraries, Government agencies, and others interested in a demonstration of the Government Printing Office's Access system, provided under the GPO Electronic Information Access Enhancement Act of 1993 (Pub. L. 103–40).

Two meetings will be held on Friday, October 21, 1994. The first meeting, scheduled from 9:30 a.m. to 12 noon, will be for Federal depository libraries only; the second, scheduled from 1:30 p.m. to 3 p.m., will be for Federal, State, and local agencies, and all other interested organizations. Both sessions will be held at the California State Library, Library-Courts Building, 914 Capitol Mall, Room 500, Sacramento, California.

Under Public Law 103–40, the Superintendent of Documents implemented on June 8, 1994, a system of online access to the **Federal Register**, Congressional Record, and Congressional Bills databases. The purpose of the meetings 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 databases: 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 Congressional Bills from the 103d Congress (1993–1994). The **Federal Register** and Congressional Record databases provide ASCII text files, with all graphics included as individual files in TIFF format. Both databases 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 Congressional 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 Congressional Bills.

Individuals interested in attending either session should contact Tom Andersen at the California State Library by telephone on 916–653–0085, or by e-mail at tanderse@library.ca.gov.

Michael F. DiMario,

Public Printer.

[FR Doc. 94–25825 Filed 10–18–94; 8:45 am]

BILLING CODE 1505–02–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Request for Nomination for Members on Public Advisory Committee

AGENCY: The Administration on Aging, HHS.

ACTION: Notice of Nominations.

SUMMARY: The Administration on Aging (AoA) is requesting nominations for members to serve on a proposed Administration on Aging National Nutrition Advisory Council.

DATES: Nominations must be received by October 31, 1994.

ADDRESSES: All nominations for membership must be addressed to Jean L. Lloyd, Nutrition Officer (address below).

FOR FURTHER INFORMATION CONTACT: Jean L. Lloyd, Nutrition Officer, Administration on Aging, Office of State and Community Programs, 330 Independence Avenue SW., Washington, DC 20201, 202–619–0011.

SUPPLEMENTARY INFORMATION:

Administration on Aging National Nutrition Advisory Council

The Administration on Aging is requesting nominations for members to serve on the proposed Administration on Aging National Nutrition Advisory Council. The function of the Council is as follows:

1. To develop recommendations for guidelines on the efficiency and quality in furnishing nutrition services provided under Title III, Part C of the Older Americans Act;

2. To assist and advise the Assistant Secretary for Aging in the areas of nutrition and aging, nutrition and health, malnutrition, nutrition and home and community-based care, hunger, food security/insecurity, food, community nutrition services, community nutrition services delivery, prevention and intervention strategies, special needs of minority elderly, Older Americans Act nutrition services, nutrition policy and other matters in these areas which affect older individuals;

3. To assist and advise the Assistant Secretary for Aging regarding the Older Americans Act;

4. To provide a public forum for discussion of concerns regarding nutrition and the elderly;

5. To provide a structure for communication and cooperation between the Assistant Secretary for Aging and organizations with an interest in nutrition and aging.

The Administration on Aging is currently seeking the authority to establish the proposed Administration on Aging National Nutrition Advisory Council. Nominations are being sought prior to the establishment of the Administration on Aging National Nutrition Advisory Council in order to expedite the process of selecting members.

Criteria for Members

Persons nominated for membership on the proposed Administration on Aging National Nutrition Advisory Council shall have knowledge, expertise and experience in one or more of the following areas: Nutrition, nutrition and aging, malnutrition, nutrition and home and community-based care, hunger, food security/insecurity, food community nutrition services, community nutrition services delivery, prevention and intervention strategies, special needs of minority elderly, Older Americans Act nutrition services nutrition policy and other matters in these areas which affect older individuals.

Nomination Procedures

Any interested person may nominate a qualified person for membership. A nomination form is available from the Jean L. Lloyd.

The Administration on Aging has a special interest in assuring that older persons, older women, minority groups, and the physically disabled are adequately represented on the advisory committee and therefore extends particular encouragement to nominations for qualified older persons, older women, members of minority groups and those with physical disabilities.

This notice is issued under the Federal Advisory Committees Act (5 U.S.C. Appendix 2) and 21 CFR part 14 relating to advisory committees.

Dated: October 13, 1994.

Fernando M. Torres-Gil,

Assistant Secretary for Aging.

[FR Doc. 94–25822 Filed 10–18–94; 8:45 am]

BILLING CODE 4150–04–M

Food and Drug Administration

[Docket No. 94N–0368]

The Upjohn Co., et al.; Withdrawal of Approval of Seven Abbreviated Antibiotic Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of seven abbreviated antibiotic applications (AADA's). The holders of the AADA's notified the agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

EFFECTIVE DATE: November 18, 1994.

FOR FURTHER INFORMATION CONTACT: Lola E. Batson, Center for Drug Evaluation and Research (HFD–360), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1038.

SUPPLEMENTARY INFORMATION: The holders of the AADA's listed in the table in this document have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications. The applicants have also, by their request, waived their opportunity for a hearing.

AADA No.	Drug	Applicant
61–651	Penicillin V Potassium Tablets, U.S.P., 500 milligrams (mg)	The Upjohn Co., 7000 Portage Rd., Kalamazoo, MI 499001–0199.

AADA No.	Drug	Applicant
61–656	Penicillin V Potassium for Oral Solution, U.S.P., 125 mg/5 milliliters (mL) and 250 mg/5 mL	Do.
61–838	Penicillin G Potassium(nonsterile bulk, technical grade)	SmithKline Beecham Pharmaceuticals, Four Falls Corporate Center, Rt. 23 and Woodmont Ave., P.O. Box 1510, King of Prussia, PA 19406.
62–158	Bacitracin Ophthalmic Ointment, U.S.P., 500 units/gram (g)	Pharmaderm, Division of Altana Inc., 60 Baylis Rd., Melville, NY 11747.
62–440	Gentamicin Sulfate Ophthalmic Solution, U.S.P., 0.3%	Pharmafair, Inc., 110 Kennedy Dr., Hauppauge, NY 11788.
62–558	Erythromycin Ethylsuccinate Oral Suspension, U.S.P., 400 mg/5 mL	Do.
62–799	Bacitracin Ointment, U.S.P., 500 units/g	Combe Inc., 1101 Westchester Ave., White Plains, NY 10604–3597.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)) and under authority delegated to the Director, Center for Drug Evaluation and Research (21 CFR 5.82), approval of the AADA's listed above, and all amendments and supplements thereto, is hereby withdrawn, effective on November 18, 1994.

Dated: October 4, 1994.

Janet Woodcock,

Director, Center for Drug Evaluation and Research.

[FR Doc. 94–25908 Filed 10–18–94; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 94N–0369]

King Pharmaceuticals, Inc., et al.; Withdrawal of Approval of 27 Abbreviated New Drug Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of 27 abbreviated new drug applications (ANDA's). The holders of the ANDA's notified the agency in writing that the drug products were no longer marketed and requested that the approval of the applications be withdrawn.

EFFECTIVE DATE: November 18, 1994.

FOR FURTHER INFORMATION CONTACT: Lola E. Batson, Center for Drug Evaluation and Research (HFD–360), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1038.

SUPPLEMENTARY INFORMATION: The holders of the ANDA's listed in the table in this document have informed FDA that these drug products are no longer marketed and have requested that FDA withdraw approval of the applications. The applicants have also, by their request, waived their opportunity for a hearing.

ANDA No.	Drug	Applicant
70–106	Metoclopramide Tablets, U.S.P., 10 milligrams (mg)	King Pharmaceuticals, Inc., 501 Fifth St., Bristol, TN 37620.
70–484	Betamethasone Valerate Lotion, U.S.P., 0.1%	Pharmafair, Inc., 110 Kennedy Dr., Hauppauge, NY 11788.
72–817	Albuterol Tablets, U.S.P., 2 mg	Warner Chilcott Laboratories, 201 Tabor Rd., Morris Plains, NJ 07950.
72–818	Albuterol Tablets, U.S.P., 4 mg	Do.
80–635	Diphenhydramine Hydrochloride Capsules, U.S.P., 50 mg	Roxane Laboratories, Inc., P.O. Box 16532, Colombus, OH 43216–6532.
80–731	Cortisone Acetate Tablets, U.S.P., 25 mg	Inwood Laboratories, Inc., 300 Prospect St., Inwood, NY 11896.
80–732	Hydrocortisone Tablets, U.S.P., 20 mg	Do.
80–932	Propylthiouracil Tablets, U.S.P., 50 mg	Danbury Pharmacal, Inc., 131 West St., Danbury, CT 06810.
85–902	Homatropine Methylbromide Tablets, U.S.P., 10 mg	Lemmon Co., 650 Cathill Rd., Sellersville, PA 18960.
86–610	Amitriptyline Hydrochloride Tablets, U.S.P., 10 mg	Do.
86–853	Amitriptyline Hydrochloride Tablets, U.S.P., 150 mg	Do.
86–854	Amitriptyline Hydrochloride Tablets, U.S.P., 100 mg	Do.
86–857	Amitriptyline Hydrochloride Tablets, U.S.P., 50 mg	Do.
86–859	Amitriptyline Hydrochloride Tablets, U.S.P., 25 mg	Do.
86–860	Amitriptyline Hydrochloride Tablets, U.S.P., 75 mg	Do.
87–838	Hydrocortisone Cream, U.S.P., 1%	Pharmafair, Inc.
88–150	Cyclopentolate Hydrochloride Ophthalmic Solution, U.S.P., 1%	Do.
88–274	Tropicamide Ophthalmic Solution, U.S.P., 0.5%	Do.
88–433	Dexamethasone Sodium Phosphate Ophthalmic, Solution, U.S.P., 0.1%	Do.
88–560	Hydralazine Hydrochloride Tablets, U.S.P.	Amide Pharmaceutical, Inc., 101 East Main St., Little Falls, NJ 07424.
88–643	Cyclopentolate Hydrochloride Ophthalmic Solution, U.S.P., 0.5%	Pharmafair, Inc.
88–649	Hydralazine Hydrochloride Tablets, U.S.P.	Amide Pharmaceutical, Inc.
88–713	Hydroxyzine Pamoate Capsules, U.S.P., 25 mg	Lemmon Co.

ANDA No.	Drug	Applicant
88–746	Theophylline Syrup, 150 mg/15 milliliters	Marion Merrell Dow, Inc., P.O. Box 9627, Kansas City, MO 64134–0627.
88–947	Sulfacetamide Sodium 10% with Hydroxyethylcellulose Ophthalmic Solution	Pharmafair, Inc.
89–115	Butalbital, Acetaminophen, and Caffeine Capsules, U.S.P., 50 mg/325 mg/40 mg	Krebs and Associates, P.C., For U.S. Pharmaceutical Corp., 2401–C Mellon Ct., Decatur, GA 30035.
89–360	Hydrocodone Bitartrate and Acetaminophen Capsules, U.S.P., 5 mg/500 mg	Central Pharmaceuticals, Inc., 120 East Third St., P.O. Box 328, Seymour, IN 47274–0328.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(e)) and under authority delegated to the Director, Center for Drug Evaluation and Research (21 CFR 5.82), approval of the ANDA's listed above, and all amendments and supplements thereto, is hereby withdrawn, effective November 18, 1994.

Dated: October 4, 1994.

Janet Woodcock,

Director, Center for Drug Evaluation and Research.

[FR Doc. 94–25909 Filed 10–18–94; 8:45 am]

BILLING CODE 4160–01–F

National Institutes of Health

National Cancer Institute; Opportunity for a Cooperative Research Agreement (CRADA) for the Scientific and Commercial Development of Monoclonal Antibodies to a Tumor-Specific Growth Factor for the Diagnosis and Prognosis of Premalignant Lesions and Cancer

AGENCY: National Institutes of Health, PHS, DHHS.

ACTION: Readvertisement.

SUMMARY: This is a readvertisement of a notice which originally appeared in the **Federal Register** on August 16, 1994 (FR 59 42061–42062). Two changes are incorporated: The date for receipt of proposals has been extended and Item 8 under "The role of the successful corporate partner * * *" has been modified. The complete, revised text reads as follows:

The National Cancer Institute (NCI) seeks a pharmaceutical or biotechnology company that can effectively pursue the scientific and commercial generation and development of a panel of monoclonal antibodies against an epidermal growth factor (EGF)-related peptide, cripto-1 (CR–1). The project is of scientific importance because CR–1 is a protein that exhibits structural homology to the EGF/transforming growth factor α (TGFα) gene family peptides. As such, CR–1 might function as a growth factor or growth inhibitor. Therefore, CR–1 may be important as an autocrine or paracrine modulator in such processes as tumor cell growth, wound repair, neovascularization, and inflammation.

NCI has successfully isolated and cloned the gene that encodes CR–1, an EGF-related peptide growth factor that does not function through the EGF receptor. The NCI has also obtained a rabbit anti-peptide polyclonal antibody that can detect the expression of CR–1 in formalin-fixed, paraffin-embedded human tissue sections. CR–1 has been shown to be preferentially and differentially expressed in several different human premalignant lesions and cancers. The selected sponsor will purify a recombinant CR–1 protein and use this material as an immunogen to generate anti-CR–1 monoclonal antibodies for use in the diagnosis and prognosis of human cancers.

ADDRESSES: Inquiries and proposals regarding this opportunity should be addressed to either Michael Christini or Mark Noel (Tel # 301–496–0477 Fax # 301–402–2117), Office of Technology Development, National Cancer Institute, Bldg. 31, Room 4A49, NIH, 9000 Rockville Pike, Bethesda, MD 20892.

DATES: Proposals must be received at the above address by November 18, 1994.

SUPPLEMENTARY INFORMATION: The NCI is seeking a pharmaceutical or biotechnology company which, after obtaining a license in accordance with the requirements of the regulations governing the transfer of Government-developed agents (37 CFR part 404), can purify a recombinant CR–1 protein for which patents are pending or have been issued and to utilize this purified recombinant CR–1 protein as an immunogen to generate a panel of mouse monoclonal antibodies. The immunoreactive CR–1 protein has been detected by immunoperoxidase staining using a rabbit anti-peptide polyclonal CR–1 antibody in a majority of human colon cancers, breast cancers, gastric cancers and pancreatic cancers. Little or no staining was detected in surrounding, noninvolved colon, breast or gastric epithelial cells. In addition, a majority of premalignant colonic adenomas, breast ductal carcinomas *in situ* and gastric intestinal metaplasia express immunoreactive CR–1.

A recombinant CR–1 protein has been generated using a yeast expression vector in *Pichia pastoris* and a partially purified protein obtained. This protein as well as synthetic, refolded peptides that correspond to the EGF-like domain in CR–1 are mitogenic for human breast cancer cells yet fail to bind to the EGF receptor or other type I receptor tyrosine kinases. Expression of CR–1 antisense mRNA using a recombinant, replication defective retroviral expression vector in colon cancer cells that expresses CR–1 inhibits the growth of these cells *in vivo* in nude mice. In order to utilize the diagnostic and therapeutic potentials of CR–1, it will be necessary to purify a significant amount of the recombinant CR–1 protein to more fully define its biological properties and to identify the receptor through which it functions. In addition, mouse monoclonal antibodies against the purified CR–1 recombinant protein will expedite screening studies for CR–1 expression in other human premalignant lesions and cancers and should exhibit more specificity and sensitivity for the detection of CR–1 in tissues by immunocytochemistry (ICC) or in tissue extracts or serum samples by ELISA.

The role of the National Cancer Institute, the Division of Cancer Biology, Diagnosis and Centers includes:

1. NCI will provide expression vectors that encode CR–1 and can be used to produce CR–1 in *E. coli*.

2. NCI will provide expression vectors that encode CR–1 in yeast *Pichia pastoris* containing several milligrams of recombinant CR–1 protein.

3. NCI will provide a rabbit polyclonal anti-CR–1 antibody for monitoring CR–1 recovery during the purification from the yeast conditioned medium.

4. NCI will assay the purified recombinant CR–1 protein for bioactivity.

5. NCI will screen anti-CR–1 monoclonal antibodies for reactivity by

Western blot analysis against native CR–1 protein from CR–1 positive human embryonal carcinoma or colon carcinoma cells.

The role of the successful corporate partner will include:

1. Obtain background license in appropriate fields of use to the relevant Government patent rights.

2. Purify to homogeneity 30–50 milligrams of CR–1 from *Pichia pastoris* conditioned medium.

3. Provide the purified recombinant CR–1 protein.

4. Utilize the purified recombinant CR–1 protein to generate mouse anti-CR–1 monoclonal antibodies.

5. Screen anti-CR–1 monoclonal antibodies for specificity, reactivity, and sensitivity toward recombinant CR–1 protein.

6. Ascertain whether monoclonal anti-CR–1 antibodies can detect native CR–1 protein in CR–1 positive human colorectal or embryonal carcinoma cells by radioimmunoprecipitation analysis and by ELISA.

7. Determine whether anti-CR–1 antibodies can be used for ICC on formalin-fixed, paraffin embedded tissues known for CR–1 expression.

8. Provide funds to support associated CRADA-related research expenses including supplies, reagents, travel, and training. Criteria for choosing the collaborating company will include:

1. Ability to obtain background license to relevant patent rights.

2. Experience in producing and purifying recombinant proteins, particularly growth factors or cytokines.

3. Experience in generating and screening monoclonal antibodies.

4. Willingness to cooperate with the NCI in the collection and evaluation of data.

5. Willingness to cost share in laboratory studies.

6. An agreement to be bound by the DHHS rules involving the use of human and animal subjects, and human tissue.

7. Provisions for equitable distribution of patent rights to any inventions. Generally the rights of ownership are retained by the organization which is the employer of the inventor, with (1) an irrevocable, nonexclusive, royalty-free license to the Government (when a company employee is the sole inventor) or (2) an exclusive or nonexclusive license to the company on terms that are appropriate (when the Government employee is the sole inventor).

Dated: Octber 13, 1994.

Barbara M. McGarey,

Deputy Director, Office of Technology Transfer.

[FR Doc. 94–25922 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–P

Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

Name of Committee: Genome Research Review Committee.

Date: November 17, 1994.

Time: 8:30 a.m. to adjournment.

Place: Hyatt Regency Hotel, Bethesda, Maryland.

Contact Person: Ms. Linda Engel, Chief, Office of Scientific Review, National Center for Human Genome Research, National Institutes of Health, Building 38A, Room 604, Bethesda, Maryland 20892, (301) 402–0838.

Purpose/Agenda: To review and evaluate grant applications and/or contract proposals.

The meeting will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalogue of Federal Domestic Assistance Program No. 93.172, Human Genome Research)

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25929 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–M

National Institute on Aging; Notice of Meeting of the Board of Scientific Counselors

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the Board of Scientific Counselors, National Institute on Aging (NIA), November 29–30, 1994, to be held at the National Institutes of Health, Building 31, Conference Room 10, Bethesda, Maryland. The meeting will be open to the public from 9:30 a.m. until 12:30 p.m.; and again from 1:30 until 4:30 p.m. on Tuesday, November 29. On Wednesday, November 30, the meeting will be open from 9:00 a.m. until 12:30 p.m. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sec. 552b(c)(6), Title 5, U.S.C. and sec. 10(d) of Pub. L. 92–463, the meeting will be closed to the public on November 29 from 8:30 to 9:30 a.m., from 12:30 to 1:30 p.m. and again from 4:30 until recess. On November 30, the meeting will be closed from 8:30 to 9:00 a.m. and again from 12:30 p.m. until adjournment for the review, discussion, and evaluation of individual programs and projects conducted by the National Institute on Aging, NIH, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute of clearly unwarranted invasion of personal privacy.

Ms. June McCann, Committee Management Officer, NIA, Gateway Building, Room 2C218, National Institutes of Health, Bethesda, Maryland 20892, (301/496–9322), will provide a summary of the meeting and a roster of committee members upon request.

Dr. George R. Martin, Scientific Director, NIA, Gerontology Research Center, 4940 Eastern Avenue, Baltimore, Maryland 21224, will furnish substantive program information.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Scientific Director in advance of the meeting.

(Catalog of Federal Domestic Assistance Program No. 93.866, Aging Research, National Institutes of Health)

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25297 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–M

National Cancer Institute; Notice of Meeting of the Ad Hoc Working Group on NCI Structural Organization, National Cancer Advisory Board

Pursuant to Public Law 92–463, notice is hereby given of the meeting of Ad Hoc Working Group on NCI Structural Organization, National Cancer Advisory Board, October 27, 1994, at the Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD. The meeting will be open to the public from 9 am to 12 noon. Discussions will address the working group's format and a review of the organizational history and methods of evaluation of the NCI intramural program. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in secs. 552b(c)(6) of Title 5 U.S. Code, this meeting will be closed to the public on October 27 for review, discussion, evaluation of individual staff areas. The discussions could reveal personal information concerning

individuals associated with these areas, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. Carole Frank, Committee Management Specialist, National Cancer Institute, National Institutes of Health, Executive Plaza North, Room 630E, 9000 Rockville Pike, Bethesda, Maryland 20892 (301/496–5708), will provide a summary of the meeting and a roster of the Subcommittee members upon request.

Dr. Marvin R. Kalt, Executive Secretary, National Cancer Advisory Board, National Cancer Institute, National Institutes of Health, Executive Plaza North, Room 600, Bethesda, Maryland 20892 (301/496–4128), will furnish substantive program information.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Dr. Marvin R. Kalt on (301/496–4128) in advance of the meeting.

This notice is being published less than 15 days prior to the meeting due to the difficulty of coordinating the attendance of members because of conflicting schedules.

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25933 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–M

Office of the Director; Notice of Meeting of the Women's Health Initiative Program Advisory Committee

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the Women's Health Initiative Program Advisory Committee (WHIPAC), Office of the Director, November 1, 1994 from 8 a.m. to 5 p.m. The meeting will be held in Building 31C, Conference Room 6, 9000 Rockville Pike, Bethesda, Maryland 20892 and will be open to the public, with attendance limited to space available.

The purpose of the meeting is to review the status and progress in the planning and conduct of the Women's Health Initiative (WHI), and to advise the Director, NIH, on the comprehensive plan of prevention studies in the WHI. These will also be a panel discussion on clinical trials, coronary heart disease, dietary interventions and calcium/vitamin D.

Dr. Loretta P. Finnegan, Director, Women's Health Initiative, National Institutes of Health, Bethesda, Maryland 20892 (301–402–2900) will provide a summary of the meeting, a roster of committee members, and substantive program information, upon request. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mrs. Nancy Morris 301–402–2900 in advance of the meeting.

This notice is being published less than 15 days prior to the meeting due to the difficulty of coordinating the attendance of members because of conflicting schedules.

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25924 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–M

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting:

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel.

Date: November 1, 1994.

Time: 8 a.m. to 5 p.m.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD.

Contact Person: Mary Nekola, Ph.D., Scientific Review Administrator, NIH, NIDCD, EPS Suite 400C, 6120 Executive Boulevard, MSC 7180, Bethesda, MD 20892–7180, 301/496–8683.

Purpose/Agenda: To review and evaluate Small Grant applications.

The meeting will be closed in accordance with the provisions set forth in sec. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program No. 93.173 Biological Research Related to Deafness and Communication Disorders)

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25926 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Diabetes and Digestive and Kidney Diseases; Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings:

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases; Special Grants Review Committee, Subcommittee B.

Dates: October 27–28, 1994.

Time: October 27, 8:00 a.m.-5 p.m., October 28, 8:00 a.m.-adjournment.

Place: Embassy Suites Hotel, 4300 Military Road, Washington, D.C. 20015

Contact Person: Michael W. Edwards, Ph.D., Westwood Building, Room 607, National Institutes of Health, Bethesda, Maryland 20892, Phone: 301–594–9300.

Purpose/Agenda: To review and evaluate research grant applications.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases; Special Grants Review Committee, Subcommittee C.

Dates: November 3–4, 1994.

Time: November 3, 8:00 a.m.-5 p.m., November 4, 8:00 a.m.-adjournment.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, Maryland 20815.

Contact Person: Daniel Matsumoto, Westwood Building, Room 604, National Institutes of Health, Bethesda, Maryland 20892, Phone: 301–594–7587.

Purpose/Agenda: To review and evaluate research grant applications.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases; Special Grants Review Committee, Subcommittee D.

Date: November 3–4, 1994.

Time: November 3, 8:00 a.m.-5 p.m., November 4, 8:00 a.m.-adjournment.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, Maryland 20815.

Contact Person: Ann A. Hagan, Westwood Building, Room 604, National Institutes of Health, Bethesda, Maryland 20892, Phone: 301–594–7575.

Purpose/Agenda: To review and evaluate research grant applications.

The meetings will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and the discussions could reveal confidential trade secrets or commercial property, such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This notice is being published less than 15 days prior to the meeting due to the difficulty of coordinating the attendance of members because of conflicting schedules.

(Catalog of Federal Domestic Assistance Program No. 93.847–849, Diabetes, Endocrine and Metabolic Diseases; Digestive Diseases and Nutrition; and Kidney Diseases, Urology and Hematology Research, National Institutes of Health.)

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25930 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Neurological Disorders and Stroke; Closed Meeting, Board of Scientific Counselors

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5, U.S.C. Appendix 2), notice is hereby given of the following meeting:

Name of Committee: Board of Scientific Counselors, National Institute of Neurological Disorders and Stroke.

Dates: November 3–4, 1994.

Time: November 3, 10 a.m.-5 p.m.

Place: Medical Board Room, Bldg. 10, Rm. 2C116.

Time: November 4, 9 a.m.-adjournment.

Place: Bldg. 10, Rm. 5S235.

Contact Person: Harold Gainer, Ph.D., Acting Director, Division of Intramural Research, NINDS, Building 10, Room 5N214, National Institutes of Health, Bethesda, MD 20892, (301) 496–4297.

Agenda: To review and evaluate individual programs and projects conducted by the NINDS.

The meeting will be closed in accordance with the provisions set forth in sec. 552b(c)(6), Title 5, U.S.C. The programs and discussions include consideration of personnel qualifications and performances, the competence of individual investigators and similar items, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program No. 13.853, Clinical Basis Research; No. 13.854, Biological Basis Research, National Institutes of Health, HHS).

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25928 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–M

Division of Research Grants; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Division of Research Grants Special Emphasis Panels (SEPs) meetings:

Purpose/Agenda: To review individual grant applications.

Name of SEP: Chemistry and Related Sciences.

Date: October 27, 1994.

Time: 8:00 a.m.

Place: Holiday Inn, Chevy Chase, MD.

Contact Person: Dr. Ed Copeland, Scientific Review Administrator, 5333 Westbard Ave., Room 322, Bethesda, MD 20892, (301) 594–7154.

Name of SEP: Microbiological and Immunological Sciences.

Date: November 3, 1994.

Time: 2:00 p.m.

Place: NIH, Westwood Building, Room A27, Telephone Conference.

Contact Person: Dr. Calbert Laing, Scientific Review Admin., 5333 Westbard Ave., Room A27, Bethesda, MD 20892, (301) 594–7190.

Name of SEP: Clinical Sciences.

Date: November 9, 1994.

Time: 8:30 a.m.

Place: Holiday Inn, Chevy Chase, MD.

Contact Person: Dr. Jerrold Fried, Scientific Review Admin., 5333 Westbard Ave., Room 355B, Bethesda, MD 20892, (301) 594–7261.

Purpose/Agenda: To review Small Business Innovation Research Program grant applications.

Name of SEP: Multidisciplinary Sciences.

Date: November 6–8, 1994.

Time: 7:00 p.m.

Place: River Inn, Washington, DC.

Contact Person: Dr. Richard Panniers, Scientific Review Admin., 5333 Westbard Ave., Room 2A17, Bethesda, MD 20892, (301) 594–7348.

Name of SEP: Multidisciplinary Sciences.

Date: November 17–18, 1994.

Time: 8:00 a.m.

Place: McLean Hilton, Tysons Corner, VA.

Contact Person: Dr. Eileen Bradley, Scientific Review Admin., 5333 Westbard Ave., Room 2A10, Bethesda, MD 20892, (301) 594–7188.

The meetings will be closed in accordance with the provisions set forth in sec. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Nos. 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25932 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–M

Division of Research Grants; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Division of Research Grants Special Emphasis Panels (SEPs) meetings:

Purpose/Agenda: To review individual grant applications.

Name of SEP: Clinical Sciences.

Date: October 26, 1994.

Time: 2:00 p.m.

Place: NIH Westwood Building, Room 219B, Telephone Conference.

Contact Person: Dr. Priscilla Chen, Scientific Review Administrator, 5333 Westbard Ave., Room 219B, Bethesda, MD 20892, (301) 594–7287.

Name of SEP: Biological and Physiological Sciences.

Date: October 27, 1994.

Time: 2:00 p.m.

Place: NIH Westwood Building, Room 233B, Telephone Conference.

Contact Person: Dr. Ramesh Nayak, Scientific Review Admin., 5333 Westbard Ave., Room 233B, Bethesda, MD 20892, (301) 594–7169.

Name of SEP: Microbiological and Immunological Sciences.

Date: October 28, 1994.

Time: 8:30 a.m.

Place: Holiday Inn, Chevy Chase, MD.

Contact Person: Dr. Betty Hayden, Scientific Review Admin., 5333 Westbard Ave., Room A25, Bethesda, MD 20892, (301) 594–7310.

Name of SEP: Biological and Physiological Sciences.

Date: October 31, 1994.

Time: 9:00 a.m.

Place: Holiday Inn, Chevy Chase, MD.

Contact Person: Dr. Abubakar Shaikh, Scientific Review Admin., 5333 Westbard Ave., Room 218A, Bethesda, MD 20892, (301) 594–7368.

Name of SEP: Microbiological and Immunological Sciences.

Date: November 1, 1994.

Time: 1:00 p.m.

Place: NIH, Westwood Building, Room A10, Telephone Conference.

Contact Person: Dr. Gil Meier, Scientific Review Administrator, 5333 Westbard Ave., Room A10, Bethesda, MD 20892, (301) 594–7118.

Name of SEP: Microbiological and Immunological Sciences.

Date: November 2, 1994.

Time: 1:00 p.m.

Place: NIH, Westwood Building, Room A10, Telephone Conference.

Contact Person: Dr. Gil Meier, Scientific Review Administrator, 5333 Westbard Ave., Room A10, Bethesda, MD 20892, (301) 594–7118.

Name of SEP: Microbiological and Immunological Sciences.

Date: November 3, 1994.

Time: 1 p.m.

Place: NIH, Westwood Building, Room A10, Telephone Conference.

Contact Person: Dr. Gil Meier, Scientific Review Administrator, 5333 Westbard Ave., Room A10, Bethesda, MD 20892, (301) 594–7118.

Name of SEP: Microbiological and Immunological Sciences.

Date: November 4, 1994.

Time: 1 p.m.

Place: NIH, Westwood Building, Room A27, Telephone Conference.

Contact Person: Dr. Calbert Laing, Scientific Review Administrator, 5333

Westbard Ave., Room A27, Bethesda, MD 20892, (301) 594–7190.

Name of SEP: Clinical Sciences.
Date: November 9, 1994.
Time: 1 p.m.
Place: NIH, Westwood Building, Room 348, Telephone Conference.
Contact Person: Dr. Sooja Kim, Scientific Review Administrator, 5333 Westbard Ave., Room 348, Bethesda, MD 20892, (301) 594–7174.

Name of SEP: Clinical Sciences.
Date: November 10, 1994.
Time: 8:30 a.m.
Place: Marriott Hotel, Bethesda, MD.
Contact Person: Dr. Harold Davidson, Scientific Review Admin., 5333 Westbard Ave., Room 354A, Bethesda, MD 20892, (301) 594–7313.

Name of SEP: Behavioral and Neurosciences.
Date: November 13, 1994.
Time: 8:30 a.m.
Place: The Hilton, Hollywood, FL.
Contact Person: Dr. Joe Marwah, Scientific Review Administrator, 5333 Westbard Ave., Room 303, Bethesda, MD 20892, (301) 594–7158.

Name of SEP: Multidisciplinary Sciences.
Date: November 14, 1994.
Time: 8 a.m.
Place: Holiday Inn, Crystal City, VA.
Contact Person: Dr. Paul Parakkal, Scientific Review Admin., 5333 Westbard Ave., Room 437, Bethesda, MD 20892, (301) 594–7258.

Purpose/Agenda: To review Small Business Innovation Research program grant applications.

Name of SEP: Multidisciplinary Sciences.
Dates: October 27–29.
Time: 8 a.m.
Place: Holiday Inn, Bethesda, MD.
Contact Person: Dr. Miriam Behar, Scientific Review Administrator, 5333 Westbard Ave., Room 2A11A, Bethesda, MD 20892, (301) 594–7376.

Name of SEP: Microbiological and Immunological Sciences.
Date: November 4, 1994.
Time: 1 p.m.
Place: Holiday Inn, Chevy Chase, MD.
Contact Person: Dr. Gil Meier, Scientific Review Administrator, 5333 Westbard Ave., Room A10, Bethesda, MD 20892, (301) 594–7118.

Name of SEP: Multidisciplinary Sciences.
Date: November 7, 1994.
Time: 8:30 a.m.
Place: Crowne Plaza, Rockville, MD.
Contact Person: Dr. Harish Chopra, Scientific Review Admin., 5333 Westbard Ave., Room 2A18A, Bethesda, MD 20892, (301) 584–7342.

Name of SEP: Multidisciplinary Sciences.
Date: November 14, 1994.
Time: 8:00 a.m.
Place: Holiday Inn, Bethesda, MD.
Contact Person: Dr. Dharam Dhindsa, Scientific Review Admin., 5333 Westbard Ave., Room 2A15A, Bethesda, MD 20892, (301) 594–7683.

Name of SEP: Multidisciplinary Sciences.
Date: November 18, 1994.
Time: 8:30 p.m.
Place: Crowne Plaza, Rockville, MD.
Contact Person: Dr. Harish Chopra, Scientific Review Admin., 5333 Westbard Ave., Room 2A18A, Bethesda, MD 20892, (301) 594–7342.

The meetings will be closed in accordance with the provisions set forth in sec. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Nos. 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25931 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–01–M

Division of Research Grants; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Division of Research Grants Special Emphasis Panels (SEPs) meetings:

Purpose/Agenda: To review individual grant applications.

Name of SEP: Clinical Sciences.
Date: November 1, 1994.
Time: 11:00 a.m.
Place: NIH, Westwood Building, Room 219B, Telephone Conference.
Contact Person: Dr. Priscilla Chen, Scientific Review Administrator, 5333 Westbard Ave., Room 219B, Bethesda, MD 20892, (301) 594–7315.

Name of SEP: Chemistry and Related Sciences.
Date: November 8, 1994.
Time: 4:00 p.m.
Place: NIH, Westwood Building, Room 318A, Telephone Conference.
Contact Person: Dr. Alex Liacouras, Scientific Review Administrator, 5333 Westbard Ave., Room 318A, Bethesda, MD 20892, (301) 594–7264.

Name of SEP: Clinical Sciences.
Date: November 22, 1994.
Time: 1:00 p.m.
Place: NIH, Westwood Building, Room 353, Telephone Conference.
Contact Person: Dr. Anthony Chung, Scientific Review Administrator, 5333 Westbard Ave., Room 353, Bethesda, MD 20892, (301) 594–7338.

Name of SEP: Behavioral and Neurosciences.
Date: November 29, 1994.
Time: 8:30 a.m.
Place: Holiday Inn, Chevy Chase, MD.
Contact Person: Dr. Lillian Pubols, Scientific Review Administrator, 5333 Westbard Ave., Room 306A, Bethesda, MD 20892, (301) 594–7325.

Name of SEP: Clinical Sciences.
Date: November 29, 1994.
Time: 3:00 p.m.
Place: NIH, Westwood Building, Room 353, Telephone Conference.
Contact Person: Dr. Anthony Chung, Scientific Review Administrator, 5333 Westbard Ave., Room 353, Bethesda, MD 20892, (301) 594–7338.

Name of SEP: Clinical Sciences.
Date: December 1, 1994.
Time: 9:00 a.m.
Place: Holiday Inn, Chevy Chase, MD.
Contact Person: Dr. Richard Peabody, Scientific Review Administrator, 5333 Westbard Ave., Room 434, Bethesda, MD 20892, (301) 594–7344.

Name of SEP: Multidisciplinary Sciences.
Dates: December 11–13, 1994.
Time: 7:00 p.m.
Place: Jumer Hotels, Urbana, IL.
Contact Person: Dr. Lee Rosen, Scientific Review Administrator, 5333 Westbard Ave., Room 2A11, Bethesda, MD 20892, (301) 594–7276.

Purpose/Agenda: To review Small Business Innovation Research Program grant applications.

Name of SEP: Multidisciplinary Sciences.
Date: November 6, 1994.
Time: 1:00 p.m.
Place: Rosslyn Westpark Hotel, Rosslyn, VA.
Contact Person: Dr. Lee Rosen, Scientific Review Administrator, 5333 Westbard Ave., Room 2A11B, Bethesda, MD 20892, (301) 594–7276.

Name of SEP: Behavorial and Neurosciences.
Dates: November 10–11, 1994.
Time: 8:30 a.m.
Place: Embassy Suites, Washington, DC.
Contact Person: Dr. Teresa Levitin, Scientific Review Admin., 5333 Westbard, Ave., Room 303, Bethesda, MD 20892, (301) 594–7141.

The meetings will be closed in accordance with the provisions set forth in sec. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Nos. 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 12, 1994.

Susan K. Feldman,

Committee Management Officer, NIH.

[FR Doc. 94–25925 Filed 10–18–94; 8:45 am]

BILLING CODE 4140–10–M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Designating a Segment of the Klamath River a Component of the National Wild and Scenic Rivers System

AGENCY: Interior.

ACTION: Notice.

SUMMARY: Pursuant to the authority granted the Secretary of the Interior by section 2 of the Wild and Scenic Rivers Act (82 Stat. 906, 16 U.S.C. 1273), and upon proper application of the Governor of the State of Oregon, an 11-mile segment of the Klamath River is hereby designated as a State-administered component of the National Wild and Scenic Rivers System. This action is based on the designation of the river by the State of Oregon and the protection offered this river and its immediate environment by and pursuant to applicable State laws and regulations.

FOR FURTHER INFORMATION CONTACT: Dan Haas, National Park Service, Pacific Northwest Regional Office, 909 First Avenue, Seattle, Washington 98104–1060, telephone (206) 220–4120.

SUPPLEMENTARY INFORMATION: On April 22, 1993, Oregon Governor Barbara Roberts petitioned the Secretary of the Interior to add a segment of the Klamath River to the National Wild and Scenic Rivers System. (See **Federal Register** of March 4, 1994, page 10423.) Section 2(a)(ii) of the Wild and Scenic Rivers Act allows a governor to request that rivers already protected in a State System be included in the National System. In her application, Governor Roberts requested that the 11-mile reach of the Klamath River from the J.C. Boyle Powerhouse (river mile 220.3) downstream to the Oregon-California border (river mile 209.3) be protected as a wild and scenic river. Pursuant to section 2(a)(ii), the river will be managed by the State of Oregon at no cost to the Federal Government except for those lands currently managed by the Bureau of Land Management (BLM).

For a State-managed river to be eligible for the National System, three conditions must be met: (1) The river must be free-flowing and possess at least one "outstandingly remarkable" natural, cultural or recreational value, (2) the river must be part of a State system; and (3) the State must have effective mechanisms in place to protect the outstandingly remarkable values.

The responsibility for making determinations of eligibility has been delegated to the National Park Service (NPS). The NPS Pacific Northwest Region conducted a study and environmental assessment with the BLM acting as a cooperating agency. In February of 1994, the NPS released the Draft Klamath Wild & Scenic River Eligibility Report and Environmental Assessment for public review and comment. A period for public comment on the report was provided from March 4, 1994, to April 28, 1994. The draft report was finalized based on comments received. On August 12 the NPS published in the **Federal Register** a notice that it had found that designation would not result in impacts significantly affecting the quality of the environment and invited public comment through September 9. The notice also announced that the river under consideration had been found eligible for the National Wild and Scenic Rivers System and the State of Oregon had met the criteria for designation.

This action is taken following public involvement and consultation with the Departments of Agriculture, Army, Energy and Transportation; the Federal Energy Regulatory Commission; all Department of the Interior agencies; the National Marine Fisheries Service; the States of Oregon and California; the U.S. Environmental Protection Agency; and all other Federal agencies that might have an interest.

Based on the recommendations of the NPS and a review of all relevant documents, I have determined that the 11-mile stretch of the Klamath River should be designated as a State-administered component of the National Wild and Scenic Rivers System, as provided for in section 2(a)(ii) of the Wild and Scenic Rivers Act. Notice is hereby given that effective upon this date, the segment of the Klamath River from the J.C. Boyle Powerhouse to the Oregon-California border is approved for inclusion in the National Wild and Scenic Rivers System as a National Scenic River.

Dated: September 22, 1994.

Bruce Babbitt,

Secretary of the Interior.

[FR Doc. 94–25917 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–70–P

Bureau of Land Management

[MT–921–05–1320–01–P; MTM 80697]

Availability of Final Environmental Impact Statement and Request for Comments of the Fair Market Value and Maximum Economic Recovery; Coal Lease Application MTM 80697—Western Energy Company

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction.

SUMMARY: In notice document 94–24840 beginning on page 51205 in the issue of Friday, October 7, 1994, make the following correction:

On page 51205, in the third column in the twelfth line from the top, the description previously published in the **Federal Register** was T. 1 N., *R. 39 W.*, P.M.M. This should be changed to T. 1 N., *R. 39 E.*, P.M.M.

Dated: October 12, 1994.

Larry Hamilton,

State Director.

[FR Doc. 94–25824 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–DN–P

Bureau of Reclamation

Quarterly Status Report of Water Service and Repayment Contract Negotiations

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given of contractual actions that are new, modified, discontinued or completed since the last publication of this notice on July 28, 1994. The May 6, 1994, notice should be used as a reference point to identify changes. The number in parenthesis corresponds to the number in the May 6, 1994, notice. This notice is one means in which the public is informed about contractual actions for capital recovery and management of project resources and facilities. Additional Bureau of Reclamation (Reclamation) announcements of individual contract actions may be published in the **Federal Register** and in newspapers of general circulation in the areas determined by Reclamation to be affected by the proposed action. Announcements may be in the form of news releases, legal notices, official letters, memorandums, or other forms of written material. Meetings, workshops, and/or hearings may also be used, as appropriate, to provide local publicity. The public participation procedures do not apply to proposed contracts for sale

of surplus or interim irrigation water for a term of 1 year or less. Either of the contracting parties may invite the public to observe any contract proceedings. All public participation procedures will be coordinated with those involved in complying with the National Environmental Policy Act.

ADDRESSES: The identity of the approving officer and other information pertaining to a specific contract proposal may be obtained by calling or writing the appropriate regional office at the address and telephone number given for each region in the supplementary information.

FOR FURTHER INFORMATION CONTACT: Alonzo Knapp, Manager, Reclamation Law, Contracts, and Repayment Office, Bureau of Reclamation, P.O. Box 25007, Denver, Colorado 80225–0007; telephone 303–236–1061 extension 224.

SUPPLEMENTARY INFORMATION: Pursuant to section 226 of the Reclamation Reform Act of 1982 (96 Stat. 1273) and 43 CFR 426.20 of the rules and regulations published in 52 FR 11954, Apr. 13, 1987, Reclamation will publish notice of proposed or amendatory contract actions for any contract for the delivery of project water for authorized uses in newspapers of general circulation in the affected area at least 60 days prior to contract execution. Pursuant to the "Final Revised Public Participation Procedures" for water resource-related contract negotiations, published in 47 FR 7763, Feb. 22, 1982, a tabulation is provided of all proposed contractual actions in each of the five Reclamation regions. Each proposed action is, or is expected to be, in some stage of the contract negotiation process in 1994. When contract negotiations are completed, and prior to execution, each proposed contract form must be approved by the Secretary of the Interior, or pursuant to delegated or redelegated authority, the Commissioner of Reclamation or one of the regional directors. In some instances, congressional review and approval of a report, water rate, or other terms and conditions of the contract may be involved.

Public participation in and receipt of comments on contract proposals will be facilitated by adherence to the following procedures:

1. Only persons authorized to act on behalf of the contracting entities may negotiate the terms and conditions of a specific contract proposal.

2. Advance notice of meetings or hearings will be furnished to those parties that have made a timely written request for such notice to the appropriate regional or project office of Reclamation.

3. Written correspondence regarding proposed contracts may be made available to the general public pursuant to the terms and procedures of the Freedom of Information Act (80 Stat. 383), as amended.

4. Written comments on a proposed contract or contract action must be submitted to the appropriate regional officials at the locations and within the time limits set forth in the advance public notices.

5. All written comments received and testimony presented at any public hearings will be reviewed and summarized by the appropriate regional office for use by the contract approving authority.

6. Copies of specific proposed contracts may be obtained from the appropriate regional director or his designated public contact as they become available for review and comment.

7. In the event modifications are made in the form of a proposed contract, the appropriate regional director shall determine whether republication of the notice and/or extension of the comment period is necessary.

Factors considered in making such a determination shall include, but are not limited to: (i) the significance of the modification, and (ii) the degree of public interest which has been expressed over the course of the negotiations. As a minimum, the regional director shall furnish revised contracts to all parties who requested the contract in response to the initial public notice.

Acronym Definitions Used Herein

(BCP) Boulder Canyon Project
(CAP) Central Arizona Project
(CUP) Central Utah Project
(CVP) Central Valley Project
(CRSP) Colorado River Storage Project
(D&MC) Drainage and Minor Construction
(FR) **Federal Register**
(IDD) Irrigation and Drainage District
(ID) Irrigation District
(M&I) Municipal and Industrial
(O&M) Operation and Maintenance
(P-SMBP) Pick-Sloan Missouri Basin Program
(R&B) Rehabilitation and Betterment
(SRPA) Small Reclamation Projects Act
(WCUA) Water Conservation and Utilization Act
(WD) Water District

The following contract actions are either new, modified, or completed in the Bureau of Reclamation since the May 6, 1994 **Federal Register** notice.

Pacific Northwest Region

Bureau of Reclamation, 1150 North Curtis Road, Boise, Idaho 83706–1234, telephone 208–378–5346.

1. Contract Action Discontinued

(1) Cascade Reservoir Water Users, Boise Project, Idaho: Repayment contracts for irrigation and M&I water: 19,201 acre-feet of stored water in Cascade Reservoir. Storage water no longer available due to environmental considerations.

2. Contract Action Discontinued

(6) City of Cle Elum, Yakima Project, Washington: Amendatory or replacement M&I water service contract; 2,200 acre-feet (1,350 gallons per minute) annually for the term of the contract. Storage water no longer available due to environmental considerations.

3. Contract Action Discontinued

(7) Baker Valley ID, Baker Project, Oregon: Irrigation water service contract on a surplus interruptible basis to serve up to 13,000 acres; sale of excess capacity in Mason Reservoir (Phillips Lake) for the term of the contract. No action will occur in next quarter and none is likely to occur next year.

4. Contract Action Modified

(4) Willamette Basin Water Users, Willamette Basin Project, Oregon: Water service contracts: $8 per acre-foot per annum.

5. Contract Action Completed

(19) Willamette Basin water users, Willamette Basin Project, Oregon: Add language to water service contract to provide for periodic reviews, with adjustments if necessary to mitigate for impacts to natural resources. This language has been added to the current form of contract.

6. Contract Action Completed (Not on May 6, 1994 notice)

Umatilla Project Irrigation Districts, Oregon: Temporary contracts with Hermiston, Stanfield, Westland, and West Extension Irrigation Districts to provide water service for 1994 to lands lying outside of their boundaries. Temporary contracts were not executed for 1994 water service.

Mid-Pacific Region

Bureau of Reclamation, 2800 Cottage Way, Sacramento, California 95825–1898, telephone 916–978–5030.

1. New Contract Action

Glide WD, CVP, California: Assignment of Tehama WD's water service contract to Glide WD.

2. Contract Action Discontinued

(11) San Luis WD, CVP, California: Amendment to Contract No. 14–06–200–7773A to include assigned lands and allocated share of CVP water supply to San Luis WD from Romero WD. Amendment will not take place.

3. Contract Action Modified

(12) Romero WD, CVP, California: Amendment to Contract No. 14–06–200–7758 to assign lands and allocated share of CVP water supply to San Luis WD. Will be assigned, amendment not necessary.

4. Contract Action Modified

(16) Del Puerto WD, CVP, California: Amend water service Contract No. 14–06–200–922 to include M&I use. This contract will not be amended. It will be considered as a renewal or will not take place.

5. Contract Action Modified

(22) Gateway WD, CVP, California: Combine by assignment 12 Delta-Mendota Canal water service contracts into 1 entity to be renamed Gateway WD for administrative and operation purposes. Change in water district name. Del Puerto WD, CVP, California: Assignment of 12 Delta-Mendota Canal water service contracts to Del Puerto WD for administrative and operational purpose.

Lower Colorado Region

Bureau of Reclamation, P.O. Box 61470 (Nevada Highway and Park Street), Boulder City, Nevada 89006–1470, telephone 702–293–8536.

1. Contract Action Completed

(25) Southern Nevada Water Authority, BCP, Nevada: Assignment or transfer of 14,550 acre-feet of Basic Management, Inc.'s water entitlement to the Southern Nevada Water Authority as a result of Basic Management, Inc.'s water conservation efforts.

Upper Colorado Region

Bureau of Reclamation, P.O. Box 11568 (125 South State Street) Salt Lake City, Utah 84147, telephone 801–524–5435.

1. New Contract Action

Florida Water Conservancy District, Florida Project, Colorado: Water service contract to market for municipal and industrial use 114 acre-feet of water rights held by the United States.

Great Plains Region

Bureau of Reclamation, P.O. Box 36900, Federal Building, 316 North 26th Street, Billings, Montana 59107–6900, telephone 406–657–6413.

1. Contract Action Discontinued

(2) Fort Shaw ID, Sun River Project, Montana: R&B loan repayment contract; up to $1.5 million. There is no activity by the Fort Shaw Irrigation District.

2. Contract Action Modified

(13) Canadian River Municipal Water Authority, Canadian River Project, Texas: Amendatory contract to reflect credit for project lands transferred to the National Park Service under Pub. L. 101–628 for the Lake Meredith National Recreation Area. Issue of credit for transferred lands under review.

3. Contract Action Modified

(17) Thirty Mile Canal Company, Nebraska: SRPA contract for a loan of $2,264,000 to reline the main canal, replace open laterals with buried pipe, and replace bridges. Pending appropriation of funds.

Dated: October 12, 1994.

Wayne O. Deason,

Assistant Director, Program Analysis Office.

[FR Doc. 94–25847 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–94–P

Fish and Wildlife Service

Endangered and Threatened Species Permit Applications

ACTION: Notice of Receipt of Applications for Permit.

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*):

PRT–795454

Applicant: Conservation Fisheries, Incorporated, Knoxville, Tennessee

The applicant requests a permit to take (collection and hold for captive breeding) the smoky madtom (*Noturus baileyi*), yellowfin madtom (*Noturus flavipinnis*), duskytail darter (*Etheostoma (=Catonotus)* sp.), boulder darter (*Etheostoma wapiti*), spotfin chub (*Cyprinella (=Hybopsis) monacha*), and blackside dace (*Phoxinus cumberlandensis*) for the purpose of enhancement of propagation and survival of the species.

PRT–795459

Applicant: The Audubon Institute, Freeport McMoran Species Survival Center, New Orleans, Louisiana

The applicant requests a permit to perform husbandry and propagation efforts on the Mississippi Sandhill Crane (*Grus canadensis pulla*). These activities are proposed for the purpose of enhancement of propagation and survival of the species.

PRT–795451

Applicant: White Oak Conservation Center, Yulee, Florida

The applicant requests a permit to perform husbandry and propagation efforts on the Mississippi Sandhill Crane (*Grus canadensis pulla*). These activities are proposed for the purpose of enhancement of propagation and survival of the species.

PRT–795453

Applicant: Environmental and GIS Consulting, Incorporated, Bentonville, Arkansas

The applicant requests a permit to take (conduct population surveys, handle) the Ozark Bigeared bat (*Plecotus townsendii ingens*), Indiana Gray bat (*Myotis sodalis*), Ozark cavefish (*Amblyopsis rosae*), and a cave crayfish (*Cambarus zophonastes*) in Arkansas. These activities are proposed for the purpose of enhancement of survival of the species.

PRT–795456

Applicant: Dr. Thane Wibbels, Birmingham, Alabama

The applicant requests a permit to take (collect dead hatchling and disturb eggs and nests) of the Hawksbill sea turtle (*Eretmochelys imbricata*) on Buck Island, United States Virgin Islands. These activities are the purpose of enhancement of survival of the species.

Written data or comments on any of these applications should be submitted to: Regional Permit Coordinator, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345. All data and comments must be received within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: Permit Coordinator). Phone: (404) 679–7110; FAX: (404) 679–7081.

Dated: October 7, 1994.

David P. Flemming,

Chief, Division of Endangered Species.

[FR Doc. 94–25844 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–55–P

Issuance of Permit for Marine Mammals

On March 22, 1994, a notice was published in the **Federal Register**, Vol. 59, No. 55, Page 13504, that an application had been filed with the Fish and Wildlife Service by National Biological Survey for a permit (PRT–672624) for the continuation of capture and tagging activities in support of research on California sea otters (*Enhydra lutris nereis*).

Notice is hereby given that on October 12, 1994, as authorized by the provisions of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

Documents and other information submitted for these applications are available for review by any party who submits a written request to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Rm 420(c), Arlington, Virginia 22203. Phone (703) 358–2104 or Fax (703) 358–2281.

Dated: October 14, 1994.

Caroline Anderson,

Acting Chief, Branch of Permits, Office of Management Authority

[FR Doc. 94–25893 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–55–P

Notice of Availability of a Draft Environmental Assessment Addressing Genetic Management Options for the Florida Panther for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability and public comment period.

SUMMARY: The U.S. Fish and Wildlife Service (Service) announces the availability for public review of a draft Environmental Assessment addressing genetic management options for the Florida panther, *Felis concolor coryi*. A single population estimated to number 30 to 50 adults represents the sole known remaining population in the wild. This population utilizes approximately 2–3 million acres of habitat on public and privately owned lands in south Florida. Existing data indicate that the Florida panther will likely to extinct without actions to restore genetic health to the population. The Environmental Assessment examines four genetic management alternatives for the panther. The preferred alternative involves a strategy to restore lost gene flow to the panther from a western *Felis concolor* population. Copies of the draft Environmental Assessment can be obtained by making requests to the address below. This notice is being furnished under provisions of the National Environmental Policy Act Regulations (40 CFR 1501.7) to obtain comments from other agencies and the public on the draft Environmental Assessment. Following an appropriate public comment and review process, the Service intends to evaluate all comments received and select an intended course of action by December 31, 1994.

DATES: Comments on the draft Environmental Assessment must be received on or before December 5, 1994 to receive consideration by the Service.

ADDRESSES: Comments soul be addressed to the Regional Director, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Atlanta, Georgia 30345.

FOR FURTHER INFORMATION AND COPIES OF THE DRAFT ENVIRONMENTAL ASSESSMENT CONTACT: Dennis B. Jordan, Florida Panther Coordinator, U.S. Fish and Wildlife Service, PO Box 110450, Gainseville, Florida 32611–0450, telephone 904/392–1861.

SUPPLEMENTARY INFORMATION:

Background

Restoring endangered or threatened animals or plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goals of the Service's endangered species program. The Service will consider all information presented during the public comment period prior to finalizing and implementing a specific genetic management strategy for the Florida panther.

The Florida panther is one of the most endangered large mammals in the world. The biological circumstances of geographic isolation, habitat loss, population reductions, and associated inbreeding have resulted in significant loss of genetic variability and health of the population. The genetic variability and health of the Florida population must be restored for the tax on to survive even with adequate habitat preservation and other enhancement measures.

The Florida panther formerly occupied a range comprising much of the southeastern United States. This range was contiguous with other populations of North American cougars (*Felis concolor* spp.). The panther is presently restricted to a small relict population in southern Florida numbering 30 to 50 adults. This population utilizes approximately 2–3 million acres of habitat on public and privately owned lands.

Population declines and associated inbreeding in the Florida panther have resulted in significant losses in genetic variability and viability. The population exhibits multiple physiological abnormalities that are likely a consequence of recent close inbreeding. High incidences of maladaptive traits which include reproductive and medical abnormalities have been observed. Significant among these are: Cryptorchidism (50+% of male population at times), abnormal sperm (average 93.5% per ejaculate), and atrial septal defects (5 individuals). Furthermore, the Florida panther has suffered from numerous health problems and infectious diseases that many be a consequence of a defective immune system.

The goal will be to develop and implement a management strategy to restore and maintain the historic genetic character of the of Florida panther. The objectives will be to reduce the occurrence of inbreeding and restore genetic variability and vitality of offspring produced and recruited as breeders into a healthier, ore resilient panther population and to resume the evolutionary adaptive potential by restoring levels of genetic diversity in the Florida population to levels comparable of other *Felis concolor* subspecies in western North America. The identification and implementation of actions needed to accomplish this goal will be guided by the analysis and evaluation of various alternatives that may be available.

Public Comments Solicited

The Service solicits written comments on the draft Environmental Assessment. All comments received by the date specified above will be considered prior to finalizing the Assessment.

Authority

The authority for this action is Section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: October 12, 1994.

David J. Wesley,

State Administrator.

[FR Doc. 94–25875 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–55–M

Availability of an Environmental Assessment and Receipt of an Application for an Incidental Take Permit for Timbering Harvesting Activities in Monroe County, AL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: Ms. Sara N. Bradley (Applicant) is seeking an incidental take permit from the Fish and Wildlife Service (Service), pursuant to Section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act), as amended. The permit would authorize the take of the Red Hills salamander *Phaeognathus hubrichti*, a threatened species, in Monroe County, Alabama, for a period of 2 years. The proposed taking is incidental to a planned timber harvest on an 80-acre tract of land owned by the Applicant. The tract is located in the eastern 1/2 of the southwest 1/4 of Section 9, Townships 8 North, Range 8 East, Monroe County, Alabama.

The Service also announces the availability of an environmental assessment (EA) and habitat conservation plan (HCP) for the incidental take application. Copies of the EA or HCP may be obtained by making a request to the Regional Office address below. This notice also advises the public that the Service has made a preliminary determination that issuing the incidental take permit is not a major Federal action significantly affecting the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, as amended. The Finding of No Significant Impact is based on information contained in the EA and HCP. The final determination will be made no sooner than 30 days from the date of this notice. This notice is provided pursuant to Section 10(c) of the Act and National Environmental Policy Act Regulations (40 CFR 1506.6).

DATES: Written comments on the permit application, EA and HCP should be received on or before November 18, 1994.

ADDRESSES: Persons wishing to review the application, HCP, and EA may obtain a copy by writing the Service's Southeast Regional Office, Atlanta, Georgia. Documents will also be available for public inspection by appointment during normal business hours at the Regional Office, or the Jackson, Mississippi, Field Office. Written data or comments concerning the application, EA, or HCP should be submitted to the Regional Office. Please reference permit under PRT–795455 in such comments.

Regional Permit Coordinator, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345, (telephone 404/679–7110, fax 404/679–7081).

Field Supervisor, U.S. Fish and Wildlife Service, 6578 Dogwood View Parkway, Suite A, Jackson, Mississippi 39213 (telephone 601/965–4900 extension 27, fax 601/965–4340).

FOR FURTHER INFORMATION CONTACT: Wendell Neal at the Jackson, Mississippi, Field Office, or Rick G. Gooch at the Atlanta, Georgia, Regional Office.

SUPPLEMENTARY INFORMATION: The Red Hills salamander is a plethodontid salamander and the sole member of its genus. Its range is confined to a small area of southern Alabama. Portions of the Applicant's lands in the Red Hills physiographic province of south-central Alabama are occupied by this species. The applicant owns 80 acres of timberland within the Red Hills salamander's historic range in Monroe County. The Applicant's HCP identifies a 15-acre preserve area characterized as having steep slopes (>30 percent), within the Tallahatta and/or Hatchetigbee geologic formations, have moist loamy topsoils, and forested with naturally occurring mixed hardwood/pine and pine/hardwood trees. Previous status surveys for the species indicate this to be optimal habitat, with burrow density as high as 5 per 100 square meters. Timber harvesting in the adjacent streamside management zones, encompassing 16 acres of the property, will be restricted to removal of approximately 20 percent of the canopy coverage. These areas are considered marginal habitat for the Red Hills salamander. On the remainder of the site (49 acres), normal timber harvesting will be conducted and will result in approximately 40 percent of the canopy coverage.

Take incidental to the applicant's harvest plan is expected to occur in the marginally suitable areas, through the physical crushing of burrows (and thus individuals) from timber felling and removal of large pine trees. Incidental take of this nature is expected in approximately 5 acres of marginally suitable habitat. Mitigation and minimization measures identified in the HCP include the preservation of 15 acres of optimal habitat, restrictions of cutting in marginally suitable areas, restrictions of the use of chemical pesticides and herbicides within and in a 50-foot buffer of optimum habitat, and training and education of logging personnel.

The EA considers the environmental consequences of three alternatives, including acceptance of the HCP as submitted, no action, or the HCP modified for a different mitigation strategy.

(**Notice:** Availability of an Environmental Assessment and Receipt of an Application for a Section 10(a)(1)(B) Incidental Take Permit of the Endangered Species Act.)

Dated: October 12, 1994.

Gloria Lee,

Acting Chief, Division of Endangered Species.

[FR Doc. 94–25843 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–55–P

National Park Service

Availability of a Plan of Operations and Environmental Assessment, Proposed Drilling and Production Operations; EP Operating Limited Partnership, Padre Island National Seashore, Kleberg, County, TX

The National Park Service has received for approval a Plan of Operation for exploratory drilling and production of a gas well at Padre Island National Seashore, Kleberg County, Texas, from EP Operating Limited Partnership (EP Operating).

Pursuant to § 9.52(b) of Title 36 of the Code of Federal Regulations, part 9, subpart B (36 CFR part 9B); Executive Order 11988, Floodplain Management; and Executive Order 11990, Protection of Wetlands, the Plan of Operations and Environmental Assessment are available for public review and comment for a period of 60 days from the publication date of this notice in the Office of the Superintendent, Padre Island National Seashore, 9405 South Padre Island Drive, Corpus Christi, Texas; and in the Division of Environmental Coordination, National Park Service, Southwest Regional Office, 1220 S. St. Francis Drive, Santa Fe, New Mexico. Copies of the documents are available from the Superintendent, Padre Island National Seashore, 9405 South Padre Island Drive, Corpus Christi, Texas 78418–5597, and will be sent upon request.

EP Operating has sited their proposed operations to avoid, as much as possible, impacts to wetlands, and has developed mitigation measures to minimize unavoidable impacts. EP Operating proposes to compensate for direct loss of 0.11 acres of non-tidal

wetlands by restoring 0.22 acres of an abandoned oil and gas access road to its original wind-tidal flat condition. The wetlands compensation project is also located at Padre Island National Seashore.

Dated: October 13, 1994.

Philip A. Francis,

Acting Regional Director, Southwest Region.

[FR Doc. 94–25918 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–70–M

General Management Plan; Kaloko Honokohau National Historical Park; Notice of Availability of Final Environmental Impact Statement

Summary: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, Public Law 91–190, the National Park Service has prepared a final environmental impact statement (FEIS) on the general management plan (GMP) for Kaloko-Honokohau National Historical Park, Hawaii County, Hawaii. The general management plan calls for the development of access and visitor use facilities at the park. Facilities proposed in the park are limited to those essential for the protection of resources, provision of visitor services, and perpetuation of the Hawaiian culture. They are confined to areas already disturbed, known not to contain cultural or natural resources, and located away from the coast. Developments are to be designed to blend in with the historical and open character of the park's landscape. Moreover, they are to be located so as to not interfere with the traditional Hawaiian activities taking place in the park.

The draft environmental impact statement (DEIS) was released for public review in October 1992, and the public comment period closed December 11, 1992. Both the DEIS and the FEIS evaluate the same proposal and three alternatives, and information in the FEIS is essentially unchanged from the DEIS. The alternatives consist of no action, limited facility development (minimum requirements), and maximization of vehicle access with more emphasis on recreational use. The FEIS contains written responses to substantive comments made on the DEIS, as well as minor modifications and clarifications to the text as appropriate in response to those comments.

Supplementary Information: The no action period on the GMP/FEIS will extend for 30 days after EPA publishes a notice of its availability in the **Federal Register**. Requests for information on, or copies of the final document should be directed to the Superintendent, Kaloko-Honokohau National Historical Park, 73–4786 Kanalani Street, #14, Kailua-Kona, Hawaii 96740; or to the Park Planner, National Park Service Pacific Area Office, 300 Ala Moana Blvd., Box 56065, Honolulu, Hawaii 96850.

Dated: September 28, 1994.

Stanley T. Albright,

Regional Director, Western Region.

[FR Doc. 94–25920 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–70–P

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before October 8, 1994. Pursuant to § 6013 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013–7127. Written comments should be submitted by November 3, 1994.

Carol D. Shull,

Chief of Registration, National Register.

Florida

Dade County

Trapp Homestead, 2521 S. Bayshore Dr., Miami, 94001279

Maryland

Baltimore Independent City

St. Elizabeth of Hungary, Jct. of E. Baltimore St. and Lakewood Avenue, Baltimore (Independent City), 94001278

Nebraska

Lancaster County

Murphy, William L. and Sydney V., House, 2525 N St., Lincoln, 94001280

New York

Rensselaer County

Public School No. 10, 77 Adams St., Troy, 94001281

Winslow Chemical Laboratory, 105 Eighth St., Troy, 94001284

Schuyler County

Brick Tavern Stand, 108 Catharine St., Montour Falls, 94001283

Tompkins County

Dryden District School No. 5, 1756 Hanshaw Rd., Dryden, 94001282

Ohio

Green County

Dean Family Farm Historic District (Boundary Increase), 199 S. Ballard Rd., Xenia vicinity, 94001300

West Virginia

Berkeley County

Abell—Kilbourn House, 1018 Winchester Ave., Martinsburg, 94001290

Balwin—Grantham House, Co. Rd. 18 E of Shanghai, Shanghai vicinity, 94001296

Cool Spring Farm, Runnymede Rd. (Rt. 26) S of Gerrardstown, Garrardstown vicinity, 94001292

Hays—Pitzer House, Middle Creek Rd. (WV 45) N of Inwood, Martinsburg vicinity, 94001294

Hedges, Owen Tudor, House, Co. Rd. 8 E of Hedgesville, Hedgesville vicinity, 94001293

Parks's Gap Bridge, Rt. 6 over Back Cr., Martinsburg vicinity, 94001299

Rauch House, Off WV 9, S of Martinsburg, Martinsburg vicinity, 94001298

Stone House Mansion, Off WV 9, SE of Martinsburg, Martinsburg, 94001297

Strayer—Couchman House, Warm Springs Rd. E of Martinsburg, Martinsburg vicinity, 94001291

Thunder Hill Farm, Co. Rd. 30 N of Inwood, Inwood vicinity, 94001295

VanMetre, Nathan, House, Dry Run Rd. (Co. Rd. 13) N of Martinsburg, Martinsburg vicinity, 94001289

Jefferson County

Tackley Farm, WV 9, 2 mi. E of jct. with WV 480, Shenandoah Junction vicinity, 94001286

Kanawha County

St. Albans Post Office, 202 Sixth Ave., St. Albans, 94001285

Monongalia County

Derring Building, 175—177 Walnut St., Morgantown, 94001288

Randolph County

West Virginia Children's Home, 230 Heavener Ave., Elkins, 94001287

[FR Doc. 94–25851 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–70–M

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–360 and 361 (Final) and 731–TA–688 through 695 (Final)]

Certain Carbon Steel Butt-Weld Pipe Fittings From France, India, Israel, Malaysia, the Republic of Korea, Thailand, the United Kingdom, and Venezuela

AGENCY: United States International Trade Commission.

ACTION: Institution and scheduling of final antidumping investigations and scheduling of the ongoing countervailing duty investigations.

SUMMARY: The Commission hereby gives notice of the institution of final antidumping investigations Nos. 731–TA–688 through 695 (Final) under

section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from France, India, Israel, Malaysia, the Republic of Korea, Thailand, the United Kingdom, and Venezuela of certain carbon steel butt-weld pipe fittings,[1] provided for in subheading 7307.93.30 of the Harmonized Tariff Schedule of the United States. The Commission also gives notice of the schedule to be followed in these antidumping investigations and the ongoing countervailing duty investigations regarding imports of certain carbon steel butt-weld pipe fittings from India and Israel (invs. Nos. 701–TA–360 and 361 (Final)), which the Commission instituted effective May 31, 1994 (59 F.R. 37054, July 20, 1994). The schedules for the subject investigations will be identical, pursuant to Commerce's alignment of its final subsidy and dumping determinations (59 F.R. 32955, June 27, 1994).

For further information concerning the conduct of these investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

EFFECTIVE DATE: October 3, 1994.

FOR FURTHER INFORMATION CONTACT: Debra Baker (202–205–3180), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. Information can also be obtained by calling the Office of Investigations' remote bulletin board system for personal computers at 202–205–1895 (N,8,1).

SUPPLEMENTARY INFORMATION:

Background

The subject antidumping investigations are being instituted as a result of affirmative preliminary determinations by the Department of Commerce that imports of certain carbon steel butt-weld pipe fittings from France, India, Israel, Malaysia, the Republic of Korea, Thailand, the United Kingdom, and Venezuela are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The Commission instituted the subject countervailing duty investigations on May 31, 1994 (59 F.R. 37054, July 20, 1994). Both investigations were requested in a petition filed on February 28, 1994, by the U.S. Fittings Group, Washington, DC, an ad hoc trade association consisting of five domestic firms: Hackney, Inc., Dallas, TX; Ladish Co., Inc., Cudahy, WI; Mills Iron Works, Inc., Gardena, CA; Steel Forgings, Inc., Shreveport, LA; and Tube Forgings of America, Inc., Portland, OR.

Participation in the Investigations and Public Service List

Any person having already filed an entry of appearance in the countervailing duty investigations is considered a party in the antidumping investigations. Any other persons wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, not later than twenty-one (21) days after publication of this notice in the **Federal Register**. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations upon the expiration of the period for filing entries of appearance.

Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these final investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made not later than twenty-one (21) days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff Report

The prehearing staff report in these investigations will be placed in the nonpublic record on December 5, 1994, and a public version will be issued thereafter, pursuant to section 207.21 of the Commission's rules.

Hearing

The Commission will hold a hearing in connection with these investigations beginning at 9:30 a.m. on December 16, 1994, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before December 9, 1994. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on December 13, 1994, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.23(b) of the Commission's rules. Parties are strongly encouraged to submit as early in the investigation as possible any requests to present a portion of their hearing testimony *in camera*.

Written Submissions

Each party is encouraged to submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.22 of the Commission's rules; the deadline for filing is December 12, 1994. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.23(b) of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.24 of the Commission's rules. Witness testimony must be filed no later than three (3) days before the hearing. The deadline for filing posthearing briefs is December 23, 1994. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the 5 investigations on or before December 23, 1994. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6,

[1] The imported products covered by the scope of these investigations consist of certain carbon steel butt-weld pipe fittings having an inside diameter of less than 14 inches (355 millimeters), imported in either finished or unfinished condition. Such pipe fittings are formed or forged carbon steel products used to join pipe sections in piping systems where conditions require permanent welded connections, as distinguished from fittings based on other methods of fastening (e.g., threaded, grooved, or bolted fittings). The subject pipe fittings come in a variety of shapes which include "elbows," "tees," "caps," and "reducers." The edges of the finished pipe fittings are beveled, so that when a fitting is placed against the end of a pipe (the ends of which have also been beveled), a shallow channel is created to accommodate the "bead" of the weld which joints the fitting to the pipe.

207.3, and 207.7 of the Commission's rules.

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to section 207.20 of the Commission's rules.

Issued: October 14, 1994.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 94–25913 Filed 10–18–94; 8:45 am]

BILLING CODE 7020–02–P

[Investigation No. 731–TA–670 (Final)]

Certain Cased Pencils From Thailand

Determination

On the basis of the record [1] developed in the subject investigation, the Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Thailand of certain cased pencils,[2] provided for in subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted this investigation effective June 16, 1994, following a preliminary determination by the Department of Commerce that imports of certain cased pencils from Thailand were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. § 1673b(b)). Notice of the institution of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of July 7, 1994 (59 FR 34865). The hearing was held in Washington, DC, on August 25, 1994, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this investigation to the Secretary of Commerce on October 13, 1994. The views of the Commission are contained in USITC Publication 2816 (October 1994), entitled "Certain Cased Pencils from Thailand: Investigation No. 731–TA–670 (Final)."

Issued: October 14, 1994.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 94–25912 Filed 10–18–94; 8:45 am]

BILLING CODE 7020–02–M

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

[2] For purposes of its investigation, the Department of Commerce defined "certain cased pencils" as pencils of any shape or dimension which are writing and/or drawing instruments that feature cores of graphite or other materials encased in wood and/or manmade materials, whether or not decorated and whether or not tipped (e.g., with erasers, etc.) in any fashion, and either sharpened or unsharpened. Specifically excluded from the scope of the investigations are mechanical pencils, cosmetic pencils, pens, noncased crayons (wax), pastels, charcoals, or chalks.

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32584]

Caldwell County Railroad Company—Lease, Operation, and Acquisition Exemption—Norfolk Southern Railway Company

Caldwell County Railroad Company (CCR), a noncarrier, has filed a notice of exemption for the lease, operation, and possible future acquisition of a rail line [1] currently owned by the Norfolk Southern (NS) and leased and operated by the Carolina & Northwestern Railroad, Inc. (C&NW).[2] The line extends from milepost HG–90.0 at Hickory, NC, to milepost HG–112.7 at Valmead, NC, a distance of approximately 22.7 miles. The lease transaction was expected to be consummated on or after September 24, 1994.

This proceeding is related to Donald J. and Carol N. McGrady—Continuance in Control Exemption—Caldwell County Railroad Company, Finance Docket No. 32585, wherein Donald J. and Carol N. McGrady filed a notice of exemption seeking to continue in control of CCR and Southeast Shortlines, Inc., d/b/a Thermal Belt Railway, upon CCR becoming a carrier.

Any comments must be filed with the Commission and served on: Robert A. Wimbish, Rea, Cross & Auchincloss, Suite 420, 1920 N Street, N.W., Washington, DC 20036.

This notice is filed under 49 CFR 1150.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: October 13, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Acting Secretary.

[FR Doc. 94–25874 Filed 10–18–94; 8:45 am]

BILLING CODE 7035–01–P

[1] The Caldwell County Economic Development Commission (CCEDC) is currently negotiating with NS for the purchase of the line. Should CCEDC be successful in its efforts to acquire the line, it has agreed in principle to extend to CCR an option to purchase the subject rail property. Both CCEDC's acquisition of the NS line and CCR's exercise of its option to acquire the line from CCEDC, should it be formalized, would require subsequent Commission approval or exemption. To the extent that the notice of exemption relates to the future purchase of the subject NS line, it is rejected.

[2] The transaction is to be implemented pursuant to an agreement entered into by NS, C&NW, and CCR under which the C&NW lease to operate the NS line is to be assigned to CCR. Under these circumstances, C&NW will not be required to seek Commission approval to terminate operations over the line.

[Finance Docket No. 32585]

Donald J. and Carol N. McGrady—Continuance in Control Exemption—Caldwell County Railroad Company

Donald J. and Carol N. McGrady (petitioners) have filed a notice of exemption to continue in control of Caldwell County Railroad Company (CCR), upon CCR becoming a class III rail carrier.[1]

CCR, a noncarrier, has concurrently filed a notice of exemption in Finance Docket No. 32584, *Caldwell County Railroad Company—Lease, Operation, and Acquisition Exemption—Norfolk Southern Railway Company*, to lease, operate, and possibly acquire in the future [2] approximately 22.7 miles of rail line currently leased by the Carolina & Northwestern Railroad, Inc., and owned by the Norfolk Southern Railway Company.

Petitioners also control a nonconnecting class III rail carrier, Southeast Shortlines, Inc., d/b/a Thermal Belt Railway (SES), that operates approximately 16.4 miles of railroad in southwestern North Carolina.

[1] Petitioners will own 100% of the outstanding stock of CCR.

[2] CCR's possible future acquisition of the line will require further Commission authority or exemption.

Petitioners state that: (1) The properties operated by SES and CCR do not connect with each other; (2) the continuance in control is not a part of a series of anticipated transactions that would connect the railroads with each other or any railroad in their corporate family; and (3) the transaction does not involve a class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11343. *See* 49 CFR 1180.2(d)(2).

As a condition to use of this exemption, any employees affected by the transaction will be protected by the conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979).

Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction. Pleadings must be filed with the Commission and served on: Robert A. Wimbish, Rea, Cross & Auchincloss, Suite 420, 1920 N Street, N.W., Washington, DC 20036.

Decided: October 13, 1994.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Acting Secretary.

[FR Doc. 94–25873 Filed 10–18–94; 8:45 am]

BILLING CODE 7035–01–P

DEPARTMENT OF JUSTICE

Lodging a Final Judgment by Consent Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on Sept. 29, 1994, a proposed *De Minimis* consent decree in *United States v. Aluminum Company of America, et al.* was lodged with the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 89–7421. The decree pertains to the Moyer Landfill Site in Collegeville, Pennsylvania. The proposed consent decree resolves the liability under Section 107 of CERCLA, 42 § 9607, for response costs incurred and to be incurred by the United States and Commonwealth of Pennsylvania, of twenty-two original and third-party defendants.

The proposed consent decree requires the Settlors to pay the United States $3,478,626.00, which equals 100% of their share of past and estimated future response costs at the Site, plus a 213% premium on these past and future costs. The proposed settlors are as follows: Air Products & Chemicals, Inc., Ajax/Acorn Manufacturing, Inc., Aluminum Co. of America, American Packaging Corp., formerly American Bag & Paper Corporation, Beazer East, Inc., formerly Koppers Company, Inc., Bethlehem Steel Corporation, the Borough of Prospect Park, Bridgestone/Firestone, Inc.; Chamberlain Manufacturing Corporation, Johnson Matthey Inc., formerly Matthey Bishop, Inc., Kaiser Aluminum and Chemical Corp., Lancaster Metals Science Corporation, Lukens Steel Company (formerly Lukens, Inc.), M.A. Industries, Inc., Merck & Co., Inc., National Starch and Chemical NL Industries, Inc., Occidental Chemical Corp., Paramount Packaging Corporation, Public Service Electric and Gas Company, Stroehmann Bakeries, Inc., Techalloy Co., Inc., and Uniform Tubes, Inc.

The Department of Justice will receive comments relating to the proposed consent decree for a period of thirty days from the date of publication of this notice. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Washington, D.C., 20530, and should refer to *United States v. Aluminum Company of America, et al.* (E.D. Pa.) and DOJ Ref. No. 90–11–3–145. The proposed consent decree may be examined at the office of the United States Attorney, Eastern District of Pennsylvania, 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106–4476 or at the office of the Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania, 19107. A copy of the proposed consent decree may also be examined at the Consent Decree Library, 601 Pennsylvania Avenue Building, N.W., Box 1097, Washington, D.C. 20004 (202) 347–2072. 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 enclose a check in the amount of $17.25 (25 cents per page reproduction costs) payable to "Consent Decree Library".

Bruce S. Gelber,

Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 94–25817 Filed 10–18–94; 8:45 am]

BILLING CODE 4410–01–M

Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with the policy of the Department of Justice, 28 CFR 50.7 and Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9622, notice is hereby given that a proposed consent decree in *United States v. Environmental Conservation and Chemical Corporation, et al.*, Civil Action No. 83–1419C (S.D. Ind.)., was lodged with the United States District Court for the District of Indiana, on September 29, 1994. That action was brought against approximately 283 defendants pursuant to Sections 106 and 107 of CERCLA for the cleanup of, and for recovery of costs the United States incurred in performing response actions at, the Envirochem Site. The eight settlors to this decree as *de minimis* contributors of hazardous substances to the Site, as defined in Section 122(g) of CERCLA, and under the terms of this decree are paying a certain charge per gallon of wastes that they sent to the Site. This money will be used to reimburse the Superfund for costs the United States incurred in carrying out certain response actions at the Site. The terms of this decree are substantially similar to the terms of two other *de minimis* settlements entered in this case in 1990 and 1991, which involved other *de minimis* defendants. The Site is currently being remediated by other defendants pursuant to a consent decree entered in 1991.

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 Environmental and Natural Resources Division, Department of Justice, Washington, D.C. 20530. All comments should refer to *United States v. Environmental Conservation and Chemical Corporation, et al.*, D.J. Ref. No. 90–11–2–48.

The proposed consent decree may be examined at the office of the United States Attorney for the Southern District of Indiana, U.S. Courthouse, 5th floor, 46 E. Ohio Street, Indianapolis, IN 46204; at the Region V office of the Environmental Protection Agency, 77 West Jackson Blvd., Chicago, IL 60604; and 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 enclose a check in the amount of $12.25 for the decree (25 cents per page reproduction costs) payable to the Consent Decree Library. When requesting a copy, please refer to *United States v. Environmental Conservation and Chemical*

Corporation, et al., D.J. Ref. No. 90–11–2–48.

Bruce S. Gelber,

Acting Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 94–25815 Filed 10–18–94; 8:45 am]

BILLING CODE 4410–01–M

Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that a proposed consent decree in *United States* v. *Hi-Mill Manufacturing Company*, Civil Action No. 94–CV–60261–AA was lodged on September 29, 1994 with the United States District Court for the Eastern District of Michigan. The consent decree settles an action brought under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.*, ("CERCLA") for costs incurred by the United States in responding to a release or threat of release of hazardous substances at the Hi–Mill Manufacturing Company Site in Highland, Michigan (the "Site") and for implementation of response action at the Site. The United States alleges that Hi-Mill Manufacturing Company ("Hi-Mill") owns and operates the Site at which hazardous substances were released and is liable for costs incurred by the United States in responding to such releases pursuant to Section 107(a)(2) of CERCLA. The Consent Decree requires Hi-Mill to reimburse the United States $169,871.30 for response costs incurred in connection with the Site and to implement a response action for the Site selected by the U.S. Environmental Protection Agency in a Record of Decision dated September 28, 1993.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Hi-Mill Manufacturing Company*, DOJ Ref. #90–11–2–974.

The proposed consent decree may be examined at the office of the United States Attorney, 817 Federal Building, 231 West Lafayette, Detroit, Michigan; the Region 5 Office of the Environment Protection Agency, 77 West Jackson Boulevard Chicago, IL 60604; and 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, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy please refer to the referenced case and enclosed a check in the amount of $30.25 (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. 94–25816 Filed 10–18–94; 8:45 am]

BILLING CODE 4410–01–M

Notice of Lodging of Consent Decree Pursuant to CERCLA

In accordance with Departmental policy, 28 CFR 50.7, and 42 U.S.C. § 9622(d), notice is hereby given that a proposed Consent Decree in *United States of America* v. *Smith-Jones, Inc., et al.*, Civil Action No. 4–92–80417 was lodged on September 29, 1994 with the United States District Court for the Southern District of Iowa, Central Division.

On July 24, 1992, the United States filed a Complaint pursuant to Sections 104(e) and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604(e) and 9607, as amended ("CERCLA") for civil penalties and reimbursement of response costs incurred and to be incurred by the United States for response actions related to the release or threatened release of hazardous substances at the Midwest Manufacturing/North Farm Superfund Site which is comprised of two properties: one located in Kellog, Iowa and the other located two miles north and one-half mile east of Kellog. An Amended Complaint was filed with the proposed Consent Decree which adds a claim for injunctive relief for implementation of the remedy selected by EPA for the Site.

Subsequently, the United States, Smith-Jones, Inc. and Midwest International, Inc. reached a settlement which resolves the issues set forth in the Amended Complaint. Under the Consent Decree, the Settling Defendants will implement the remedy selected by EPA for the Site and pay the United States $536,300 for past costs incurred for the Site, as well as all future costs of overseeing the implementation of the remedial action.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Acting Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States of America* v. *Smith-Jones, Inc., et al.*, DOJ Ref. No. 90–11–2–651.

The proposed Consent Decree may be examined at the office of the United States Attorney, 115 United States Courthouse, East First and Walnut Streets, Des Moines, Iowa 50309; the Region VII Office of the Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, Kansas 66101; and 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, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy please refer to the referenced case and enclose a check in the amount of $18.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

Bruce Gelber,

Acting Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 94–25475 Filed 10–18–94; 8:45 am]

BILLING CODE 4410–01–M

Antitrust Division

Request for Comments on Draft Antitrust Enforcement Guidelines for International Operations

AGENCY: Department of Justice.

ACTION: Notice.

SUMMARY: The Department of Justice (Department) and the Federal Trade Commission (Commission) have drafted proposed new Antitrust Enforcement Guidelines for International Operations. The Guidelines, when adopted in final form by the Department and the Commission, will state the antitrust enforcement policy of the Department and the Commission with respect to the international aspects of business operations. The Department's 1988 Antitrust Guidelines for International Operations will be withdrawn when these draft Guidelines are adopted in final form. Portions of the 1988 guidelines will also be superseded by the Department's proposed Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property, which recently have been published for public comment in the **Federal Register**. See 59 FR 41,339 (Aug. 11, 1994).

[Comments on these draft Antitrust Enforcement Guidelines for International Operations should be submitted in writing within 60 days of their publication.]

FOR FURTHER INFORMATION: Persons wishing to comment on the proposed Guidelines must submit their views to both Ms. Diane P. Wood, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, Tenth and Pennsylvania Avenue, N.W., Washington, D.C. 20530, 202–514–2404; and Mr. Walter T. Winslow, Associate Director, Bureau of Competition, Federal Trade Commission, Washington, D.C. 20580, 202–326–2560.

SUPPLEMENTARY INFORMATION: These proposed Guidelines were drafted to state the current views of the Department and the Commission on antitrust enforcement policy with respect to international business operations. The Guidelines are not intended to create or recognize any legally enforceable right in any person. They are not intended to affect the admissibility of evidence or in any other way necessarily to affect the course or conduct of any present or future litigation. Moreover, changes in the relevant statutory framework, legal precedent, and methods of internal Department and Commission analysis may occur over time, and these changes will not always be simultaneously reflected in amendments to the Guidelines. Parties seeking to know the Department's or the Commission's specific enforcement intentions should consider using the Department's Business Review Procedure, see 28 CFR 50.6 (1993), or the Commission's Advisory Opinion procedure. See 16 C.F.R. §§ 1.1–1.4 (1993).

Dated: October 13, 1994.

Diane P. Wood,

Deputy Assistant Attorney General, Antitrust Division, Department of Justice.

Antitrust Enforcement Guidelines for International Operations 1994

1. Introduction

For more than a century, the U.S. antitrust laws have stood as the ultimate protector of the competitive process that underlies our free market economy. Through this process, society as a whole benefits from the best possible allocation of resources, which in turn maximizes consumer choice and maintains competitive prices.

Although the federal antitrust laws have always applied to foreign commerce, that application is particularly important today. Throughout the world, the importance of antitrust law as a means to ensure open and free markets, protect consumers, and prevent conduct that impedes competition is becoming more apparent. The Department of Justice ("the Department") and the Federal Trade Commission ("the Commission" or "FTC") (when referred to collectively, "the Agencies"), as the federal agencies charged with the responsibility of enforcing the antitrust laws, thus have made enforcement of the antitrust laws with respect to international operations a top priority. In furtherance of this priority, the Agencies have revised and updated the Department's 1988 Antitrust Enforcement Guidelines for International Operations, which are hereby withdrawn.[1]

The 1994 Antitrust Enforcement Guidelines for International Operations (hereinafter "Guidelines") are intended to provide antitrust guidance to businesses engaged in international operations on questions that relate specifically to the Agencies' international enforcement policy.[2] They do not, therefore, provide a complete statement of the Agencies' general enforcement policies. The topics covered include the Agencies' subject matter jurisdiction over conduct and entities outside the United States and the considerations, issues, policies, and processes that govern their decision to exercise that jurisdiction; comity; mutual assistance in international antitrust enforcement; and the effects of foreign governmental involvement on the antitrust liability of private entities. In addition, the Guidelines discuss the relationship between antitrust and international trade initiatives. Finally, to illustrate how these principles may operate in certain contexts, the Guidelines include a number of examples.

As is the case with all guidelines, users should rely on qualified counsel to assist them in evaluating the antitrust risk associated with any contemplated transaction or activity. No set of guidelines can possibly indicate how the Agencies will assess the particular facts of every case. Persons seeking more specific advance statements of enforcement intentions with respect to the matters treated in these Guidelines should use the Department's Business Review procedure, the Commission's Advisory Opinion procedure, or one of the more specific procedures described below for particular types of transactions.

2. Antitrust Laws Enforced by the Agencies

Foreign commerce cases can involve almost any provision of the antitrust laws.[3] The Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Once jurisdictional requirements and considerations of international comity have been considered and satisfied, the same substantive rules apply to all.

The following is a brief summary of the laws enforced by the Agencies that are likely to have the greatest significance for international transactions.

2.1 Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. § 1, sets forth the basic antitrust prohibition against contracts, combinations, and conspiracies in restraint of trade or commerce among the several States or with foreign nations. Section 2 of the Act, 15 U.S.C. § 2, prohibits monopolization, attempts to monopolize, and conspiracies to monopolize any part of trade or commerce among the several States or with foreign nations. Section 6a of the Sherman Act, 15 U.S.C. § 6a, defines the jurisdictional reach of the Act with respect to non-import foreign commerce.

Violations of the Sherman Act may be prosecuted as civil or criminal offenses. Conduct that the Department prosecutes criminally is limited to traditional *per se* offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging or other cartel activities that would also be violations of the law in many countries. Criminal violations of the Act are punishable by fines and imprisonment. The Sherman Act provides that corporate defendants

[1] The U.S. Department of Justice Antitrust Guidelines for the Enforcement and Acquisition of Intellectual Property (Proposed), the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992), and the Statements of Antitrust Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, Jointly Issued by the U.S. Department of Justice and Federal Trade Commission (1994), are not qualified, modified, or otherwise amended by the issuance of these Guidelines.

[2] Readers should separately evaluate the risk of private litigation by competitors, consumers and suppliers, as well as the risk of enforcement by state prosecutors under state and federal antitrust laws.

[3] Certain exceptions may arise due to jurisdictional limitations. For example, the Robinson-Patman Act, 15 U.S.C. § 13 (1988), applies only to purchases involving commodities "for use, consumption, or resale within the United States." It has been construed not to apply to sales for export See, *e.g.*, General Chem., Inc. v. Exxon Chem. Co., 625 F.2d 1231, 1234 (5th Cir. 1980). Intervening domestic sales, however, would be subject to the Act. See Raul Int'l Corp. v. Sealed Power Corp., 586 F. Supp. 349, 351–55 (D.N.J.) 1984).

may be fined up to $10 million, other defendants may be fined up to $350,000, and individuals may be sentenced to up to 3 years' imprisonment.[4] The Department has sole responsibility for the criminal enforcement of the Sherman Act. In a civil proceeding, the Department may obtain injunctive relief against prohibited practices. It may also obtain treble damages if the U.S. government is the purchaser of affected goods or services.[5] Private plaintiffs may also obtain injunctive and treble damage relief for violations of the Sherman Act. Before the Commission conduct that violates the Sherman Act may be challenged pursuant to the Commission's power under Section 5 of the Federal Trade Commission Act, described below.

2.2 Clayton Act

The Clayton Act, 15 U.S.C. § 12 *et seq.*, expands on the general prohibitions of the Sherman Act and addresses anticompetitive problems in their incipiency.[6] Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits any merger or acquisition of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[7] Section 15 of the Clayton Act empowers the Attorney General, and Section 13(b) of the FTC Act empowers the Commission, to seek a court order enjoining consummation of a merger that would violate Section 7. In addition, the Commission may seek a cease and desist order in an administrative proceeding against a merger under either Section 11 of the Clayton Act or Section 5 of the FTC Act, or both. Private parties may also seek injunctive relief under 15 U.S.C. § 26.

Section 3 of the Clayton Act prohibits any person engaged in commerce from conditioning the lease or sale of goods or commodities upon the purchaser's agreement not to use the products of a competitor, if the effect may be substantially to lessen competition or to tend to create a monopoly in any line of commerce.[8] In evaluating transactions, the trend of recent authority is to use the same analysis employed in the evaluation of tying under Sherman Act Section 1 to assess a defendant's liability under Section 3 of the Clayton Act.[9]

Section 2 of the Clayton Act, known as the Robinson-Patman Act,[10] prohibits price discrimination in certain circumstances. Historically, the Commission has enforced this provision.

2.3 Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act ("FTC Act") declares unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[11] Pursuant to its authority over unfair methods of competition, the Commission may take administrative action against conduct that violates the Sherman Act and the Clayton Act, as well as anticompetitive practices that do not fall within the scope of the Sherman or Clayton Acts. The Commission may also seek injunctive relief in federal court against any such conduct under Section 13(b) of the FTC Act. Although enforcement at the Commission relating to international deceptive practices has become increasingly important over time, these Guidelines are limited to the Commission's antitrust authority under the unfair methods of competition language of Section 5.

2.4 Hart-Scott-Rodino Antitrust Improvements Act of 1976

Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), 15 U.S.C. § 18a, provides the Department and the Commission with several procedural devices to facilitate enforcement of the antitrust laws with respect to anticompetitive mergers and acquisitions.[12] The HSR Act requires persons engaged in commerce or in any activity affecting commerce to notify the Agencies of proposed mergers or acquisitions that would exceed statutory size-of-party and size-of-transaction thresholds,[13] to provide certain information relating to reportable transactions, and to wait for a prescribed period—15 days for cash tender offers and 30 days for all other transactions—before consummating the transaction.[14] The Agency may, before the end of the waiting period, request additional information concerning a transaction (make a "Second Request") and thereby extend the waiting period beyond the initial one prescribed, to a specified number of days after the receipt of the material required by the Second Request—10 days for cash tender offers and 20 days for all other transactions.[15]

The HSR Act and the FTC rules implementing the HSR Act[16] exempt from the premerger notification

[4] Defendants may be fined up to twice the gross pecuniary gain or loss caused by their offense in lieu of the Sherman Act fines, pursuant to 18 U.S.C. § 3571(d) (1988 & Supp. 1993). In addition, the U.S. Sentencing Commission Guidelines provide further information about possible criminal sanctions for individual antitrust defendants in § 2R1.1 and for organizational defendants in Chapter Eight.

[5] See 15 U.S.C. § 4 (1988) (injunctive relief); 15 U.S.C. § 15a (1988 & Supp. 1993) (damages).

[6] Under the Clayton Act, "commerce" includes "trade or commerce among the several states and with foreign nations * * *." "Persons" include corporations or associations existing under or authorized either by the laws of the United States or any of its states or territories, or by the laws of any foreign country. 15 U.S.C. § 12 (1988 & Supp. 1993).

[7] 15 U.S.C. § 18 (1988). The asset acquisition clause applies to "person[s] subject to the jurisdiction of the Federal Trade Commission" under the Clayton Act.

[8] 15 U.S.C. § 14 (1988).

[9] See, e.g., Mozart Co. v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1352 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988).

[10] 15 U.S.C. §§ 13–13b, 21a (1988).

[11] 15 U.S.C. § 45 (1988 & Supp. 1993).

[12] The scope of the Agencies' jurisdiction under Clayton § 7 exceeds the scope of those transactions subject to the premerger notification requirements of the HSR Act. Whether or not the HSR Act premerger notification thresholds are satisfied, either Agency may request the parties to a merger affecting U.S. commerce to provide information voluntarily concerning the transaction. In addition, the Department may issue Civil Investigative Demands ("CIDs") pursuant to the Antitrust Process Act, 15 U.S.C. §§ 1311–1314 (1988), and the Commission may issue administrative CIDs pursuant to the Act of Aug. 26, 1994, Pub. L. No. 103–312, § 7; 108 Stat. 1691 (1994). The Commission may also issue administrative subpoenas and orders to file special reports under Sections 9 and 6(b) of the FTC Act, respectively. 15 U.S.C. §§ 49, 46(b) (1988). Authority in particular cases is allocated to either the Department or the Commission pursuant to a voluntary clearance protocol. See Antitrust & Trade Reg. Daily (BNA), Dec. 6, 1993.

[13] Unless exempted pursuant to the Act, the parties must provide premerger notification to the Agencies if (1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or any activity affecting commerce; and (2)(a) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of $10 million or more are being acquired by any person which has total assets or annual net sales of $100 million or more, or (b) any voting securities or assets of a person not engaged in manufacturing which has total assets of $10 million or more are being acquired by any person which has total assets or annual sales of $100 million or more; or (c) any voting securities or assets of a person with annual net sales or total assets of $100 million or more are being acquired by any person with total assets or annual net sales of $10 million or more; and (3) as a result of such acquisition, the acquiring person would hold (a) 15 percent or more of the voting securities or assets of the acquired person, or (b) an aggregate total amount of the voting securities and assets of the acquired person of $15 million. 15 U.S.C. § 18a(a) (1988). The size of the transaction test set forth in (3) *supra* must be read in conjunction with 16 CFR 802.20 (1994). This Section exempts asset acquisitions valued at $15 million or less. It also exempts voting securities acquisitions of $15 million or less unless, as a result of the acquisition, the acquiring person would hold 50 percent or more of the voting securities of an issuer that has annual net sales or total assets of $25 million or more. The HSR rules are necessarily technical, and should be consulted, rather than relying on this summary.

[14] 15 U.S.C. § 18a(b) (1988 & Supp. 1993); 16 CFR 803.1 (1994).

[15] 15 U.S.C. § 18a(e) (1988).

[16] 16 CFR 801–803 (1994).

requirements certain international transactions (typically those having little nexus to U.S. commerce) that otherwise meet the statutory thresholds.[17] Failure to comply with the HSR Act is punishable by court-imposed civil penalties of up to $10,000 for each day a violation continues. The court may also order injunctive relief to remedy a failure substantially to comply with the HSR Act. Businesses may seek an interpretation of their obligations under the HSR Act from the Commission.[18]

2.5 National Cooperative Research and Production Act

The National Cooperative Research and Production Act ("NCRPA"), 15 U.S.C. §§ 4301–06, clarifies the substantive application of the U.S. antitrust laws to joint research and development activities and joint production activities. Originally drafted to encourage research and development by providing a special antitrust regime for research and development ("R&D") joint ventures, the NCRPA requires U.S. courts to judge the competitive effects of a challenged joint R&D or joint production venture, or a combination of the two, in properly defined relevant markets and under a rule-of-reason standard. The statute specifies that the conduct "shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets." 15 U.S.C. § 4302. This approach is consistent with the Agencies' general analysis of joint ventures.[19]

The NCRPA also establishes a voluntary procedure pursuant to which the Attorney General and the FTC may be notified of a joint R&D or production venture. The statute limits the monetary relief that may be obtained in private civil suits against the participants in a notified venture to actual rather than treble damages, if the challenged conduct is within the scope of the notification. With respect to joint production ventures, the National Cooperative Production Amendments of 1993, Pub. L. No. 103–42, 107 Stat. 117, 119, provide that the benefits of the limitation on recoverable damages for claims resulting from conduct within the scope of a notification are not available unless (1) the principal facilities for the production are located within the United States or its territories, and (2) "each person who controls any party to such venture (including such party itself) is a United States person, or a foreign person from a country whose law accords antitrust treatment no less favorable to United States persons than to such country's domestic persons with respect to participation in joint ventures for production." 15 U.S.C. § 4306(2) (Supp. 1993).

2.6 Webb-Pomerene Act

The Webb-Pomerene Act, 15 U.S.C. §§ 61–65, provides a limited antitrust exemption for the formation and operation of associations of otherwise competing businesses to engage in collective export sales. The exemption applies only to the export of "goods, wares, or merchandise."[20] It does not apply to conduct that has an anticompetitive effect in the United States or that injures domestic competitors of the members of an export association. Nor does it provide any immunity from prosecution under foreign antitrust laws.[21] Associations seeking an exemption under the Webb-Pomerene Act must file their articles of agreement and annual reports with the Commission, but pre-formation approval from the Commission is not required.

2.7 Export Trading Company Act of 1982

The Export Trading Company Act of 1982 (the "ETC Act"), Pub. L. No. 97–290, 96 Stat. 1234, is designed to increase U.S. exports of goods and services. It addresses that goal in several ways. First, in Title II, it encourages more efficient provision of export trade services to U.S. producers and suppliers by reducing restrictions on trade financing provided by financial institutions.[22] Second, in Title III, it reduces uncertainty concerning the application of the U.S. antitrust laws to export trade through the creation of a procedure by which persons engaged in U.S. export trade may obtain an export trade certificate of review ("ETCR").[23] Third, in Title IV, it clarifies the jurisdictional rules applicable to non-import cases brought under the Sherman Act and the FTC Act.[24] The Title III certificates are discussed briefly here; the jurisdictional rules are treated below in Section 3.1.

Export trade certificates of review are issued by the Secretary of Commerce with the concurrence of the Attorney General. Persons named in the ETCR obtain limited immunity from suit under both state and federal antitrust laws for activities that are specified in the certificate and that comply with the terms of the certificate. To obtain an ETCR, an applicant must show that proposed export conduct will:

(1) Result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant;

(2) Not unreasonably enhance, stabilize, or depress prices in the United States of the class of goods or services covered by the application;

(3) Not constitute unfair methods of competition against competitors engaged in the export of the class of goods or services exported by the applicant; and

(4) Not include any act that may reasonably be expected to result in the sale for consumption or resale in the United States of such goods or services.[25]

Congress intended that these standards "encompass the full range of the antitrust laws," as defined in the ETC Act.[26]

Although an ETCR provides significant protection under the antitrust laws, it has certain limitations. First, conduct that falls outside the scope of a certificate remains fully subject to private and governmental enforcement actions. Second, an ETCR that is obtained by fraud is void from the outset and thus offers no protection under the antitrust laws. Third, any person that has been injured by certified conduct may recover actual (though not treble) damages if that conduct is found to violate any of the statutory criteria described above. In any such action, certified conduct enjoys a presumption of legality, and the prevailing party is

[17] 16 CFR 801.1(e), (k), 802.50–52 (1994). See Section 4.22 *infra*.

[18] See 16 CFR 803.30 (1994).

[19] See, *e.g.*, U.S. Department of Justice Antitrust Guidelines for the Enforcement and Acquisition of Intellectual Property (Proposed), § 4; Statements of Antitrust Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, Issued by the U.S. Department of Justice and the Federal Trade Commission, Sept. 27, 1994, Statement 2 (outlining a four-step approach for joint venture analysis). See *generally* National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984); F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).

[20] 15 U.S.C. § 61 (1988).

[21] See, *e.g.*, Cases 89/85, etc., Ahlstrom v. Comm'n ("Wood Pulp") (E.C.J., Sept. 27, 1988), 1988 E.C.R. 5193, [1988] 4 C.M.L.R. 901.

[22] See 12 U.S.C. §§ 372, 635 a–4, 1841, 1843 (1988 & Supp. 1993) (Because Title II does not implicate the antitrust laws, it is not discussed further in these Guidelines.)

[23] 15 U.S.C. §§ 4011–21 (1988 & Supp. 1993).

[24] 15 U.S.C. § 6a (1988); 15 U.S.C. § 45(a)(3) (1988).

[25] 15 U.S.C. § 4013(a) (1988).

[26] H.R. Rep. No. 924, 97th Cong., 2d Sess. 26 (1982). See 15 U.S.C. § 4021(6).

entitled to recover costs and attorneys' fees.[27] Fourth, an ETCR does not constitute, explicitly or implicitly, an endorsement or opinion by the Secretary of Commerce or by the Attorney General concerning the legality of such business plans under the laws of any foreign country.

The Secretary of Commerce may revoke or modify an ETCR if the Secretary or the Attorney General determines that the applicant's export activities have ceased to comply with the statutory criteria for obtaining a certificate. The Attorney General may also bring suit under Section 15 of the Clayton Act to enjoin conduct that threatens "a clear and irreparable harm to the national interest,"[28] even if the conduct has been pre-approved as part of an ETCR.

The Commerce Department, in consultation with the Department, has issued guidelines setting forth the standards used in reviewing ETCR applications.[29] The *ETC Guidelines* contain several examples illustrating application of the certification standards to specific export trade conduct, including the use of vertical and horizontal restraints and technology licensing arrangements. In addition, the Commerce Department's *Export Trading Company Guidebook*[30] provides information on the functions and advantages of establishing or using an export trading company, including factors to consider in applying for a certificate of review. The Commerce Department's Office of Export Trading Company Affairs provides advice and information on the formation of export trading companies and facilitates contacts between producers of exportable goods and services and firms offering export trade services.

2.8 Related Legislation

2.81 Wilson Tariff Act

The Wilson Tariff Act, 15 U.S.C. §§ 8–11, prohibits "every combination, conspiracy, trust, agreement, or contract" made by or between two or more persons or corporations, either of whom is engaged in importing any article from a foreign country into the United States, where the agreement is intended to restrain trade or increase the market price in any part of the United States of the imported articles, or of "any manufacture into which such imported article enters or is intended to enter." Violation of the Act is a misdemeanor, punishable by a maximum fine of $5,000 or one year in prison. The Act also provides for seizure of the imported articles.[31]

2.82 Antidumping Act of 1916

The Revenue Act of 1916, better known as the Antidumping Act, 15 U.S.C. §§ 71–74, is not an antitrust statute, but its subject matter is closely related to the antitrust rules regarding predation. It is a trade statute that creates a private claim against importers who sell goods into the United States at prices substantially below the prices charged for the same goods in their home market. In order to state a claim, a plaintiff must show both that such lower prices were commonly and systematically charged, and that the importer had the specific intent to injure or destroy an industry in the United States, or to prevent the establishment of an industry. Dumping cases are more commonly brought using the administrative procedures of the Tariff Act of 1930, discussed below.

2.83 Tariff Act of 1930

A comprehensive discussion of the trade remedies available under the Tariff Act is beyond the scope of these Guidelines. However, because antitrust questions sometimes arise in the context of trade actions, it is appropriate to describe these laws briefly.

2.831 Countervailing Duties

Pursuant to Title VII.A of the Tariff Act,[32] U.S. manufacturers, producers, wholesalers, unions and trade associations may petition for the imposition of offsetting duties on subsidized foreign imports.[33] The Department of Commerce's International Trade Administration ("ITA") must make a determination that the foreign government in question is subsidizing the imports, and in most cases the International Trade Commission ("ITC") must determine that a domestic industry is materially injured or threatened with material injury by reason of these imports.

2.832 Antidumping Duties

Pursuant to Title VII.B of the Tariff Act,[34] parties designated in the statute may petition for antidumping duties, which must be imposed on foreign merchandise that is being, or is likely to be, sold in the United States at "less than fair value" ("LTFV"), if the U.S. industry is materially injured or threatened with material injury by imports of the foreign merchandise. The ITA makes the LTFV determination, and the ITC is responsible for the injury decision.

2.833 Section 337

Section 337 of the Tariff Act, 19 U.S.C. 1337, prohibits "unfair methods of competition and unfair acts in the importation of articles into the United States," if the effect is to destroy or substantially injure a U.S. industry, or where the acts relate to importation of articles infringing U.S. patents, copyrights, trademarks, or registered mask works.[35] Complaints are filed with ITC. The principal remedies under Section 337 are an exclusion order directing that any offending goods be excluded from entry into the United States, and a cease and desist order directed toward any offending U.S. firms and individuals.[36] The ITC is required to give the Agencies an opportunity to comment before making a final determination.[37] In addition, the Department participates in the interagency group that prepares recommendations for the President to approve, disapprove, or allow to take effect the import relief proposed by the ITC.

2.84 Trade Act of 1974

2.841 Section 201

Section 201 of this Act, 19 U.S.C. 2251 *et seq.*, provides that American businesses claiming serious injury due to significant increases in imports may petition the ITC for relief or modification under the so-called "escape clause." If the ITC makes a determination that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article," and formulates its recommendation for appropriate relief, the Department participates in the interagency committee that conducts the

[27] See 15 U.S.C. § 4016(b)(1) (1988) (injured party) and § 4016(b)(4) (1988) (party against whom claim is brought).

[28] 15 U.S.C. § 4016(b)(5) (1988).

[29] *See* Department of Commerce, International Trade Administration, *Guidelines for the Issuance of Export Trade Certificates of Review* (2d ed.), 50 Fed. Reg. 1786 *et seq.* (hereinafter "*ETC Guidelines*").

[30] U.S. Department of Commerce, International Trade Administration, *The Export Trading Company Guidebook* (March 1984).

[31] § 15 U.S.C. § 11 (1988).

[32] See 19 U.S.C. §§ 1671 *et seq.* (1988 & Supp. 1993).

[33] An alternative procedure exists under Tariff Act § 303 for countries that have not subscribed to the Subsidies Code or measures equivalent to it. See 19 U.S.C. § 1303(a)(1). *CF.* Cabot Corp. v. United States, 694 F. Supp. 949, 955 (Ct. Int'l Trade, 1988).

[34] See 19 U.S.C. 1673 *et seq.* (1988 & Supp. 1993).

[35] 19 U.S.C. 1337 (1988 & Supp. 1993).

[36] 19 U.S.C. 1337 (d), (f) (1988 & Supp. 1993).

[37] 19 U.S.C. 1337(b)(2) (1988).

investigations and advises the President whether to adopt, modify, or reject the import relief recommended by the ITC.

2.842 Section 301

Section 301 of this Act, 19 U.S.C. 2411, provides that the U.S. Trade Representative ("USTR"), subject to the specific direction, if any, of the President, may take action, including restricting imports, to enforce rights of the United States under any trade agreement, to address acts inconsistent with the international legal rights of the United States, or to respond to unjustifiable, unreasonable or discriminatory practices of foreign governments that burden or restrict U.S. commerce. Interested parties may initiate such actions through petitions to the USTR, or the USTR may itself initiate proceedings.[38] Of particular interest to antitrust enforcement is Section 301(d)(3)(B)(III), which includes among the "unreasonable" practices of foreign governments that might justify a proceeding the "toleration by a foreign government of systematic anticompetitive activities by private firms or among enterprises in the foreign country that have the effect of restricting * * * access of United States goods [or services] to purchasing by such firms."[39] The Department participates in the interagency committee that makes recommendations to the President on what actions, if any, should be taken.

2.9 Relevant International Agreements

To further the twin goals of promoting enforcement cooperation between the United States and foreign governments and of reducing any tensions that may arise in particular proceedings, the Agencies have developed close bilateral relationships with antitrust and competition policy officials of many different countries. In some instances, understandings have been reached with respect to notifications, consultations, and cooperation in antitrust matters. In other instances, more general rules endorsed by multilateral organizations such as the Organization for Economic Cooperation and Development ("OECD") provide the basis for the Agencies' cooperative policies. Finally, even in the absence of specific or general international understandings or recommendations, the Agencies often seek cooperation with foreign authorities.

2.91 Bilateral Cooperation Agreements

Formal written bilateral arrangements exist between the United States and the Federal Republic of Germany, Australia, and Canada.[40] International antitrust cooperation can also occur through mutual legal assistance treaties ("MLATs"), which are treaties of general application pursuant to which the United States and a foreign country agree to assist one another in criminal law enforcement matters. MLATs currently are in force with nearly 20 foreign countries, and many more are in the process of ratification or negotiation. However, only the MLAT with Canada has been used to date to cover antitrust offenses.[41] The Agencies also hold regular consultations with the antitrust officials of Canada, the European Commission, and Japan, and have close, informal ties with the antitrust authorities of many other countries. Since 1990, they have cooperated closely with countries in the process of establishing competition agencies, assisted by funding provided by the Agency for International Development.

During the week of October 3, 1994, Congress passed H.R. 4781, the International Antitrust Enforcement Assistance Act of 1994, see n.95 *infra*, which authorizes the Agencies to enter into antitrust mutual assistance agreements in accordance with the legislation.

2.92 International Guidelines and Recommendations

The Agencies have agreed with respect to member countries of the OECD to consider the legitimate interests of other nations in accordance with relevant OECD recommendations.[42] Under the terms of a 1986 recommendation, the United States agency with responsibility for a particular case notifies a member country whenever an antitrust enforcement action may affect important interests of that country or its nationals.[43] Examples of potentially notifiable actions include requests for documents located outside the United States, attempts to obtain information from potential witnesses located outside the United States, and cases or investigations with significant foreign conduct or involvement of foreign persons.

3. Threshold International Enforcement Issues

3.1 Jurisdiction

Just as the acts of U.S. citizens in a foreign nation ordinarily are subject to the law of the country in which they occur, the acts of foreign citizens in the United States ordinarily are subject to U.S. law. The reach of the U.S. antitrust laws is not limited, however, to conduct and transactions that occur within the boundaries of the United States. Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved. In a world in which economic transactions observe no boundaries, international recognition of the "effects doctrine" of jurisdiction has become widespread.[44]

3.11 Jurisdiction Over Conduct Involving Import Commerce

With respect to foreign import commerce, the Supreme Court has recently in *Hartford Fire Insurance Co. v. California* that "the Sherman Act

[38] 19 U.S.C. 2412(a), (b) (1988); see also Identification of Trade Expansion Priorities, Exec. Order No. 12, 901, 59 Fed. Reg. 10,727 (1994).

[39] 19 U.S.C. 2411(d)(3)(B)(i)(III)(1988).

[40] See Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, U.S.–F.R.G., 27 U.S.T. 1956, T.I.S. No. 8291, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,501; Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, U.S.-Austrl., T.I.A.S. No. 10365, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,502; and Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, U.S.-Can., *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,503. The Agencies also signed a similar agreement with the Commission of the European Communities in 1991. See Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 ILM 1491 (Nov. 1991), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504. However, on August 9, 1994, the European Court of Justice ruled that the Agreement did not comply with institutional requirements of the law of the European Union ("EU"). Under the Court's decision, action by the EU Council of Ministers is necessary for this type of agreement. See French Republic v. Commission of European Communities (No. C–327/91) (Aug. 9, 1994).

[41] Treaty with Canada on Mutual Legal Assistance in Criminal Matters, S. Exec. Rep. No. 100–114, 100th Cong., 2d Sess. (1989).

[42] See Revised Recommendations of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. No. C(86)44 (Final) (May 21, 1986). The Recommendation also calls for countries to consult with each other in appropriate situations, with the aim of promoting enforcement cooperation and minimizing differences that may arise.

[43] The OECD has 25 member countries and the European Union is represented as an observer. The OECD's membership includes many of the most advanced market economies in the world. The OECD also has several observer nations, who have rapid progress toward open market economies. The Agencies follow recommended OECD practices with respect to all member countries.

[44] The test adopted in the European Court of Justice usually produces the same outcomes as the "effects" test employed in the U.S. See Cases 89/85, etc., Ahlstrom v. Comm'n, note 21 *supra*. The merger laws of the European Union, Canada, Germany, France, Australia, and the Czech and Slovak Republics, among others, take a similar approach.

applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[45] Imports intended for sale in the United States by definition affect the U.S. domestic market directly, and will, therefore, almost invariably satisfy the intent part of the *Hartford* test. Whether they in fact produce the requisite substantial effects will depend on the facts of each case.

Illustrative Example A[46]

Situation: A, B, C, and D, are foreign companies that produce a product in various foreign countries. None has any U.S. production, nor any U.S. subsidiaries. They organize a cartel for the purpose of raising the price for the product in question. Collectively, the cartel members make substantial sales into the United States, both in absolute terms and relative to total U.S. consumption.

Discussion: These facts present the straightforward case of cartel participants selling products directly into the United States. In this situation, the transaction is unambiguously an import into the U.S. market, and the sale is not complete until the goods reach the United States. Thus, U.S. jurisdiction is clear under the general principles of antitrust law expressed most recently in *Hartford Fire*. The facts presented here demonstrate actual and intended participation in U.S. commerce.[47]

3.12 Jurisdiction Over Mergers and Acquisitions Subject to Section 7 of the Clayton Act

The general jurisdictional reach of Section 7 is co-extensive with the reach of the Sherman Act, as a result of the 1980 amendment of the Clayton Act extending it to all matters affecting commerce, which includes trade or commerce with foreign nations.[48] Thus, the Agencies would apply the same principles regarding their foreign commerce jurisdiction to Clayton Section 7 cases as they would apply in Sherman Act cases.

Illustrative Example B

Situation: Two foreign firms, one in Europe and the other in Canada, account together for 80% of U.S. sales of a particular product. Neither firm has a U.S. subsidiary, and neither has productive assets in the United States; instead, both serve the U.S. market purely through direct imports. They enter into an agreement to merge.

Discussion: As noted above, the jurisdictional provisions of Section 7 of the Clayton Act reach the stock and asset acquisitions of persons engaged in "any activity affecting commerce." In assessing jurisdiction under Section 7 for international transactions the Agencies analyze the question of effects on commerce in a manner consistent with the foreign Trade Antitrust Improvements Act of 1982 ("FTAIA")[49]: that is, they look to see whether the effects on U.S. domestic or import commerce are direct, substantial, and reasonably foreseeable.[50] It is appropriate to do so because the FTAIA sheds light on the type of effects Congress considered necessary for foreign commerce cases, even though the FTAIA itself did not amend the Clayton Act. On the facts of this example, the Agencies would conclude that Section 7 jurisdiction exists.[51] While the transaction may be subject to the terms of the HSR Act (assuming size of person and size of transaction thresholds are met), it would appear to be exempted by 16 CFR 802.51(b). See Section 4.22 *infra*.

3.13 Jurisdiction Over Conduct Involving Other Commerce

With respect to foreign commerce other than imports, the jurisdictional limits of the Sherman Act and the FTC Act are delineated in the FTAIA.

3.131 The Foreign Trade Antitrust Improvements Act of 1982

The FTAIA provides, in nearly identical language in both the Sherman Act and the FTC Act, that the statutes:

* * * shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States;[52] and

(2) such effect gives rise to a claim under the provisions of [the Sherman Act or the FTC Act], other than this Section.

Illustrative Example C

Situation: Companies E and F are the only producers of product Q in country Epsilon, one of the biggest markets for sales of Q in the world. E and F together account for 90% of the sales of product Q in Epsilon. In order to prevent a competing U.S. producer from entering the market in Epsilon, E and F agree that neither one of them will purchase or distribute the U.S. product, and that they will take "all feasible" measures to keep the U.S. company out of their market. Without specifically discussing what other measures they will take to carry out this plan, E and F meet with their distributors and, through a variety of threats and inducements, obtain agreement of all the distributors not to carry the U.S. product. There are no commercially feasible substitute distribution channels available to the U.S. producer. Because of the actions of E and F, the U.S. producer cannot find any distributors to carry its product and is unable to enter the market in Epsilon.

Discussion: The agreement between E and F not to purchase or distribute the U.S. product would clearly have a direct and reasonable foreseeable effect on U.S. export commerce, since it is aimed at a U.S. exporter. The substantiality of the effects on U.S. exports would depend on the significance of E and F as purchasers and distributors of Q, although on these facts virtually total foreclosure from the Epsilon market would almost certainly qualify as a substantial effect for jurisdictional purposes.

3.132 Jurisdiction in Cases Under Subsection 1(A) of FTAIA

To the extent that conduct in foreign countries does not "involve" import commerce but does have an "effect" on either import transactions or commerce within the United States, the Agencies apply the "direct, substantial, and reasonable foreseeable" standard of the FTAIA. That standard is applied, for example, in cases in which a cartel of foreign enterprises, or a foreign monopolist, reaches the U.S. market through any mechanism that goes beyond direct sales, such as the use of an unrelated intermediary, as well as cases in which foreign vertical restrictions or intellectual property licensing arrangements have an anticompetitive effect on U.S. commerce.

Illustrative Example D

Situation: As in Illustrative Example A, the foreign cartel produces a product in several foreign countries. None of its members have any U.S. production, nor do any of them have U.S. subsidiaries. They organize a cartel for the purpose of raising the price for the product in question. Rather than selling directly into the United States, however, the cartel sells to an intermediary outside the United States, which they know will resell the product in the United States.

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[45] 113 S.CT. 2891, 2909 (1993).

[46] The examples incorporated into the text are intended solely to illustrate how the Agencies would apply the principles articulated in the Guidelines in differing fact situations. In each case, of course, the ultimate outcome of the analysis, *i.e.*, whether or not a violation of the antitrust laws has occurred, would depend on the specific facts and circumstances of the case. These examples, therefore, do not address many of the factual and economic questions the Agencies would ask in analyzing particular conduct or transactions under the antitrust laws. Therefore, certain hypothetical situations presented here may, when fully analyzed, not violate any provision of the antitrust laws.

[47] See Section 3.13 *infra*.

[48] See note 6 *supra*; Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96–349, 94 Stat. 1154 (1980).

[49] 15 U.S.C. § 6a (1988) (Sherman Act) and § 45(a)(3) (1988) (FTC Act).

[50] See Section 3.131 *infra*.

[51] If it appears in a particular case that effective relief may be difficult to obtain, the case may be one in which the Agencies would seek to coordinate their efforts with other authorities who are examining the transaction. Through concepts such as "positive comity," one country's authorities may ask another country to take measures that address possible harm to competition in the requesting country's market.

[52] If the Sherman Act or the FTC Act applies to such conduct only because of the operation of paragraph (1)(B), then the Act shall apply to such conduct only for injury to export business in the United States. (15 U.S.C. §§ 6a, 45(a)(3) (1988).

Discussion: The jurisdictional analysis would change slightly from the one presented in Example A, because not only is the conduct being challenged entered into by cartelists in a foreign country, but it is also initially implemented through a sale made in a foreign country. Despite the different test, however, the outcome would remain the same. The existence of the intermediary would trigger the application of the FTAIA because the conduct would not involve import commerce within the meaning of the FTAIA and the Agencies would have to determine whether the challenged conduct had "direct, substantial and reasonably foreseeable effects" on U.S. domestic or import commerce. Furthermore, in keeping with the Supreme Court's admonition in *Summit Health, Ltd.* v. *Pinhas*, 111 S. Ct. 1842, 1847 (1991), the Agencies would focus on the potential harm that would ensue if the conspiracy were successful, not on whether the alleged unlawful conduct itself had the prohibited effect upon interstate or foreign commerce.

Illustrative Example E

Situation: Widgets are manufactured in both the United States and various other countries around the world. The non-U.S. manufacturers get together privately outside the United States and agree among themselves to raise prices to specified levels and take measures to restrict imports into their respective countries, but specifically indicate that sales in the United States are not covered, and that each company will be free independently to set its prices for the U.S. market. Over time, however, the cartel members unilaterally begin to sell excess production into the United States as a means by which to stabilize the existing pact. The resulting sales into the United States affect output and price in the United States and U.S. exports are impaired.

Discussion: This example is intended to highlight the type of effects on U.S. commerce that can result from a price-fixing agreement that expressly excludes sales in the United States and thus does not involve import commerce within the meaning of the FTAIA. The jurisdictional issue presented, therefore, is whether the consequence of each party's unilateral decision to sell into the United States in order to stabilize the agreement is sufficiently direct and reasonably foreseeable under the FTAIA to satisfy the jurisdictional standard. If the facts showed that certain members of the cartel independently sold in a manner that was not attributable to the agreement, the Agencies would not have jurisdiction to challenge the underlying agreement.[53] However, if the facts showed that the cartel anticipated affecting the U.S. market as a necessary and indispensable aspect of the original conspiracy, then the express exclusion of the U.S. market in the price-fixing agreement would be pretextual. In that case, the cartel would be affecting output and price in the United States, and the sales into the United States to alleviate pressure on the cartel would be considered sufficiently direct to satisfy the requirements of the FTAIA. In addition, because the illegal agreement incorporated provisions designed to restrict access to foreign markets and stymied efforts by U.S. firms to export, the facts would support a conclusion that the agreement's restraints had a "direct, substantial and reasonably foreseeable effect" on the commerce of U.S. exporters. See infra Sec. 3.133.

3.133 Jurisdiction in Cases Involving Foreign Export Commerce

Two categories of "export cases" fall within the FTAIA's jurisdictional test.

First, the Agencies may in appropriate cases take enforcement action against anticompetitive conduct, wherever occurring, that restrains U.S. exports, if (1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States, and (2) the U.S. courts can obtain jurisdiction over the foreign persons or corporations engaged in such conduct.[54] As Section 3.2 below explains more fully, if the conduct is unlawful under the importing country's antitrust laws as well, the Agencies are also prepared to work with that country's authorities if they are better situated to remedy the conduct, and if they are prepared to take action against such conduct pursuant to their antitrust laws that will address the U.S. concerns.

Second, the Agencies may in appropriate cases take enforcement action against conduct by U.S. exporters that has a direct, substantial, and reasonably foreseeable effect on trade or commerce within the United States, or on import trade or commerce. This can arise in two principal ways. First, if demand in the United States were inelastic or if sellers not involved in the agreement are unable to increase sales readily, an agreement among U.S. firms regarding the level of their exports that had a substantial share of the relevant market could reduce supply and raise prices in the United States.[55] Second, conduct ostensibly export-related could affect the price of products sold or resold in the United States. This kind of effect could occur if, for example, U.S. firms fixed the price of an input used to manufacture a product overseas for ultimate resale in the United States.

Illustrative Example F

Situation: Companies, P, Q, R, and S, organized under the laws of country Alpha, all manufacture and distribute construction equipment. Much of that equipment is protected by patents in the various countries where it is sold, including Alpha. The companies all belong to a private trade association, which develops industry standards that are often (although not always) adopted by Alpha's regulatory authorities. Feeling threatened by competition from the United States, the companies agree at a trade association meeting (1) to refuse to adopt any U.S. company technology as an industry standard, and (2) to boycott any distributor of construction equipment that stocks competing U.S. products. The U.S. companies have taken all necessary steps to protect their intellectual property under the law of Alpha.

Discussion: In this example, the collective activity impedes U.S. companies in two ways: Their technology is boycotted (even if U.S. companies are willing to license their intellectual property) and they are foreclosed from access to existing distributors who cannot afford to lose the accounts of their major domestic companies. The jurisdictional question is whether these actions create a direct, substantial, and reasonably foreseeable effect on the exports of U.S. companies. The mere fact that only the market of Alpha appears to be foreclosed is not enough to defeat such an effect. Only if exclusion from Alpha as a quantitative measure were so *de minimis* in terms of actual volume of trade that there would not be a substantial effect on U.S. export commerce would jurisdiction be lacking. Given that this example involves construction equipment, a generally highly priced capital good, the exclusion from Alpha would probably satisfy the substantiality requirement for FTAIA jurisdiction, even if U.S. exports to Alpha would be expected to amount to only a few machines. This arrangement appears to have been created with particular reference to competition from the United States, which indicates that the effects on U.S. exports are both direct and foreseeable.

3.14 Jurisdiction When U.S. Government Finances or Purchases

The Agencies may, in appropriate cases, take enforcement action when the U.S. Government is a purchaser, or substantially funds the purchase, of goods or services for consumption or use abroad. Cases in which the effect of anticompetitive conduct with respect to the sale of these goods or services falls primarily on U.S. taxpayers may qualify for redress under the federal antitrust

[53] If the Agencies lack jurisdiction under the FTAIA to challenge the cartel, the facts of this example would nonetheless lend themselves well to cooperative enforcement action among antitrust agencies. Virtually every country with an antitrust law prohibits horizontal cartels and the Agencies would willingly cooperate with foreign authorities taking direct action against the cartel in the countries where the agreement has raised the price of widgets to the extent such cooperation is allowed under U.S. law and any agreement executed pursuant to U.S. law with foreign agencies.

[54] See U.S. Department of Justice Press Release dated April 3, 1992 (announcing enforcement policy that would permit the Department to challenge foreign business conduct that harms American exports when the conduct would have violated U.S. antitrust laws if it occurred in the United States).

[55] One would need to show more than indirect price effects resulting from legitimate export efforts to support an antitrust challenge. See ETC Guidelines, note 29, *supra*, 50 Fed.Reg. at 1791.

laws.[56] As a general matter, the Agencies consider there to be a sufficient effect on U.S. commerce to support the assertion of jurisdiction if, as a result of its payment or financing, the U.S. Government bears more than half the cost of the transaction. For purposes of this determination, the Agencies apply the standards used in certifying export conduct under the ETC Act of 1982, 15 U.S.C. §§ 4011–21 (1982).[57]

Illustrative Example G

Situation: A combination of U.S. firms and local firms in country Beta create a U.S.-based joint venture for the purpose of building a major pollution control facility for Beta's Environmental Control Agency ("BECA"). The venture has received preferential funding from the U.S. Government, which has the effect of making the present value of expected future repayment of the principal and interest on the loan less than half its face value. Once the venture has begun work, it appears that its members secretly agreed to inflate the price quoted to BECA, in order to secure more funding.

Discussion: The fact that the U.S. Government bears more than half the financial risk of the transaction is sufficient for jurisdiction. With jurisdiction established, the Agencies would proceed to investigate whether the apparent bid-rigging actually occurred.[58]

Illustrative Example H

Situation: The United States has many military bases and other facilities located in other countries. These facilities procure substantial goods and services from suppliers in the host country. In country X, it comes to the attention of the local U.S. military base commander that bids to supply certain construction services have been rigged.

Discussion: Sales made by a foreign party to the U.S. Government, including to a U.S. facility located in a foreign country, are within U.S. antitrust jurisdiction when they fall within the rule of Section 3.13 above. Bid-rigging of sales to the U.S. Government represents the kind of conduct that can lead to an antitrust action. Indeed, in the United States this type of behavior is normally prosecuted by the Department as a criminal offense. In practice, the Department has whenever possible worked closely with the host country antitrust authorities to explore remedies under local law. This has been successful in a number of instances.[59]

3.2 COMITY

In enforcing the antitrust laws, the Agencies consider international comity. Comity itself reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[60] Thus, in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected.[61]

In performing a comity analysis, the Agencies take into account all relevant factors. Among others, these may include: (1) the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad; (2) the nationality of the persons involved in or affected by the conduct; (3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters; (4) the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad; (5) the existence of reasonable expectations that would be furthered or defeated by the action; (6) the degree of conflict with foreign law or articulated foreign economic policies; (7) the effect on foreign enforcement; and (8) the effectiveness of foreign enforcement.

The relative weight that each factor should be given depends on the facts and circumstances of each case. With respect to the factor concerning foreign law, the Supreme Court made clear in *Hartford Fire*[62] that no conflict exists for purposes of an international comity analysis in the courts if the person subject to regulation by two states can comply with the laws of both. Bearing this in mind, the Agencies first ask what laws or policies of the arguably interested foreign jurisdictions are implicated by the conduct in question. There may be no actual conflict between the antitrust enforcement interests of the United States and the laws or policies of a foreign sovereign. This is increasingly true as more countries adopt antitrust or competition laws that are compatible with those of the United States. In these cases, the anticompetitive conduct in question may also be prohibited under the pertinent foreign laws, and thus the only possible conflict would relate to enforcement practices or remedy. If the laws or policies of a foreign nation are neutral, it is again possible for the parties in question to comply with the U.S. prohibition without violating foreign law. Of course, the Agencies take into account comity factors beyond whether there is a conflict with foreign law. For example, in deciding whether or not to challenge an alleged antitrust violation, the Agencies would, as part of a comity analysis, consider whether one country either encourages a certain course of conduct or wishes to leave parties free to choose among different strategies, while another opts to prohibit some of those strategies.

In lieu of bringing an enforcement action, or course, the Agencies may consult with interested foreign sovereigns through appropriate diplomatic channels to attempt to eliminate anticompetitive effects in the United States. If, however, the United States decides to prosecute an antitrust action, such a decision represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns.[63] The Department does not believe that it is the role of the courts to "second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.[64] To date, no Commission cases have presented

[56] *Cf.* United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 208 (1968) ("[A]lthough the fertilizer shipments were consigned to Korea although in most cases Korea formally let the contracts, American participation was the overwhelmingly dominant feature. The burden of noncompetitive pricing fell, not on any foreign purchaser, but on the American taxpayer. The United States was, in essence, furnishing fertilizer to Korea * * *. The foreign elements in the transaction were, by comparison insignificant."); United States v. Standard Tallow Corp., 1988–1 Trade Cas. (CCH) ¶67,913 (S.D.N.Y. 1988) (consent decree) (barring suppliers from fixing prices or rigging bids for the sale of tallow financed in whole or in part through grants or loans by the U.S. Government); United States v. Anthracite Export Ass'n, 1970 Trade Cas. (CCH) ¶73,348 (M.D. Pa. 1970) (consent decree) (barring price-fixing, bid-rigging, and market allocation in Army foreign aid program).

[57] *See ETC Guidelines*, note 29 *supra*, 50 Fed. Reg. 1799–1800. The requisite U.S. Government involvement could include the actual purchase of goods by the U.S. Government for shipment abroad, a U.S. Government grant to a foreign government that is specifically earmarked for the transaction, or a U.S. Government loan specifically earmarked for the transaction that is made on such generous terms that it amounts to a grant. U.S. Government interests would not be considered to be sufficiently implicated with respect to a transaction that is funded by an international agency, or a transaction in which the foreign government received non-earmarked funds from the United States as part of a general government-to-government aid program.

[58] Such conduct might also violate the False Claims Act, 31 U.S.C. §§ 3729–3733 (1988 & Supp. 1993).

[59] If, however, local law does not provide adequate remedies, or the local authorities are not prepared to take action, the Department will weigh the comity factors, discussed in Section 3.2 *infra*, and take such action as is appropriate.

[60] Hilton v. Guyot, 159 U.S. 113, 164 (1895).

[61] The Agencies have agreed to consider the legitimate interests of other nations in accordance with the recommendations of the OECD and various bilateral agreements, see Section 2.9 *supra*.

[62] 113 S.Ct. 2891, 2910.

[63] Foreign policy concerns may also lead the United States not to prosecute a case. See, *e.g.*, U.S. Department of Justice Press Release dated Nov. 19, 1984 (announcing the termination, based on foreign policy concerns, of a grand jury investigation into passenger air travel between the United States and the United Kingdom).

[64] United States v. Baker Hughes, Inc., 731 F. Supp. 3, 6 n.5 (D.D.C.), *aff'd*, 908 F.2d 981 (D.C. Cir 1990).

this issue. It is important also to note that in disputes between private parties, many courts are willing to undertake a comity analysis.[65]

Illustrative Example I

Situation: A group of buyers in one foreign country decide that they will agree on the price that they will offer to suppliers of a particular product that they procure from overseas. Major suppliers of that product are located in the United States and the agreement results in substantial loss of sales and capacity reductions in the United States.

Discussion: From a jurisdictional point of view, the FTAIA standard appears to be satisfied because the effects on U.S. exporters presented here are direct and the percentage of supply accounted for by the buyers' cartel is substantial given the fact that the U.S. suppliers are "major." The Agencies, however, would also take into consideration the comity aspects presented before deciding whether or not to proceed.

Consistent with its consideration of comity and its obligations under various international agreements, the Agencies would ordinarily notify the antitrust authority in the cartel's home country. If that authority were in a better position to address the competitive problem, and were prepared to take effective action to address the adverse effects on U.S. commerce, the Agencies would consider working cooperatively with the foreign authority or staying their own remedy pending enforcement efforts by the foreign country. In deciding whether to proceed, the Agencies would weigh the factors relating to comity set forth above. Factors weighing in favor of bringing such an action include the substantial harm caused by the cartel to the United States and the fact that the foreign parties purposefully availed themselves of the benefits of doing business in and with the United States.

3.3 Effects of Foreign Government Involvement

Foreign governments may be involved in a variety of ways in conduct that may have antitrust consequences. To address the implications of such foreign governmental involvement, Congress and the courts have developed four special doctrines: The doctrine of foreign sovereign immunity; the doctrine of foreign sovereign compulsion; the act of state doctrine; and the application of the *Noerr-Pennington* doctrine to immunize the lobbying of foreign governments. Although these doctrines are interrelated, for purposes of discussion the Guidelines discuss each one individually.

3.31 Foreign Sovereign Immunity

The scope of immunity of a foreign government or its agencies and instrumentalities (hereinafter foreign government)[66] from the jurisdiction of the U.S. courts for all causes of action, including antitrust, is governed by the Foreign Sovereign Immunities Act of 1976 ("FSIA").[67] Subject to the treaties in place at the time of FSIA's enactment, a foreign government is immune from suit except where designated in the FSIA.[68]

Under the FSIA, a U.S. court has jurisdiction if the foreign government has:

(a) Waived its immunity explicitly or by implication,

(b) Engaged in commercial activity,

(c) Expropriated property in violation of international law,

(d) Acquired rights to U.S. property,

(e) Committed certain torts within the United States, or agreed to arbitration of a dispute.[69]

The commercial activities exception is a frequently invoked exception to sovereign immunity under the FSIA. Under the FSIA, a foreign government is not immune in any case:

> * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[70]

"Commercial activity of the foreign state" is not defined in the FSIA, but is to be determined by the "nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[71] In attempting to differentiate commercial from sovereign activity, courts have considered whether the conduct being challenged is customarily performed for profit[72] and whether the conduct is of a type that only a sovereign government can perform.[73] As a practical matter, most activities of foreign government-owned corporations operating in the commercial marketplace will be subject to U.S. antitrust laws to the same extent as the activities of foreign privately-owned firms.

The commercial activity also must have a substantial nexus with the United States before a foreign government is subject to suit. The FSIA sets out three different standards for meeting this requirement. First, the challenged conduct by the foreign government may occur in the United States.[74] Alternatively, the challenged commercial activity may entail an act performed in the United States in connection with a commercial activity of the foreign government elsewhere.[75] Or, finally, the challenged commercial activity of a foreign government outside of the United States may produce a direct effect within the United States, i.e., there is an effect which follows "as an immediate consequence of the defendant's * * * activity."[76]

3.32 Foreign Sovereign Compulsion

Although U.S. antitrust jurisdiction extends to conduct and parties in foreign countries whose actions have the required effects on U.S. commerce, as discussed above, those parties may find themselves subject to conflicting requirements from the other country (or countries) where they are located.[77]

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[65] See, *e.g.*, Timberlane Lumber Co. v. Bank of America, N.T., 549 F.2d 597 (9th Cir. 1976).

[66] Section 1603(b) of the Foreign Sovereign Immunities Act of 1976 defines an "agency or instrumentality of a foreign state" to be any entity "(a) which is a separate legal person, corporate or otherwise; and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and (3) which is neither a citizen of a State of the United States as defined in Section 1332 (c) and (d) of [Title 28, U.S. Code], nor created under the laws of any third country." 28 U.S.C. § 1603(b) (1988). It is not uncommon in antitrust cases to see state-owned enterprises meeting this definition.

[67] 28 U.S.C. §§ 1602 *et seq.* (1988).

[68] 28 U.S.C. § 1604 (1988 & Supp. 1993).

[69] 28 U.S.C. § 1605(a)(1–6) (1988).

[70] 28 U.S.C. § 1605(a)(2) (1988).

[71] 28 U.S.C. § 1603(d) (1988).

[72] See e.g., Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992); Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777 (9th Cir. 1991); Rush-Presbyterian—St. Luke's Medical Ctr. v. Hellenic Republic, 877 F.2d 574, 578, n.4 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989).

[73] See e.g., Saudia Arabia v. Nelson, 113 S. Ct. 1471 (1993); de Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir 1985); Letelier v. Republic of Chile, 748 F.2d 790, 797–98 (2d Cir 1984), *cert. denied*, 471 U.S. 1125 (1985); International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

[74] 28 U.S.C. § 1603(e) (1988).

[75] See H.R. Rep No. 1487, 94th Cong., 2d Sess. 18–19 (1976), *Reprinted in* 1976 U.S.C.C.A.N. 6604, 6617–18 (providing as an example the wrongful termination in the United States of an employee of a foreign state employed in connection with commercial activity in a third country.) But see Filus v. LOT Polish Airlines, 907 F.2d 1328, 1333 (2d Cir. 1990)(holding as too attenuated the failure to warn of a defective product sold outside of the United States in connection with an accident outside the United States.)

[76] Republic of Argentina, 112 S. Ct. at 2168. This test is similar to proximate cause formulations adopted by other courts. See Martin v. Republic of South Africa, 836 F.2d 91, 95 (2d Cir. 1987) (a direct effect is one with no intervening element which flows in a straight line without deviation or interruption), *quoting* Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978) *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).

[77] Conduct by private entities not required by law is entirely outside of the protections afforded by this defense. See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 706 (1962);

Continued

Under *Hartford Fire*, if it is possible for the party to comply both with the foreign law and the U.S. antitrust laws, the existence of the foreign law does not provide any excuse for actions that do not comply with U.S. law. However, sometimes a direct conflict arises when the facts demonstrate that the foreign sovereign has compelled the very conduct that the U.S. antitrust law prohibits.

In these circumstances, at least one court has recognized a defense under the U.S. antitrust laws, and the Agencies will also recognize it.[78] There are two rationales underlying the defense of foreign sovereign compulsion. First, Congress enacted the U.S. antitrust laws against the background of well recognized principles of international law and comity among nations, pursuant to which U.S. authorities give due deference to the acts of foreign governments acting within their own spheres of authority. A defense for actions taken under the circumstances spelled out below serves to accommodate two equal sovereigns. Second, important considerations of fairness to the defendant require some mechanism that provides a predictable rule of decision for those seeking to conform their behavior to all pertinent laws.

Because of the limited scope of the defense, the Agencies will refrain from enforcement actions on the ground of foreign sovereign compulsion only when certain criteria are satisfied. First the foreign government must have compelled the anticompetitive conduct in circumstances in which refusal to comply with the foreign government's command would give rise to the imposition of penal or other severe sanctions. As a general matter, the Agencies regard the foreign government's formal representation that refusal to comply with its commend would have such a result as being sufficient to establish that the conduct in question has been compelled, as long as the representation contains sufficient detail to enable them to see precisely how the compulsion would be accomplished under the local law.[79] Foreign government measures short of compulsion do not suffice for this defense, although they can be relevant in a comity analysis.

Second, although there can be no strict territorial test for this defense, the defense normally applies only when the foreign government compels conduct which can be accomplished entirely within its own territory. If the compelled conduct occurs in the United States, the Agencies will not recognize the defense.[80] For example, no defense arises when a foreign government requires the U.S. subsidiaries of several firms to organize a cartel in the United States to fix the price at which products would be sold in the United States, or when it requires its firms to fix mandatory resale prices for their U.S. distributors to use in the United States.

Third, with reference to the discussion of foreign sovereign immunity in Section 3.31 above, the order must come from the foreign government acting in its governmental capacity. The defense does not arise from conduct that would fall within the FSIA commercial activity exception.

Illustrative Example J

Situation: Greatly increased quantities of commodity X have flooded into the world market over the last two or three years, including substantial amounts indirectly coming into the United States. Because they are unsure whether they would prevail in an antidumping and countervailing duty case, U.S. industry participants have refrained from filing trade law petitions. The officials of three foreign countries meet with foreign firms and urge them to "rationalize" production by cooperatively cutting back. The foreign firms agree among themselves to limit production, but there are governmental penalties contemplated for a failure to do so.

Discussion: In the facts stated here, the Agencies would not find that sovereign compulsion precluded prosecution of this agreement, assuming for the purpose of this example that the overseas production cutbacks have the necessary effects in the U.S. market to support jurisdiction. Other doctrines, such as the foreign analog to the domestic *Noerr-Pennington* doctrine,[81] may also be relevant in these circumstances.

3.33 Acts of State

As it presently stands, the act of state doctrine is a judge-made rule of federal common law.[82] It is a doctrine of judicial abstention based on considerations of international comity and separation of powers, and applies only if the specific conduct complained of is a public act of the foreign sovereign within its territorial jurisdiction on matters pertaining to its governmental sovereignty. The act of state doctrine arises when the validity of the acts of a foreign government constitutes an unavoidable aspect of a case.[83] In such cases, courts have refused to adjudicate claims or issues that would require the court to judge the legality (as a matter of U.S. law or international law) of the sovereign act of a foreign state.[84] Although in some cases the sovereign act in question may also compel private behavior, other situations may arise in which the act imposes no such obligation.[85] While the act of state doctrine does not compel dismissal as a matter of course, abstention is appropriate in a case where the court must "declare invalid, and thus ineffective as a rule of decision in the U.S. courts,* * * the official act of a foreign sovereign."[86]

When a restraint on competition arises directly from the act of a foreign sovereign, such as the grant of a license, award of a contract, expropriation of property, or the like, the Agencies may refrain from bringing an enforcement action based on the act of state doctrine. For example, the Agencies will not challenge foreign acts of state if the facts and circumstances indicate that: (1) the specific conduct complained of is a public act of the sovereign, (2) the act was taken within the territorial jurisdiction of the sovereign, and (3) the matter is governmental, rather than commercial.

3.34 Petitioning of Sovereigns

Under the *Noerr-Pennington* doctrine, a genuine effort to obtain or influence action by governmental entities in the

United States v. Watchmakers of Switzerland Info. Ctr., Inc., 1963 Trade Cas. (CCH) ¶ 70,600 at 77,456—57 (S.D.N.Y. 1962) ("[T]he fact that the Swiss Government may, as a practical matter, approve the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from a foreign government mandate.")

[78] Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970) (defendant, having been ordered by the government of Venezuela not to sell oil to a particular refiner out of favor with the current political regime, held not subject to antitrust liability under the Sherman Act for an illegal group boycott). The defense of foreign sovereign compulsion is distinguished from the federalism-based state action doctrine. The state action doctrine applies not just to the actions of states and their subdivisions, but also to private anticompetitive conduct that is both undertaken pursuant to clearly articulated state policies, and is actively supervised by the state. See FTC v. Ticor Title Insurance Co., 112 S. Ct. 2169 (1992); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980); Parker v. Brown, 317 U.S. 341 (1943).

[79] For example, the Agencies may not regard as dispositive a statement that is ambiguous or that on its face appears to be internally inconsistent. The Agencies may inquire into the circumstances underlying the statement and they may also request further information if the source of the power to compel is unclear.

[80] See Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1325 (D. Conn. 1977).

[81] See Section 3.34 *infra*.

[82] Banco Nacional de Cuba V. Sabbatino, 376 U.S. 398, 421–22 n.21 (1964) (noting that other countries do not adhere in any formulaic way to an act of state doctrine).

[83] W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990).

[84] International Ass'n of Machinists and Aerospace Workers V. Organization of Petroleum Exporting Countries, 649 F.2d 1354, 1358 (9th Cir. 1981).

[85] See Timberlane, 459 F.2d at 606–08.

[86] Kirkpatrick, 493 U.S. at 405, *quoting* Ricaud v. American Metal Co., U.S. 246 U.S. 304, 310 (1918).

United States is immune from application of the Sherman Act, even if the intent or effect of that effort is to restrain or monopolize trade.[87] Whatever the basis asserted for *Noerr-Pennington* immunity (either as an application of the First Amendment or as a limit on the statutory reach of the Sherman Act, or both), the Agencies will apply it in the same manner to the petitioning of foreign governments and the U.S. Government.

Illustrative Example K

Situation: In the course of preparing an antidumping case, which requires the U.S. industry to demonstrate that it has been injured through the effects of the dumped imports, producers representing 75% of U.S. output exchange the information required for the adjudication. All the information is exchanged indirectly through third parties and in an aggregated form that makes the identify of any particular producer's information impossible to discern.

Discussion: Information exchanged by competitors within the context of an antidumping proceeding implicates the *Noerr-Pennington* petitioning immunity. To the extent that these exchanges are reasonably necessary in order for them to prepare their joint petition, which is permitted under the trade laws, *Noerr* is available to protect against antitrust liability that would otherwise arise. On these facts the parties are likely to be immunized by *Noerr* if they have taken the necessary measures to ensure that the provision of sensitive information called for by the Commerce Department and the ITC cannot be used for anticompetitive purposes. In such a situation, the information exchange is incidental to genuine petitioning and is not subject to the antitrust laws.

Conversely, were the parties directly to exchange extensive information relating to their costs, the prices each has charged for the product, pricing trends, and profitability, including information about specific transactions that went beyond the scope of those facts required for the adjudication, such conduct would go beyond the contemplated protection of *Noerr* immunity.

[87] See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (extending protection to petitioning before "all departments of Government," including the courts); Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 113 S. Ct. 1920 (1993). However, this immunity has never applied to "sham" activities, in which petitioning "ostensibly directed toward influencing governmental action, is a mere sham to cover * * * an attempt to interfere directly with the business relationships of a competitor." Professional Real Estate Investors 113 S. Ct. at 1926, *quoting* Noerr, 365 U.S. at 144. See also USS-Posco Indus. v Contra Costa Cty. Bldg. Constr. Council, AFL–CIO, 31 F.3d 800 (9th Cir., 1994).

3.4 Antitrust Enforcement and International Trade Regulation

There has always been a close relationship between the international application of the antitrust laws and the policies and rules governing the international trade of the United States. Restrictions such as tariffs or quotas on the free flow of goods affect market definition, consumer choice, and supply options for U.S. producers. In certain instances, the U.S. trade laws set forth specific procedures for settling disputes under those laws, which can involve price and quantity agreements by the foreign firms involved. When those procedures are followed, an implied antitrust immunity results.[88] However, agreements among competitors that do not comply with the law, or go beyond the measures authorized by the law, do not enjoy antitrust immunity. In the absence of legal authority, the fact, without more, that U.S. or foreign government officials were involved in or encouraged measures that would otherwise violate the antitrust laws does not immunize such arrangements.[89]

If a particular voluntary export restraint does not qualify for express or implied immunity from the antitrust laws, then the legality of the arrangement would depend upon the existence of the ordinary elements of an antitrust offense, such as whether or not a prohibited agreement exists or whether defenses such as foreign sovereign compulsion can be invoked.

Illustrative Example L

Situation: Six U.S. producers of product Q have initiated an antidumping action alleging that imports of Q from country Sigma at less than fair value are causing material injury to the U.S. Q industry. The ITC has made a preliminary decision that there is a reasonable indication that the U.S. industry is suffering material injury from Q imported from Sigma. The Department of Commerce has preliminarily concluded that the foreign market value of Q imported into the U.S. by Sigma's Q producers exceeds the price at which they are selling Q in this country by margins of 10 to 40 percent. Sigma's Q producers jointly initiate discussions with the Department of Commerce that lead to suspension of the investigation in accordance with Section 734 of the Tariff Act of 1930, 19 U.S.C. § 1673c. The suspension agreement provides that each of Sigma's Q producers will sell product Q in the United States at no less than its individual foreign market value, as determined periodically by the Department of Commerce in accordance with the Tariff Act. Before determining to suspend the investigation, the Department of Commerce provides copies of the proposed agreement to the U.S. Q producers, who jointly advise the Department that they do not object to the suspension of the investigation on the terms proposed. The Department also determines that suspension of the investigation was in the public interest. As a result of the suspension agreement, prices in the United States of Q imported from Sigma rise by an average of 25 percent from the prices that prevailed before the antidumping action was initiated.

Discussion: While an unsupervised agreement among foreign firms to raise their U.S. sales prices ordinarily would violate the Sherman Act, the suspension agreement outlined above qualifies for an implied immunity from the antitrust laws. As demonstrated here, the parties has engaged only in conduct contemplated by the Tariff Act and none of the participants have engaged in conduct beyond what is necessary to implement that statutory scheme.

Illustrative Example M

Situation: The Export Association is a Webb-Pomerene association that has filed the appropriate certificates and reports with the Commission. The Association exports a commodity to markets around the world, and fixes the price at which all of its members sell the commodity in the foreign markets. Nearly 80% of all U.S. producers of the commodity belong to the Association, and on a world-wide level, the Association's members account for approximately 40% of annual sales.

Discussion: The Webb-Pomerene Act addresses only the question of antitrust liability under U.S. law. Although the U.S. antitrust laws confer an immunity on such associations, the Act does not purport to confer immunity under the law of any foreign country, nor does the Act compel the members of a Webb-Pomerene association to act in any particular way. Thus, a foreign government retains the ability to initiate proceedings if such an association allegedly violates that country's competition law.

4. Personal Jurisdiction and Procedural Rules

4.1 Personal Jurisdiction

The Agencies will bring suit only if they conclude that personal jurisdiction exists under the due process clause of

[88] See *e.g.*, Letter from Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, Department of Justice, to Mr. Makoto Kuroda, Vice-Minister for International Affairs, Japanese Ministry of International Trade and Industry, July 30, 1986 (concluding that a suspension agreement did not violate U.S. antitrust laws on the basis of factual representations that the agreement applied only to products under investigation, that it did not require pricing above levels needed to eliminate sales below foreign market value, and that assigning weighted-average foreign market values to exporters who were not respondents in the investigation was necessary to achieve the purpose of the antidumping law).

[89] *Cf.* United States v. Socony-Vacuum Oil Co., 310 U.S. 150,226 (1940) ("Through employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity [in the National Industrial Recovery Act]. None other would suffice * * *."); see also Otter Tail Power Co. v. United States, 410 U.S. 366, 378–79 (1973).

the U.S. Constitution.[90] Section 12 of the Clayton Act, 15 U.S.C. § 22, provides that any suit under the antitrust laws against a corporation may be brought in the judicial district where it is an inhabitant, where it may be found, or where it transacts business. The concept of transacting business is interpreted pragmatically by the Agencies. Thus, a company may transact business in a particular district directly through an agent, or through a related corporation that is actually the "alter ego" of the foreign party.[91] In all cases, the assertion of personal jurisdiction must satisfy constitutional requirements of minimum contacts with the United States, such that the proceeding comports with "fair play and substantial justice."[92]

4.2 Investigatory Practice Relating to Foreign Nations

In conducting investigations that require documents that are located outside the United States, or contacts with persons located outside the United States, the Agencies first consider requests for voluntary cooperation when practical and consistent with enforcement objectives. When compulsory measures are needed, they seek whenever possible to work with foreign government involved. U.S. law also provides authority in some circumstances for the use of compulsory measures directed to parties over whom the courts have personal jurisdiction, which the Agencies may use when other efforts to obtain information have been exhausted or would be unavailing.[93]

Conflicts can arise, however, where foreign statutes purport to prevent persons from disclosing documents or information for us in U.S. proceedings. However, the mere existence of such statutes does not excuse noncompliance with a request for information from one of the Agencies.[94] To enable the Agencies to obtain evidence located abroad more effectively, as noted in Section 2.91 above. Congress recently has enacted legislation authorizing the Agencies to negotiate bilateral agreements between antitrust enforcement agencies to facilitate the exchange or documents and evidence in civil and criminal investigations.[95]

4.22 Hart-Scott-Rodino: Special Foreign Commerce Rules

As noted above in Section 2.4, qualifying mergers and acquisitions, defined both in terms of size of party and size of transaction, must be reported to the Agencies, along with certain information about the parties and the transaction, prior to their consummation, pursuant to the HSR Amendments to the Clayton Act, 15 U.S.C. § 18a.

In some instances, the HSR implementing regulations exempt otherwise reportable foreign transactions.[96] First, some acquisitions by U.S. persons are exempt. Acquisitions of foreign assets by a U.S. person are exempt when (i) no sales in or into the United States are attributable to those assets, or (ii) some sales in or into the United States are attributable to those assets, but the acquiring person would not hold assets of the acquired person to which $25 million or more of such sales in the acquired person's most recent fiscal year were attributable.[97] Acquisitions by a U.S. person of voting securities of a foreign issuer are exempt unless the issuer holds assets in the United States having an aggregate book value of $15 million or more, or made aggregate sales in or into the United States of $25 million or more in its most recent fiscal year.[98]

Second, some acquisition by foreign persons are exempt. An exemption exists for acquisitions by foreign persons if (i) the acquisition is of voting securities of a foreign issuer and would not confer control of a U.S. issuer having annual net sales or total assets of $25 million or more, or of any issuer with assets located in the United States having a book value of $15 million or more; or (ii) the acquired person is also a foreign person and the aggregate annual net sales of the merging firms in or into the United States is less than $110 million and their aggregate total assets in the United States are less than $110 million.[99] In addition, an acquisition by a foreign person of assets located outside the United States is exempt. Acquisitions by foreign persons of U.S. issuers or assets are not exempt.

Finally, acquisitions are exempt if the ultimate parent entity of either the acquiring or the acquired person is controlled by a foreign state, and the acquisition is of assets located within that foreign state, or of voting securities of an issuer organized under its laws.[100] The HSR rules are necessarily technical, and should be consulted rather than relying on the summary description herein.

Illustrative Example N

Situation: A and B manufacture a consumer product for which there are no readily available substitutes in ten different countries around the world, including the United States, Canada, Mexico, Spain, Australia, and others. When they decide to merge, it becomes necessary for them to file premerger notifications in many of these countries, and to subject themselves to the merger law of all ten.[101]

Discussion: Under the OECD 1986 Recommendation, OECD countries notify one another when a proceeding such as a merger review is underway that might affect the interests of other countries. Within the strict limits of national confidentiality laws, agencies attempt to cooperate with one another in processing these reviews. This might extend to exchanges of publicly available information, agreements to let the other agencies know when a decision to institute a proceeding is taken, and to consult for purposes of international comity with respect to proposed remedial measures and investigatory methods. The parties can facilitate faster resolution of these cases if they are willing voluntarily to waive confidentiality protections and to cooperate with a joint investigation. At present neither U.S. law nor foreign laws permit effective coordination of a single international investigation in the absence of such waivers.

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[90] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[91] See, e.g., Letter from Donald S. Clark, Secretary of the Federal Trade Commission, to Caswell O. Hobbs, Esq., Morgan, Lewis & Bockius, Jan. 17, 1990 (Re: Petition to Quash Subpoena Nippon Sheet Glass, *et al.*, File No. 891–0088, at page 3) ("The Commission * * * may exercise jurisdiction over and serve process on, a foreign entity that has a related company in the United States acting as its agent or alter ego."); see also Fed. R. Civ. P. 4.

[92] International Shoe, 326 U.S. 310, 320. Once personal jurisdiction under the Constitution is established, service or process must be authorized by a particular statute or rule. The Clayton Act, which permits the service of process beyond the boundaries of the forum state, is the federal statute that authorizes service wherever the corporate defendant transacts business. Go-Video, Inc. v. Akai Elec. Co., Ltd., 885 F.2d 1406, 1414 (9th Cir. 1989). Under such a statute, the question is whether the party has sufficient contacts with the United States, not any particular state. *Id.* (citations omitted).

[93] For example, 28 U.S.C. § 1783(a) (1988) authorizes a U.S. court to order the issuance of a subpoena "requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him," under circumstances spelled out in the statute.

[94] See Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).

[95] S. 2297 and H.R. 4781, International Antitrust Enforcement Assistance Act of 1994 (103d Cong., 2d Sess.) (1994).

[96] See 16 CFR 802.50–52 (1994).

[97] See 16 CFR 802.50(a) (1994).

[98] See 16 CFR 802.50 (1994).

[99] See 16 CFR 802.51 (1994).

[100] See 16 CFR 802.52 (1994).

[101] Not every country has compulsory prenotification, and the events triggering duties to notify vary from country to country.

United States v. Pilkington plc and Pilkington Holdings, Inc. Civil No. CIV 94–345 TUC WDB (D. Ariz.); Response of the United States to Public Comments Concerning Proposed Final Judgment

Pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(d), the United States publishes below the written comments received on the proposed Final Judgment in *United States* v. *Pilkington plc and Pilkington Holdings, Inc.*, Civil Action No. CIV 94–345, United States District Court for the District of Arizona, together with its response thereto.

Copies of the written comments and the response are available for inspection and copying in Room 3235 of the Antitrust Division, United States Department of Justice, Tenth Street and Constitution Avenue, N.W., Washington, D.C. 20530, (telephone 202/514–2481) and for inspection at the Office of the Clerk of the United States District Court for the District of Arizona, Tucson Division, Room 202, James A. Walsh Courthouse, 44 East Broadway Boulevard, Tucson, Arizona 85701–1711.

Mark C. Schechter,
Deputy Director of Operations.

United States District Court for the District of Arizona, United States of America, Plaintiff, Pilkington plc and Pilkington Holdings, Inc., Defendants. Civil No. 94–00345 WDB.

Response of the United States to Public Comments

Pursuant to Section 2(d) of the Antitrust Procedures and Penalties Act (the "APPA"), 15 U.S.C. § 16(b)–(h), the United States hereby responds to public comments to the proposed Final Judgment submitted on May 25, 1994, for entry in the civil antitrust action.

This action began on May 25, 1994, when the United States filed a Complaint alleging that the Defendants violated Section 1 of the Sherman Act by maintaining and enforcing licenses and other agreements that unreasonably restrict the construction and operation of float glass plants and the use and transfer of float glass process technology within the United States and around the world. In addition, the Complaint alleges that Defendant Pilkington plc violated Section 2 of the Sherman Act by wilfully acquiring and maintaining a monopoly in the world market for the design and construction of float glass plants.

On the same day, the United States and both Defendants filed with the Court, pursuant to Section 2(b) of the APPA, 15 U.S.C. § 16(b), a Stipulation submitting for entry a proposed Final Judgment, and a Competitive Impact Statement. The proposed Final Judgment embodies the relief sought in the Complaint.

During the 60-day period provided by Sections 2(b)–(d) of the APPA, 15 U.S.C. § 16(b)–(d), which expired on September 1, 1994, the United States received three comments concerning the proposed Final Judgment. The United States attaches hereto a copy of each comment and of each individual response that it made thereto.

Two of the comments were submitted by counsel for PPG Industries, Inc. ("PPG") and International Technologies Consultants, Inc. ("ITC"), the respective plaintiffs in two civil actions against Defendant Pilkington plc *et al.* currently pending in this Court. The third comment was submitted on behalf of an unidentified client by a Minneapolis, Minn. lawyer.

The PPG comment asserts that "[w]hile the Proposed Final Judgment does make it more difficult for Pilkington to continue these [trade-restraining] practices * * *, the public interest counsels modification or clarification" thereof in accordance with eleven specific proposals. The ITC comment states that "[t]he proposed decree represents an important initial step in eradicating the obviously pernicious and indefensible license provisions, but unfortunately it stops far short of providing the competitive relief required to definitively eradicate the Pilkington cartel * * *" and proposes two specific changes in it. Both comments quote press statements by Pilkington in justification of their proposals.

In response to both of these comments the United States initially points out that the sole issue currently under consideration is whether it is in the public interest to enter the proposed Final Judgment submitted to the Court by stipulation. Entry is in the public interest if the proposed Final Judgment is adequate to remedy the antitrust violations alleged in the Complaint. *United States* v. *Bechtel Corp.*, 1979–1 Trade Cas. (CCH) ¶ 62,430 (N.D. 1979), aff'd, 648 F. 2d 660, 665 (9th Cir. 1981), *cert. denied*, 454 U.S. 1083 (1982).

ITC, a U.S.-based company that never had a Pilkington license and that has persistently but so far unsuccessfully attempted to enter the float glass plant design and construction market, proposes to add a broad injunction against Defendants' entering or enforcing any contract with a U.S.-based licensee that has the purpose or effect of inhibiting market entry by U.S.-based non-licensees. PPG, a U.S.-based Pilkington licensee, proposes rendering null and void all of the U.S.-based licensees' obligations under their respective Pilkington licenses.

In response, the United States agrees that Pilkington's continued efforts to hinder entry and to enforce geographic and use restrictions against its U.S.-based licensees must be enjoined, and points out that the proposed Final Judgment achieves those results, albeit with more specifically drawn injunctive provisions that those proposed in the comments. Thus, Subparagraph IV.A. forbids Defendants to enforce license agreements with U.S.-based licensees insofar as they contain any contractual limitations or any payment or confidentiality obligations with respect to any technology that Pilkington disclosed to any U.S. licensee under its licensee agreement, subject to some narrow exceptions that lack the potential for competitive harm. Analogously, Subparagraph IV.B. forbids Defendants to claim that persons dealing with U.S.-based entities that have not been licensed by Pilkington are subject to liability under Pilkington's exclusive rights to float glass know-how, unless such claims are in good faith based on technology that is a misappropriated Pilkington trade secret specifically identified by Pilkington to the Department of Justice.

The other comments offered by ITC and PPG propose specific changes of language to the proposed Final Judgment. The United States has considered each of these, and for the detailed reasons set forth in the attached individual letter responses, explains why the public interest does not justify withdrawing its consent to entry of the proposed Final Judgment.

In the third comment, Minneapolis, Minn. lawyer John A. Grimstad, Esq. proposed several changes to the Judgment out of concern that they are necessary to protect the interest of his unidentified client, a domestic float glass producer that acquired its technology by a route not fully explained in the comment, and is uncertain as to where it fits into the Judgment's taxonomy of actual and potential technology users. Our individual response to Mr. Grimstad, appended hereto, demonstrates that the Judgment fully protects his client's right to be free of anticompetitive interference with its operations by Defendants, and that his proposed changes are therefore unnecessary.

In sum, the United States finds no basis in any of the Comments for concluding that the public interest would be served by withdrawing its consent to entry of the proposed Final

Judgment submitted to the Court by stipulation on May 25, 1994, and will request that the Court enter it forthwith.

Supplement to Response

On September 30, 1994, PPG filed an "Additional Comment"[1] reiterating its earlier proposal that Subparagraph IV.D. of the proposed Final Judgment be amended to add to the injunction against restraining float glass exports to the United States a new provision enjoining Defendants from restraining exports of float glass from the United States. PPG asserts that documents "recently produced" by Pilkington plc[2] "demonstrate the need for the suggested change" by showing

> That Pilkington's conduct * * * is designed to foreclose * * * American manufacturers from competing with Pilkington in the construction of new plants in foreign countries and, as well, in the export of glass from the United States to those foreign countries. They suggest that such exclusionary conduct is continuing to the present day.

Without suggesting that these Pilkington documents lack the probative value that PPG asserts, the Government finds in them no reason to supplement its prior response to this suggestion. As stated in our individual response letter to PPG's counsel, at 3, 5–6, the need for the proposed change is obviated by the provisons of Subparagraphs IV.A. and IV.B., which respectively assure U.S.-based Pilkington licensees and U.S.-based non-licensees freedom to export float glass from the United States to any point in the world.

Dated: October 6, 1994.

Respectively submitted.

K. Craig Wildfang, Special Counsel to the Assistant Attorney General; Kurt Shaffert, Thomas H. Liddle, Molly L. DeBusschere, John B. Arnett, Sr., M. Lee Doane, Attorneys, Antitrust Division, United States Department of Justice, Washington, D.C. 20530, (202) 307–1032.

[1] This "Additional Comment" was to submitted in accordance with the APPA, 15 U.S.C. § 16 (b)–(d) in that it is dated well after the September 1, 1994, expiration of the 60-day comment period.

[2] In its "Additional Comment," PPG states that these documents were recently produced to it "on a restricted basis" by Pilkington plc in CIV–92–753–TUC–WDB, a civil action between those parties pending in this Court, and that, because of restrictions imposed by Pilkington, PPG can only submit the documents to the Court under seal. PPG also states that, because of these Pilkington-imposed restrictions, it has not served copies of the documents upon the Government. However, the Government's remarks herein concerning the "Additional Comment" have been prepared after counsel for Defendants, in response to the Government's request for copies of these documents, furnished copies of them to Government counsel, albeit with the restriction that they "are not for further distribution outside the Department of Justice."

United States District Court, District of Arizona, United States of America, Plaintiff, v. Pilkington plc and Pilkington Holdings Inc., Defendant. No. CIV 94–00345 WDB.

Comments of PPG Industries, Inc. on Proposed Final Judgment, Stipulation and Competitive Impact Statement

PPG Industries, Inc. ("PPG") comments on the Proposed Final Judgment, Stipulation and Competitive Impact Statement in *United States v. Pilkington plc* as follows:

Preliminary Statement

Pilkington has repeatedly brought vexatious litigation and has attempted to restrain trade under the guise of protecting the confidentiality of float technology and enforcing license restrictions. While the Proposed Final Judgment does make it more difficult for Pilkington to continue these practices, Pilkington has already publicly indicated in its own press releases that it intends to continue engaging in such behavior to the degree that the consent decree allows it.

For example, on May 26, 1994, the Pilkington press release announcing the terms of this consent decree stated:

> The Government's allegations are unproven and would not have survived a test in court. * * * The Consent Decree * * * recognizes the subsequent evolution of [float] technology and that recent float bath technology developed by Pilkington will continue to be treated through normal licensing arrangements. * * * Pilkington's protection and licensing of its total float technology, throughout the rest of the world, remains unaffected. * * * Pilkington is reassured that the confidentiality of the process is protected and that the normal licensing arrangements for current and future float glass technology are secure.

Pilkington Press Release, May 26, 1994. As reported in the Financial Times on May 27, 1994, Sir Robin Nicholson, Pilkington's technology director, said:

> We have got what we wanted, in that we retain a substantial amount of proprietary knowledge which we can license in the normal way.

"Pilkington Emerges with Advantages," Financial Times, p. 6, May 27, 1994.

Based on Pilkington's own statements and to prevent continued vexations litigation and trade restraints, PPG submits that protection of the public interest counsels modification or clarification of the Proposed Final Judgment in the following limited respects.

Comments

1. Float License Agreements

Change: Paragraph IV.A.1. should be modified to provide: "All obligations of U.S. LICENSEES in all LICENSE AGREEMENTS between any defendant and any U.S. LICENSEE are hereby declared null, void and unenforceable. No defendant shall take any action to invoke, enforce or assert any claim under any such agreement." Alternatively, at a minimum, paragraph IV.A.1 should be modified to add: "Moreover, no defendant shall enter into, enforce or claim any right under any AGREEMENT to the extent that it requires any U.S. LICENSEE to: (i) Report and grant back to any defendant all improvement in FLOAT TECHNOLOGY; (ii) limit exports of FLAT GLASS to any geographic areas; (iii) litigate disputes in an arbitration, as opposed to a U.S. Court, unless such arbitration permits the application of substantive U.S. antitrust law, including its provisions for treble damages and attorneys' fees awarded to a prevailing plaintiff; or (iv) prove that the SUBJECT FLOAT TECHNOLOGY had become publicly known before being relieved of the territorial and use restrictions."

The references in paragraphs IV.A.2.(b); IV.A.3; IV.B.1; IV.B.2(a); and IV.C to "trade secret under applicable law" should be changed to "trade secret under applicable law, provided that any applicable non-U.S. trade secret law will not be applied to permit the protection of items of technology that would be unprotectable under U.S. law."

Reason for Change: As is set forth in the complaint in *United States v. Pilkington plc*, CIV 94–00345–WDB (D. Ariz.) (the "Complaint"), defendants have used float license agreements ("FLAs") to restrain trade and secure monopoly power unlawfully. The Competitive Impact Statement and the Complaint both note that Pilkington has no intellectual property of substantial value, that, since 1982, Pilkington's remaining secret unpatented technology consisted largely of engineering solutions with no substantial value over other equally efficacious engineering alternatives and that one of the devices Pilkington has used to perpetuate its control is its FLAs, including their burden-shifting clauses, which require licensees to establish the nonexistence of confidential information in any arbitration. Competitive Impact Statement ("Comp. Imp. Stat.") at 10; Complaint § 24. If Pilkington is to be allowed to continue to protect its alleged trade secrets, it should be required to prove that they exist. Pilkington should not be able to shift that burden of proof, as it has done in its FLAs.

Pilkington's grant-back clauses require licensees to report and grant to

Pilkington all improvements in float glass technology. They thus deprive any licensee of the incentives to create innovative technologies, precluding any competitive advantage to accrue to an innovative licensee and, in effect, discourage efforts to create such technologies. The grant-back clauses should be invalidated for that reason.

Pilkington also should be precluded from utilizing the FLA arbitration clauses to enforce so-called trade secret claims. Those clauses have permitted Pilkington to assert claims in a forum that: (a) Is hostile to the application of U.S. antitrust law; (b) does not recognize the extraterritorial application of U.S. antitrust law and may not recognize even this Final Judgment; and (c) enforces anticompetitive restrictions not permissible under U.S. antitrust law. Any issues involving U.S. trade secret law and U.S. antitrust . . . law should be litigated in a forum that will permit an adjudication and award under those laws.

2. Assertion of Claims Against PPG With Respect to the Use or Licensing of the LB Process

Change: Change paragraph IV.A.1 to provide: "with respect to the use, licensing or sublicensing of any SUBJECT FLOAT TECHNOLOGY *or any process developed with the use or aid of SUBJECT FLOAT TECHNOLOGY.*" *Paragraphs IV.A.2.(a) and IV.A.3 also should be modified accordingly.*

Reason for Change: In the Shenzhen Arbitration, which Pilkington filed in 1985 and which continued until 1992, Pilkington asserted that PPG's LB process was "tainted" because it was developed using Pilkington float technology, irrespective of whether PPG's use was wrongful. That "taint," according to Pilkington, subjected the LB process as a whole to an obligation of confidence coextensive with that applicable to information that was transferred by Pilkington to PPG. The design and effect of Pilkington's "taint" argument was to make it virtually impossible for any licensee to develop competing innovative technology free of Pilkington's aggressive claims and litigation, thus further discouraging and inhibiting the development of innovative technologies by those most likely and able to engage in such developmental efforts.

Although Pilkington's "taint" claim was rejected by the Shenzhen arbitrators, the language of the Proposed Final Judgment does not clearly resolve the issue and may be used to revive Pilkington's anti-competitive claims. The ambiguity may be easily remedied by amending the term "Subject Float Technology" to encompass technologies developed by licensees whether or not developed with the use or aid of subject float technology.

3. Confidentiality Provisions

Change: Paragraph IV.A.3.(b) should be changed to read: "CONFIDENTIALITY of the transferred SUBJECT FLOAT TECHNOLOGY."

Reason for Change: The reference to FLOAT TECHNOLOGY (instead of SUBJECT FLOAT TECHNOLOGY) appears to be an oversight because, as drafted, the provision would require licensees to protect the confidentiality of all float technology, whatever its source.

4. Litigation Commenced Before the Stipulation Date

Change: Paragraph IV.A.4 should be deleted and paragraph IV.A.1 should be changed to ensure that Pilkington may not enforce new unadjudicated claims arising under any FLA regardless of whether a proceeding was instituted prior to the date of the stipulation.

Reason for Change: In August 1992, only two days after the High Court denied Pilkington leave to appeal from the award in the Shenzhen Arbitration, Pilkington notified PPG of is intent to commence a new arbitration. Although a 1978 Settlement Agreement between PPG and Pilkington explicitly permits PPG to use the LB process in Canada and Italy, Pilkington now alleges that PPG's operation of its LB lines in those countries is not permitted because the width of the glass ribbons in those lines has not always been "from 70% to 90% of the constant spacing between the sidewalls," which Pilkington argues is required under the Agreement, notwithstanding the fact that any variation in the width of the ribbons at those lines does not implicate any Pilkington trade secrets or other intellectual-property interests.

United States antitrust consent decrees commonly provide that the defendants are enjoined from any future enforcement of anticompetitive restraints. However, paragraph IV.A.4 of the Proposed Final Judgment would permit Pilkington to continue its monopolistic practices by pursuing its recently commenced arbitration proceedings against PPG and its subsidiaries to punish PPG for its efforts to end Pilkington's monopolistic interference with United States trade in the worldwide float technology market. No good reason exists why Pilkington's claims in those proceedings, in which earnings have not yet commenced, should be exempted from the Proposed Final Judgment.

5. Subsidiaries and Affiliates

Change: Paragraph II.Q should be changed to read: "U.S. LICENSEE" means any LICENSEE that was or is incorporated in the United States, and shall include any subsidiaries, affiliates or parents of any such LICENSEE. * * *"

Reason for Change: As currently constituted, the Final Judgment offers no protection for subsidiaries and affiliates of U.S. companies, although Pilkington's actions directed at such entities have had and could continue to have anticompetitive effects in the United States. PPG and other U.S. competitors often participate in float glass manufacturing projects outside the United States through joint ventures and through their non-U.S. subsidiaries or affiliates. The use of U.S. licensees of subsidiaries, joint ventures and affiliates is often necessary to accommodate participation of local investors.

Because effective competition with Pilkington by U.S. Licensees will necessarily entail the use of subsidiaries and affiliates in foreign countries, PPG's ability to participate in such ventures would be impaired (and U.S. commerce thereby affected) if Pilkington were free to continue to enforce its monopolistic restrictions against these U.S.-related entities.

6. Protection of Flat Glass Exports

Change: Paragraph IV.D. should be changed to add "or from" to the caption after the word "to" and in the second line of text after the word "to."

Reason for Change: The Consent Decree should protect exports from the United States as well as imports to the United States. Exports from the United States are part of the foreign commerce of the United States and Pilkington and its subsidiaries and affiliates have engaged in a variety of exclusionary practices, unlawful under the United States antitrust laws, intended to interfere with export of Float Glass from the United States into, *e.g.*, Mexico, Brazil, Argentina and Australia.

7. Perpetual Confidentiality Obligations Should Not Revive Upon the Expiration of This Final Judgment

Change: Paragraph VII.(A) should be changed to provide: "Other than the provisions of paragraphs IV.A. and B., which provisions shall remain in effect permanently, this Final Judgment shall expire on the tenth anniversary of its entry."

Reason for Change: The ten-year expiration of the Final Judgment should not leave open an argument that the otherwise perpetual confidentiality

obligations of Pilkington's FLAs somehow revive upon its expiration, as provided in VII(A).

8. Pilkington Should Not Be Able To Assert U.S. Trade Secret Rights Against Any U.S. Licensee or Non-Licensee

Change: Paragraph IV.A.2 should be changed to read: "No defendant shall assert against any U.S. LICENSEE any proprietary FLOAT TECHNOLOGY know-how rights that it may have or claim with respect to any FLOAT TECHNOLOGY."

Reason for Change: Paragraph 24 of the DOJ Complaint states that "Pilkington's maintenance and continued enforcement of the licensee restraints described above was not justified by any intellectual property rights of substantial value." Pilkington's core float glass technology was disclosed in numerous patents that have long expired, placing that technology in the public domain. Moreover, unpatented Pilkington float glass technology has been publicly disclosed in substantial part. The Department of Justice has determined that the remaining secret unpatented technology consists largely of "engineering solutions with no substantial value over other, equally efficacious engineering alternatives." Complaint ¶ 24. Moreover, Attorney General Reno, in announcing the consent decree, said that "Pilkington had agreed that much of its technology is in the public domain." "British Company Agrees to Settle Justice Department Antitrust Suit," New York Times, p. 1, May 27, 1994.

If Pilkinton no longer holds intellectual property of substantial value, there is no reason why it should be allowed to assert trade secret rights against any United States licensee or United States non-licensee with respect to any Float Technology in existence as of the date of the Final Judgment.

Forfeiture of patent rights is a common remedy for the abuse of patent rights giving rise to antitrust violations and there is no reason that that remedy should not be applied to Pilkington's abuse of its alleged trade secret rights, particularly in view of the Department's view that its technical information is without redeeming value. Comp. Imp. Stat. at 10; Complaint ¶ 26. Given Pilkington's demonstrated propensity to pursue its monopolistic practices through unjustified assertions of propriety trade secret rights and given the trivial nature of Pilkington's claimed "trade secrets," there is no sufficient justification for allowing Pilkington to retain these weapons empowering it to use threats and litigation based on asserted trade secrets to continue to its monopolistic practices. Paragraph IV.A.2 should be modified accordingly. This suggested change is not meant to prevent Pilkington from seeking to protect any bona fide trade secrets developed after the date of entry of this Final Judgment.

9. As An Alternative, Pilkington Should be Barred From Asserting Any Trade Secret Rights Based on Information in Existence Prior to December 31, 1982 and Identify Any Other Trade Secrets on the Basis of Which Pilkington Imposes Any Restraint of Trade

Change: Paragraph IV.A.2 should be changed to read: "No defendant shall assert against any U.S. LICENSEE OR U.S. NON-LICENSEE any proprietary FLOAT TECHNOLOGY know-how rights based on information in existence prior to December 31, 1982, the date referred to in ¶ 26 of the Complaint. Within sixty (60) days of entry of this Final Judgment, Pilkington shall identify and specifically describe any trade secrets developed after December 31, 1982, which it claims may justify a restraint of trade to the Department of Justice, Antitrust Division; and identify such trade secret to all U.S. LICENSEES and to all U.S. NON-LICENSEES who shall request the same in writing.

Reason for Change: Should the Department believe it inappropriate to bar defendants from asserting any trade secrets in existence as of the date of the Final Judgment, the Department should at least bar defendants from imposing restraints of trade based on technical information in existence prior to December 31, 1982, and require defendants to identify and specifically describe any trade secret developed after December 31, 1982, which any defendant may claim justifies a restraint of trade, to the Department of Justice, Antitrust Division; and identify such trade secret to any U.S. LICENSEE and any U.S. NON-LICENSEE who requests the same.

Such relief is minimally necessary to prevent defendants from continuing to rely on stale claims of trade secrets and refusing to disclose with reasonable specificity any trade secret created after December 31, 1982, upon which it may seek to impose a restraint of trade. Without such relief, defendants will be enabled to continue their past practice of threatening their competitors with litigation based on some ambiguous assertion of trade secret rights. Defendants' public announcements make it clear that they intend to continue the assertion of some unidentified body of trade secrets, notwithstanding the Final Judgment. (See pp. 1–2 above.)

10. Justice Department Scrutiny of Litigation Brought by Pilkington

Change: Alternatively, paragraph IV.A.2(b) should be changed to add subparagraphs (iii) and (iv):

(iii) defendant has, within fourteen (14) days after any such assertion:

(a) made a showing in writing to the Department of Justice, Antitrust Division in support of the arguments described in subparagraphs 2(b)(i) and 2(b)(ii), above;

(b) identified, enumerated, and described such item or combination of items (in sufficient detail and with sufficient clarity to distinguish them from information not a trade secret under applicable law) on a list submitted to the Antitrust Division and to the U.S. LICENSEE against whom such right is asserted; and

(iv) such U.S. LICENSEE is unwilling to make lawful and commercially reasonable efforts to maintain the CONFIDENTIALITY of any such item or combination of items for which it has received actual notice of a defendant's claim of proprietary rights therein pursuant to subparagraph 2(iii)(b), above, and for which a defendant has made the requisite showing pursuant to subparagraph 2(iii)(a), above.

Reason for Change: The change is necessary to provide for the same scrutiny for Pilkington suits against licensees as is provided for suits against non-licensees (as is set forth in paragraph IV.B.2(c)). No adequate justification exists for discriminating against licensees, especially given that competition has been stultified principally through use of Pilkington's licensing scheme.

11. Adjudications in Which Information Alleged To Be Confidential by Pilkington Has Been Held To Have Been Publicly Disclosed or Otherwise Unenforceable and Related Disclosure Obligations

Change: Paragraph IV.G.1. should be changed to replace "public knowledge in the FINAL AWARD" with "public knowledge found to have been such or otherwise found to be not an enforceable trade secret in the FINAL AWARD or in any other prior proceeding . . . " Paragraph IV.G.2(b) also should be modified accordingly.

Paragraph IV.G.2 also should be changed to replace "public domain" in subparagraphs (a), (b), and (c) with "public knowledge or otherwise not a trade secret" in each subparagraph.

Reason for Change: The present formulation does not account for unenforceability arising from anything other than the public disclosure of trade secret information. Information that is claimed as a trade secret also may not be enforceable if it is readily ascertainable or had not been the subject of adequate precautions to preserve confidentiality. The change also gives effect to all proceedings to which information alleged to be confidential by Pilkington has been held to have been publicly disclosed or with respect to which Pilkington's rights have been held unenforceable for any reason.

August 13, 1994.

Respectfully submitted,

Jack E. Brown,

Lawrence G.D. Scarborough, Brown & Bain, P.A., 2901 North Central Avenue, Post Office Box 400, Phoenix, Arizona 85001–0400.

Thomas D. Barr,

Paul M. Dodyk,

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By _____

Attorneys for Plaintiff, PPG Industries, Inc.

Paul M. Dodyk

Copies sent by Federal Express this 13th Day of August, 1994 to:

Gail Kursh, Chief,

Professions and Intellectual Property Section, Room 9903, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Washington, DC 20001.

John H. Shenefield, Esq.

Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D.C. 20036.

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Sheila M. Frishman.

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Attorneys for PPG Industries, Inc.

United States District Court, District of Arizona

United States of America, Plaintiff, v. Pilkington plc and Pilkington Holdings Inc., Defendants. No. CIV 94–00345 WDB.

Additional Comment of PPG Industries, Inc. on Proposed Final Judgment (Exhibits Filed Under Seal)

PPG Industries, Inc. ("PPG") submits this Additional Comment on the Proposed Final Judgment in *United States* v. *Pilkington plc* as follows:

Paragraph IV.D of the proposed Final Judgment provides that "[n]o defendant, with the intent of restraining or limiting the amount of exports of FLOAT GLASS *to* the United States [etc.]". We have suggested [Comments at 8] that the paragraph should be changed to add "or from" after the word "to."

Enclosed are documents recently produced by Pilkington in the suit by PPG Industries against Pilkington in the District of Arizona (No. CIV–92–753–TUC–WDB). Those documents demonstrate the need for the suggested change. They show, we believe, that Pilkington's conduct, as alleged in the U.S. complaint and in PPG's complaint, is designed to foreclose PPG and other American manufacturers from competing with Pilkington in the construction of new plants in foreign countries and, as well, in the export of glass from the United States to those foreign countries. They suggest that such exclusionary conduct is continuing to the present day. The documents are filed under seal because they were produced to us on a restricted basis. We therefore suggest that the Court should seek from Pilkington a statement of the reasonable terms and conditions under which the Court may inspect the documents and obtain comments thereon from counsel appearing for the United States.

September 30, 1994.

Respectfully submitted,

Thomas D. Barr

Paul M. Dodyk

Cravath, Swaine & Moore, Worldwide Plaza, 825 Eighth Avenue, New York, New York 10019.

Jack E. Brown

Lawrence G.D. Scarborough

Brown & Bain, P.A., 2901 North Central Avenue, Post Office Box 400, Phoenix, Arizona 85001–0400.

By _____

Lawrence G.D. Scarborough,

Attorneys for PPG Industries, Inc

Copy of the foregoing (without exhibits) sent by Federal Express this 30th day of September, 1994, to:

Gail Kursh,

Chief, Professions and Intellectual Property Section, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Room 9903, Washington, D.C. 20001, Attorneys for Plaintiff United States of America.

Copy of the foregoing (with exhibits) sent by Federal Express this 30th day of September, 1994, to:

John H. Shenefield, Esq.,

Morgan, Lewis & Bockius, 1800 M Street, N.W., Washington, D.C. 20036, Attorneys for Pilkington plc and Pilkington Holdings Inc.

Lucinda F. Mason.

Judiciary Center Building, 555 4th Street, NW, Washington, DC 20001.

October 6, 1994.

Jack E. Brown, Esquire,

Brown & Bain, P.A., 2901 North Central Avenue, P.O. Box 400, Phoenix, Arizona 85001–0400

Thomas D. Barr, Esquire,

Cravath, Swayne & Moore, 825 Eighth Avenue, New York, New York 10019

Re: Response to Comment on Proposed Final Judgment *U.S. v. Pilkington plc and Pilkington Holdings, Inc., CIV 94–345 TUC WDB (D. Ariz.), filed May 25, 1994*

Dear Messrs. Brown and Barr: This letter responds to the *Comments of PPG Industries, Inc. ["PPG"] on Proposed Final Judgment, Stipulation and Competitive Impact Statement* ("Comments") submitted to the Antitrust Division over your names on August 13, 1994. The Comments include a "Preliminary Statement" that summarizes certain representations by Defendants to the press that, in your words, indicate that "Pilkington * * * intends to continue engaging in [its prior anticompetitive] behavior to the degree that the consent decree allows it." You further assert that "[b]ased on Pilkington's own statements * * * protection of the public interest counsels modification or clarification of the Proposed Final Judgment" in eleven specific ways.

Before addressing your eleven specific proposed changes, we would point out that the text of the proposed Final Judgment ("Judgment"), rather than Pilkington's characterization thereof in its own press releases, controls what it will be permitted

and required to do. Thus, contrary to Pilkington's public claim, which you quote, that the restraints Pilkington has imposed under the guise of "protection and licensing of its total float technology, throughout the rest of the world, remain unaffected," the Judgment will in fact enjoin Pilkington from anticompetitive practices *throughout the world* to the extent that those practices are aimed at U.S.-based entities seeking to use float technology anywhere, or are aimed at anyone else seeking to use float technology in North America. That is, Pilkington's specified anticompetitive conduct is enjoined insofar as it is within the jurisdiction of the U.S. antitrust laws. The competitive effect of Pilkington's ability, also referred to in the portion of Pilkington's press release that you quote, to acquire "normal licensing" of its "recent float bath technology," must be considered in the light of its ready concession to the United States during settlement negotiations that very little significant technology of that kind exists. A good measure of the near-absence of such significant recent technology, as you must certainly realize, in that float glass manufactured in this country by PPG and others who have not been licensed to use this "recent technology" has been quite competitive with Pilkington's subsidiary's production.

The standard we have applied in assessing your eleven specific proposals for modification or clarification is whether it is in the public interest to enter the Judgment that has been submitted for entry by stipulation. Entry is in the public interest if the Judgment is adequate to remedy the antitrust violations alleged in the Complaint. *United States v. Bechtel Corp.*, 1979–1 Trade Cas. (CCH) ¶ 62,430 (N.D. Cal. 1979), *aff'd*, 648 F. 2d 660, 665 (9th Cir. 1981), *cert. denied*, 454 U.S. 1083 (1982).

1. You propose, in the alternative, to change subparagraph IV.A.1 of the Judgment to provide that all obligations of U.S. LICENSEES [1] under all LICENSE AGREEMENTS are declared null, void, and unenforceable, or alternatively "at a minimum" to make four specific changes in that paragraph. As to your first proposed alternative, the Department of Justice does not agree that it is in the public interest to withhold entry of the Judgment on the ground that it does not totally render these agreements null, void, and unenforceable. We believe, rather, that the existing provisions of subparagraph IV.A. protect the interest of the public by restoring competition and remedying the violation with regard to the ability of U.S. LICENSEES to compete freely in float glass process technology and float glass markets. In that regard, we would point out that in the Complaint in *PPG Industries, Inc. v. Pilkington plc et al.*, Civil Action CIV 92–753 TUC WDB (D. Ariz.) the relief you seek is for the Court to declare null, void, and unenforceable only "the anticompetitive restraints in the Pilkington license agreements," and not the agreements themselves, relief that is essentially like that provided in the Judgment rather than that which now you propose.

As an alternative to the above, you make a four-part proposal, to which we have the following responses:

(i) The first part of this alternative proposal is that Defendants be enjoined from entering, enforcing, or claiming rights under any AGREEMENT requiring any U.S. LICENSEE to report or grant back rights to FLOAT TECHNOLOGY improvements. Inasmuch as all such improvement reporting and grant-back provisions in licenses to U.S. LICENSEES expired long ago, this proposes an unnecessary addition to the provision of the Judgment.

(ii) The second part of this alternative proposal is that Defendants be enjoined from entering, enforcing, or claiming rights under any AGREEMENT requiring any U.S. LICENSEE to limit exports of FLAT GLASS to any geographic areas. We note that Defendants have not imposed express contractual restraints upon the export of glass from the United States by PPG nor by any other U.S. LICENSEE. Nevertheless, there have been instances when defendants relied upon their patents in the destination countries to limit or prevent such exports when the U.S. LICENSEE was unable to persuade Defendants to grant or sell a full waiver of those foreign patent rights. The patents on which Defendants relied for this purpose, however, have now expired along with their counterpart U.S. patents, denying them the means to carry on this form of export restraint.

(iii) The third part of this alternative proposal is that Defendants be enjoined from entering, enforcing, or claiming rights under any AGREEMENT requiring any U.S. LICENSEE to arbitrate rather than litigate disputes unless substantive U.S. antitrust law is applied. The Judgment will foreclose most such disputes in the future by the prohibitions and conditions that it places on Defendants' ability to require U.S. LICENSEES to pay FEES, observe LIMITATIONS, or maintain CONFIDENTIALITY with respect to the use or sublicensing of any SUBJECT FLOAT TECHNOLOGY. Moreover, even prior to the entry of any judgment herein PPG has obtained the very result that this request seeks. Specifically, we refer to Judge Browning's finding

That arbitration * * * will not operate as a prospective waiver of PPG's statutory claims due to Pilkington's express representation and consent to the substantive arbitration or PPG's claims pursuant to U.S. antitrust law.

PPG Industries, Inc. v. Pilkington et al., CIV 92–753–TUC–WDB (D. Ariz. July 9, 1994) (Order Granting Stay and Compelling Arbitration).

(iv) The fourth part of this alternative proposal is that Defendants be enjoined from entering, enforcing, or claiming rights under any AGREEMENT requiring any U.S. LICENSEE to bear the burden of proving that SUBJECT FLOAT TECHNOLOGY has become publicly known before being relieved of territorial and use restrictions. Subparagraph IV.A. accomplishes precisely that result.

2. You propose to expand the coverage of subparagraph IV.A.1. to include processes developed with the use or aid of SUBJECT FLOAT TECHNOLOGY so as to preclude Defendants' future reassertion of arguments that technology developed in minds "tainted" by prior knowledge of Pilkington technology also belongs to Pilkington. However, the Judgment precludes Defendants from making such assertions. Any "taint" claim by Defendants is enjoined by subparagraph IV.A.1., inasmuch as it would "require * * * any U.S. LICENSEE to * * * observe LIMITATIONS," LIMITATIONS being defined in subparagraph II.K. as including "any restriction or limitation, or purported restriction or limitation, of the use of FLOAT TECHNOLOGY, whether the result of an affirmative prohibition or a limited authorization." In the discussions leading to the Stipulation to submit the Judgment to the Court for entry, Defendants' representatives repeatedly acknowledged to the Department that the taint issue had been resolved against Pilkington in the "Shenzhen" arbitration (a point you also make in your comment) and in subsequent judicial review thereof, and that they considered this a final determination precluding them from again asserting "taint" against your client.

3. You propose limiting IV.A.3.(b) by adding the word "SUBJECT" just before the words "FLOAT TECHNOLOGY," stating that we appear to have omitted the word by oversight. Contrary to your assumption, however, the text of this provision intentionally covers all FLOAT TECHNOLOGY. By omitting the word that your proposal would add, this provision protects against future Pilkington misappropriation charges any U.S. LICENSEE who transfers any FLOAT TECHNOLOGY (e.g., in connection with building a float glass plant abroad). This protection will cover not only charges of misappropriating SUBJECT FLOAT TECHNOLOGY, i.e., FLOAT TECHNOLOGY disclosed to the U.S. LICENSEE under its LICENSE AGREEMENT, but also FLOAT TECHNOLOGY that found its way to the U.S. LICENSEE via a third party (e.g., by hiring a former Pilkington employee) as long as the U.S. LICENSEE, when transferring such technology, includes in the agreement of transfer "a lawful and commercially reasonable provision requiring the transferee to maintain CONFIDENTIALITY." Such confidentiality provisions are customarily included in technology transfer agreements, so that this provision imposes no significant burden on U.S. LICENSEES, while protecting them against such claims by Pilkington.

4. You propose deleting subparagraph IV.A.4. and changing subparagraph IV.A.1. to ensure Pilkington cannot pursue monetary relief in proceedings regardless of when they were instituted, pointing out that in 1992 Pilkington instituted an additional arbitration proceeding against PPG on a claim growing out of a 1978 settlement concerning LB technology. Subparagraphs A.1. and A.2. of the Judgment enjoin Defendants' further pursuit of injunctive and declaratory relief against U.S. LICENSEES' "violations" of license restrictions. Subparagraph IV.A.4. creates a narrow exception that permits

[1] Capitalized terms have the meanings assigned to them in Paragraph II of the Judgment.

Defendants to continue to pursue solely monetary (but not injunctive or declaratory) relief, but only for past conduct, and only in proceedings instituted before May 25, 1994. Your comment indicates that your concern about this exception is raised by a single dispute that Pilkington initiated in 1992, one that arose out of a 1978 settlement of an earlier litigated dispute. The Department of Justice's role in this civil Sherman Act case extends to securing prospective relief that assures open competition for the benefit of the public. "[T]he antitrust laws * * * were enacted 'for the protection of competition, not competitors,'" *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977), *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). To that end, the judgment enjoins Defendants not only from prospective enforcement of previously obtained equitable relief but also from the imposition of FEES, as defined in subparagraph II.C., for the prospective use or sublicensing of SUBJECT FLOAT TECHNOLOGY. Contrarily, the claim to which you allude is limited strictly to monetary relief for your client for past conduct. Thus, no matter how ill-founded or unjust this Pilkington monetary claim against PPG may be, its assertion is a private matter and consequently concerns only the private parties involved.

5. You propose including within the definition of U.S. LICENSEE (subparagraph II.Q.) the licensees' subsidiaries, affiliates, and parents, pointing out that participation by U.S. LICENSEES in off-shore float glass manufacturing projects is often likely to occur through their subsidiaries or affiliates. While this is undoubtedly correct, such subsidiaries or affiliates participate in such projects under sublicenses granted to them by their respective U.S. LICENSEE parents or affiliates. Your proposal is unnecessary since subparagraph IV.A. of the Judgment expressly enjoins Defendants from conduct interfering with U.S. LICENSEES' sublicensing activities to the same extent as it enjoins interfering with their use of SUBJECT FLOAT TECHNOLOGY. It may be noted that, in the course of discussions leading to the Stipulation to submit the Judgment to the Court, Pilkington's representatives acknowledged that under the Judgment U.S. LICENSEES will be free, through subsidiaries or affiliates, to participate in the design, construction, and operation of overseas float glass plants such as the Shenzhen plant.

6. You propose broadening the injunctive provisions of subparagraph IV.D., which deal with exports of float glass from abroad into the United States, to cover exports of float glass from the United States as well. Subparagraph IV.A. leaves U.S. LICENSEES free to export float glass from this country. Subparagraph IV.B. analogously protects U.S. NON-LICENSEES from interference with their export of float glass from this country.

7. You propose that the injunctive provisions of subparagraphs IV.A. and IV.B. be made perpetual by exempting them from the ten-year Judgment duration provision of subparagraph VII.A. because, in your words, the "Judgment should not leave open an argument that otherwise perpetual confidentiality obligations" revive upon the Judgment's expiration. Trade secrecy obligations are, of course, never perpetual; they last only while the information to which they pertain has value and is not public. As set forth in Paragraph 24 of our Complaint, the SUBJECT FLOAT TECHNOLOGY, all of which had been communicated by Pilkington to U.S. LICENSEES by no later than 1982, no longer has substantial value. The prospect that Defendants would be able to resume interfering with open competition by assertions of confidentiality for the, by then, even more highly superannuated technology, especially in view of the pro-competitive effects that this Judgment can be expected to confer during the next decade, are too remote to justify your proposal. Consequently, the Department does not consider such a change necessary.

8. You propose, in effect, to remove the exceptions to the injunction in Subparagraph IV.A.2. against Defendants' asserting know-how rights against U.S. LICENSEES with respect to any FLOAT TECHNOLOGY on the ground that we have determined that Pilkington's core float glass technology currently lacks substantial value. We continue strongly to believe that this assessment of the value of Pilkington's technology is correct, of course. For that reason, Subparagraph IV.A.2.(a) enjoins Defendants from asserting against all U.S. LICENSEES that are not subsidiaries of Defendants any proprietary claims as to the FLOAT TECHNOLOGY disclosed to the licensees under the license agreement (except for the reservation in Subparagraph IV.A.4. of money damage claims for past conduct that, as has already been discussed in Item 4, above, does not affect the public interest). In addition, Subparagraph IV.A.2.(b) enjoins Defendants from asserting any proprietary claims against such licensees as to other FLOAT TECHNOLOGY, (i.e., technology that the licensee did not obtain under the license but that Defendants nevertheless claim is theirs, unless the claim is based on a good faith argument that the technology in question is a legally cognizable trade secret and that it was unlawfully acquired). Subparagraph IV.A.2. therefore properly protects U.S. LICENSEES from unjustified assertions of know-how rights by Defendants.

9. You propose, as an alternative to your Proposal No. 8, changes to the language of Subparagraph IV.A.2. that would categorically bar Defendants' assertion against U.S. LICENSEES of (1) rights in pre-1983 know-how and (2) trade secrets developed after that date that a Defendant, in your words, "claims may justify a restraint of trade," unless such trade secrets have been disclosed to the Department and to all U.S. LICENSEES and U.S. NON-LICENSEES who request it. You state that without such a provision Defendants will be able to continue to threaten competitors with ambiguous assertions of trade secret rights. We agree that it is important that Defendants be prevented from continuing such illegal conduct, but are certain that the Judgment will enjoin it. Subparagraph IV.A.2. absolutely bars Defendants from making such claims against U.S. LICENSEES with respect to SUBJECT FLOAT TECHNOLOGY (which in view of the already-discussed 1982 cut-off of improvement disclosures to all U.S. LICENSEES refers to pre-1983 technology), and limits such assertion by Defendants, when dealing with other FLOAT TECHNOLOGY, to instances where they have good faith arguments that they are asserting rights to subject matter that qualifies as legally recognized trade secrets and also that the U.S. LICENSEE in question has obtained the subject matter unlawfully. Subparagraph IV.B.2. similarly protects U.S. NON-LICENSEES from such future conduct. Given the protection afforded by subparagraphs IV.A.2. and IV.B.2., the additional disclosure requirements are unnecessary.

10. You propose to add to subparagraph IV.A.2. requirements that Defendants must satisfy before asserting know-how rights against U.S. LICENSEES that are as exacting as the subparagraph IV.B.2. requirements that apply when Defendants assert such claims against U.S. NON-LICENSEES. Although it may initially seem appropriate to impose the same requirements on Pilkington regardless of whether it asserts such alleged rights against U.S. LICENSEES or U.S. NON-LICENSEES, the differences in how the two groups gain access to Pilkington technology provides the basis for imposing different requirements in the two situations. U.S. LICENSEES originally obtained the SUBJECT FLOAT TECHNOLOGY under their respective licenses, an information flow, as we have already noted herein, that ended in 1982. Subparagraph IV.A.2.(a) absolutely bars Defendants' claims against U.S. LICENSEES based on such old technology; thus, Defendants would have to establish that any claim they make against a U.S. LICENSEE not only meets the requirements of subparagraphs IV.A.2.(b) but also that the technology in question was obtained by the U.S. LICENSEE after 1982. The requirement for such a showing substantially diminishes the need for the kind of additional showing in claims against U.S. LICENSEES that you propose. By contrast, claims that Defendants might make against U.S. NON-LICENSEES could cover pre-1983 technology as well as that of later origin, making the provisions of IV.B.2. (c) and (d) far more important as safeguards against anticompetitive assertions of such know-how rights.

11. Finally, you propose to extend Defendants' obligation pursuant to subparagraph IV.G.1. to identify the FLOAT TECHNOLOGY found to be public knowledge in the FINAL AWARD entered in the Shenzhen arbitration so that it also requires such identification for material "otherwise found not to be a trade secret in the FINAL AWARD or in any other proceeding." You further propose a similar change for subparagraph IV.G.2(b). Such changes would be counterproductive. Contrary to loose assertions made on Defendants' behalf that the Shenzhen arbitrators determined what Pilkington technology still merits trade secret status, they made no such determination but rather determined only that certain items had not been proven to be in the public domain. There is no basis in law for the assertion implied by the proposed change, i.e., that any subject matter not in the public domain is

entitled to trade secret protection. Such a formulation would ignore, inter alia, the requirement that alleged trade secrets must have value to merit legal or equitable protection. PPG, having been a party to this arbitration, already knows what this provision of the Judgment requires Defendants to disclose; it is thus primarily for the benefit of PPG's competitors.

For the reasons noted above the Department of Justice does not believe that it would be in the public interest to forego entry of the Judgment for failure to incorporate any of your proposed changes. We nevertheless greatly appreciate your interest in this matter.

Sincerely,

K. Craig Wildfang,

Special Counsel to the Assistant Attorney General, Antitrust Division.

Kurt Shaffert,

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Attorneys for Plaintiff, International Technologies Consultants, Inc.

United States District Court, District of Arizona, International Technologies Consultants, Inc., Plaintiff, v. Pilkington plc and Pilkington Holdings, Inc., Defendants. Civil Action No. CIV–94–00345–TUC–WDB.

Comments of International Technologies Consultants, Inc. Regarding Proposed Final Judgment, Stipulation and Competitive Impact Statement

International Technologies Consultants, Inc. ("ITC") comments on the Proposed Final Judgment, Stipulation, and Competitive Impact Statement in *United States v. Pilkington plc and Pilkington Holdings, Inc.* as follows:

Preliminary Statement

ITC, in the parlance of the proposed final decree, is a U.S. NON-LICENSEE. ITC competes in the sale of float process technology on a worldwide basis, using float technology which it independently developed from information in the public domain, supplemented by sound engineering practice and extensive expertise in the construction of float process facilities. ITC is not, nor has it ever been, a Pilkington licensee. ITC's business activities are confined to the worldwide marketing of float process technology and associated engineering and technical services. ITC has no involvement in the production or distribution of manufactured glass.

The government complaint, proposed decree and the competitive impact statement evolved from a CID investigation of the license arrangements between Pilkington and its licensees, the principal focus of which was the variety of license provisions utilized by Pilkington illegitimately to perpetuate its patent monopoly of float process technology. (See complaint, ¶ 27.) The Department's conclusion that the Pilkington licensing scheme constitutes an illegal effort to perpetuate and maintain its monopoly far beyond the expiration of the core float process patents and its consequent decision to confront this deeply entrenched, aggressive foreign-based cartel is to be commended. The proposed decree represents an important initial step in eradicating the obviously pernicious and indefensible license provisions, but unfortunately it stops far short of providing the competitive relief required to definitely eradicate the Pilkington cartel, thereby finally permitting a competitive environment to exist in the flat glass industry.

The need to revisit and rethink the efficacy of the proposed decree with a view to tightening its provisions was amply demonstrated by the reaction of senior Pilkington officials to the filing of the litigation. The company's May 26, 1994 press release dismisses the government case as unprovable, and unworthy of the cost and time required to achieve judicial vindication. The Release then describes the official Pilkington interpretation of the decree as follows:

> The Consent Decree * * * recognizes the subsequent evolution of float technologies and that some recent float bath technology developed by Pilkington will continue to be treated through normal licensing arrangements. Pilkington's protection and licensing of its total float technology throughout the rest of the world, remains unaffected. * * * Pilkington is reassured that the confidentiality of the processes is protected and that the normal licensing arrangements for current and future float glass technology are secure.

These comments must be read against the evidentiary record developed by the Division via its CID investigation which unambiguously demonstrates that Pilkington deliberately, and with full knowledge of the illegality of its actions under United States antitrust law, proceeded to adopt and aggressively implement its illegal licensing scheme in order to shore up its monopoly position to combat the erosion of its patent base. Given its longstanding distaste for antitrust law as enforced in the United States (a common malady among British corporate officials), which continues unabated as evidenced by the above referenced reaction of its senior officials to the instant litigation, common sense and prudence dictates that the Department must take unusual precautions to ensure that the substantial time and public monies expended in the investigation and prosecution of this worldwide cartel translates into lasting and meaningful pro-competitive results.

Because ITC is a U.S. NON-LICENSEE, its specific comments relative to the proposed decree reflect its perspective as one as one of the few non-Pilkington licensees to make a sustained effort to enter the float process design market in competition with Pilkington and its licensees. ITC defers to the U.S. LICENSEES in respect of the efficacy of the proposed decree in addressing the anti-competitive license provisions of particular concern to them.

Specific Comments

1. Agreements or Understandings Between Defendants and U.S. LICENSEES Aimed at Preventing, Handicapping or Otherwise Interfering With Efforts by U.S. NON-LICENSEES to Enter the Float Process Technology Market Worldwide

a. Discussions

Part B—Litigation of the Competitive Impact Statement ("CIS") at pp. 12 and 13 describes the litigation by Pilkington against AFG and Guardian, respectively, to prevent them from violating the territorial provisions of their respective licenses with Pilkington, thereby eliminating (or at least carefully controlling) competition between each of them and Pilkington. The CIS alludes to the fact that both cases were settled on the basis, *inter alia*, that each licensee defendant would abandon its aggressive competition with Pilkington, thereby preserving the Pilkington cartel against uncontrolled competition from its own licensees.[1] Significantly, the CIS omits any mention of another important element of the aforesaid settlement, namely agreements with each such defendant licensee to cooperate (conspire) with Pilkington to forestall the emerging competition from non-licensees which threatened to undermine the Pilkington cartel by entering the float process technology

[1] PPG thus remained the sole Pilkington licensee to persist in an effort to become an independent competitive factor in the industry, thereby engendering a sustained counterattack by the cartel which has effectively blocked PPG's entry date.

market and ending the cartel's control over both the production and sale of flat glass.

ITC recognizes that the Department opted to file suit against Pilkington before it had proceeded very far with its broader investigation of the above-described collusive conduct among Pilkington and various key licensees designed to protect the cartel against the entry of NON-LICENSEE competitors over whom the cartel would have no control. Through discovery undertaken largely subsequent to the filing of the government suit, ITC gained access to and reviewed many of the documents previously submitted to the Department in response to the CIDs. The CID documents pertaining to the conspiracy issue deeply implicate two of the U.S. LICENSEES—AFG and Guardian—who are principal beneficiaries of the proposed decree, along with various other U.S. NON-LICENSEES. This documentary record is sufficiently compelling that in the normal course the Division would have been expected to proceed with CID depositions and otherwise aggressively pursue the investigation. In our view, had the Division completed the comprehensive formal investigation justified by the evidence in its possession before filing its complaint, not only would there have been a broader complaint involving more parties, but the proposed decree would of necessity have been much more comprehensive. As it is, ITC must now secure relief against this broad conspiratorial conduct through its own litigation efforts.

Be that as it may, the complaint and proposed decree as filed nonetheless represents an important first step in a long overdue attack upon longstanding anti-competitive license provisions which Pilkington used in its increasing futile effort to prop up its monopoly position vis-à-vis its own licensees as its key patents expired. As noted, the principal beneficiaries of the lawsuit and the decree as currently structured are the U.S. LICENSEES who have finally achieved an important measure of freedom to engage in meaningful competition with Pilkington. However, neither the complaint nor the proposed decree displays any understanding of the critically important competitive role played by the U.S. NON-LICENSEES, nor does the decree contain provisions essential to enable U.S. NON-LICENSEES to freely enter and compete in the float process technology market, thereby achieving an even broader pro-competitive effect. It is, in short, all well and good for the government to take action which permits AFG, Guardian and other U.S. LICENSEES to free themselves from the anti-competitive constraints central to the Pilkington licensing scheme. However, U.S. NON-LICENSEES also have a right to expect their government to protect them from blatantly anti-competitive conduct undertaken by certain U.S. LICENSEES, albeit at the insistence of a foreign cartel manager desperate to protect itself against the competitive in-roads of NON-LICENSEE competitors. Indeed, one would expect that the Department would have a particularly acute interest, not to mention a solemn obligation, to ensure that, at the very least, Pilkington is enjoined from enforcing or implementing any agreements or understandings extracted from any of its Licensees as a condition to the settlement of litigation it initiated. Further, given what the evidence in the government's possession reveals, it is incumbent upon the Department to take corrective action to eliminate the remaining barriers to entry by U.S. NON-LICENSEES, thereby finally achieving and creating a truly competitive marketplace.

b. Proposed Corrective Language

ITC proposes that a new paragraph 5 be added at the end of IV A at page 7, to wit:

5. Defendants shall neither enter into any agreement or understanding, whether written or oral, and any U.S. LICENSEE, nor enforce or implement any existing such agreement or understanding, having the purpose or effect of preventing, interfering with, or otherwise handicapping efforts by U.S. NON-LICENSEES to enter the float process technology market anywhere in the world.

In addition, the Department should accelerate this critically important phase of its investigation and indicate via issuance of a press release that the investigation of alleged conspiratorial conduct among Pilkington and its licensees is continuing. The Department would be derelict in its duties were it to stand idle given the evidence in its possession.

2. Preventing Defendants From Using Assertions of Proprietary Float Technology Know-How Rights or Claims of Confidentiality To Preclude or Retard Efforts by U.S. NON-LICENSEES To Enter the Float Technology Process Market

a. Discussion

For decades Pilkington has been highly successful in discouraging prospective clients from dealing with U.S. NON-LICENSEES simply by asserting that Pilkington had been the first to develop float process technology and thus had the exclusive worldwide right to use or license that technology, and that for anyone to secure such technology from non-Pilkington sources was to invite litigation. This mantra has been repeated so often and so categorically by Pilkington and its allies that at this point in time many potential clients simply accept the primacy of Pilkington in float process-technology as an immutable given—baseless though it may be. This pattern of Pilkington conduct—fraudulent claims of exclusivity and confidentiality, accompanied by threats of litigation (should the use of non-Pilkington float process technology be contemplated) to prospective customers, competing sources of technology and float technology and sources of capital, materials and supplies, has continued at least through the spring of 1994.

Given this unbroken record of illegal conduct, the resulting deeply entrenched cartel, and the substantial economic harm caused thereby, it is obvious that the relief proposed in Section IV.B.2 of the proposed decree falls woefully short of the mark. In the first place, defendants having such a record of illegal conduct are hardly entitled to any benefit of the doubt regarding their alleged good faith in asserting proprietary float technology know-how rights and claims of confidentiality; to the contrary, the burden of proof regarding such assertions must necessarily rest upon Pilkington, rather than upon the victims of its repeated acts of illegality. Indeed, as proposed, the decree language invites precisely the sort of protracted exercise which places prospective new entrants at a fatal disadvantage. Further, the decree must contain a mechanism for fairly, quickly and effectively resolving any disputes regarding proprietary know-how or confidentiality in a neutral setting, and defendants must be enjoined from making any assertions regarding know-how rights and confidentiality unless and until their position is vindicated through the dispute resolution mechanism.

More particularly, Section IV.B.2 should be replaced in its entirety by the following:

2. No defendant shall assert against U.S. NON-LICENSEES (other than in respect of Agreements referred to in subparagraph B.1. above) any alleged proprietary FLOAT TECHNOLOGY Know-how rights (including any claim of Confidentiality) that it or any U.S. LICENSEE claims to have with respect to any FLOAT TECHNOLOGY offered by U.S. NON-LICENSEES anywhere in the world, or communicate to third parties regarding any such assertions or claims, unless for each such claim the following occurs:

a. Defendants shall have the burden of describing in writing with specificity the item of float technology covered by each claim and shall provide a detailed statement setting forth the basis for the claim;

b. a copy of the aforesaid statements shall be served upon the Court, the U.S. NON-LICENSEE involved and the Department of Justice;

c. the U.S. NON-LICENSEE and the Department shall serve any reply thereto to the court and Pilkington within fourteen (14) days of receipt of the Pilkington specification of allegations;

2d. unless the matter is resolved via negotiations between or among the defendants and the U.S. NON-LICENSEES within five (5) days, the court shall appoint a special master knowledgeable in float technology to conduct an inquiry to determine whether defendants have met their burden, and will promptly file a written report and recommendation to the court;

e. the court will enter an appropriate order;

f. only if the court order supports the claim will defendants then be permitted to notify others of the trade secrets rights and claims of confidentiality against any U.S. NON-LICENSEE; and

g. Pilkington will pay all costs should it not prevail.

ITC recognizes that such a dispute resolution mechanism has a regulatory flavor and that the Department often disfavors regulatory decrees. However, several factors militate strongly in favor of such an approach in the unique circumstances here presented. First, the proposed truth seeking process would be triggered at the earliest stage of the dispute, before the invariably corrosive and damaging false accusations circulate among prospective clients, sources of financial support and suppliers. A somewhat similar approach proved potentially useful in evaluating Guardian's trade secrets claims against ITC and Euroglas. Procedural ambiguities, confusion about the format and Guardian's reluctance to participate at the critical early stage in the process substantially compromised the proceeding, but all such potential problems have been eliminated from the mechanism proposed above. The clean bill of health ultimately achieved by ITC in the Euroglas situation unfortunately had little practical effect because Guardian had had a year to fraudulently disparage the ITC design before the report was issued. This difficulty is avoided in the proposed mechanism by enjoining Pilkington from making such characterizations until and unless it had met its burden of proof, which both creates an incentive for Pilkington to cooperate in seeking an early resolution of the dispute and prevents the circulation of fraudulent assertions until the process has been completed.

Second, there is little danger that the court and the parties will be inundated by a flood of hypertechnical disputes about know-how and confidentiality claims. Once the burden of proof is placed upon Pilkington—where it obviously belongs, coupled with the requirement that a detailed specification of the basis of the claim be prepared and shared with the accused party, the era of generalized and vague allegations of impropriety and veiled threats of litigation will finally end. Indeed, there is every likelihood that the dispute resolution mechanism would need to be used perhaps only once, to initially and definitively clear the air regarding the usual litany of Pilkington allegations of impropriety by U.S. NON-LICENSEES. Once the U.S. NON-LICENSEE passed its initial litmus test, there is little likelihood that Pilkington would have much stomach for insisting upon rematches, and the U.S. NON-LICENSEE would be free to immediately enter the market place and would do so. Apart from the *sui generis* Muliaglass situation, the Pilkington cartel, aided by various U.S. LICENSEES and others, has succeeded in preventing every effort by U.S. NON-LICENSEES from entering the float process technology market, all of which entrenches the myth that Pilkington, by virtue of divine right, is the exclusive worldwide source of such technology. In sum, once the Pilkington canards about know-how rights and confidentiality are exposed for the empty shells they are, as ITC is confident they would be by the proposed procedure, the walls of the cartel will finally crumble and the forces of competition will finally prevail.

Conclusion

ITC recognizes that the proposed decree is the product of considerable negotiations between the Department and Pilkington and that to press Pilkington further in hopes of achieving the additional relief described above may jeopardize the deal. So be it. The Antitrust Division has rarely been exposed to a cartel with the reach, longevity and anti-competitive consequences of the Pilkington cartel. The evidence of willfulness and of liability, as we both know, is unusually rich and unambiguous. The world business community, upon whom the Antitrust Division quite properly devotes considerable time and public resources in order to both demonstrate the commitment of the U.S. government to aggressive enforcement of the U.S. antitrust laws and the important public benefits to be derived therefrom, has long been aware of Pilkington and its success in creating and maintaining its worldwide cartel. Thus, should the Division lack the tenacity and commitment to principle to insist that the decree be amended in order to meaningfully eradicate this particularly pernicious, long-lived cartel, the message received by the many observers of the antitrust scene will be most unfortunate. That message, however unfair from your perspective, is that the Antitrust Division lacks the will to litigate potentially protracted cases, preferring instead to settle for the appearance of progress by accepting what has been characterized as a "sleeves off the vest" type of decree. At some point, in some case, the Department must demonstrate that this message is incorrect; that in the appropriate circumstances, the Division will litigate aggressively and fearlessly in order to fully vindicate the public interest. ITC submits that the Pilkington case—should Pilkington be unwilling to renegotiate the decree to satisfy the concerns expressed above—is the perfect vehicle for the Division to use for this purpose and ITC urges it to do so.

Dated: Washington, DC, September 1, 1994.

Anderson, Aukamp & Gingold

By _____

Kenneth C. Anderson,

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Judiciary Center Building, 555 4th Street, NW., Washington, DC 20001.

October 6, 1994.

Kenneth C. Anderson, Esq.,

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Re: Response to Comments on Proposed Final judgment *U.S. v. Pilkington plc and Pilkington Holdings, Inc. Civ 94–345 TUC WDB (D. Ariz.), filed May 25, 1994*

Dear Mr. Anderson: This responds to the *Comments of International Technologies Consultants, Inc. Regarding Proposed Final Judgment, Stipulations and Competitive Impact Statement ("Comments") submitted to the Antitrust Division over your signature on September 1, 1994. The Comments, in addition to making a Preliminary Statement that characterizes the proposed Final Judgment ("Judgment") and summarizes certain representations by Defendants to the press concerning the effect that they expect it to have on their future conduct, proposes two specific changes to be made before the Judgment is entered.*

Before addressing your specific proposals for change, we would point out that the text of the proposed Final Judgment ("Judgment"), rather than Pilkington's

characterization thereof in its own press releases controls what it will be permitted and required to do. Thus, contrary to Pilkington's public claim, which you quote, that the restraints Pilkington has imposed under the guise of "protection and licensing of its total float technology, throughout the rest of the world, remain unaffected," the judgment will in fact enjoin Pilkington from anticompetitive practices *throughout the world* to the extent that those practices are aimed at U.S.-based entities seeking to use float technology anywhere, or are aimed at anyone else seeking to use float technology in North America. That is, Pilkington's specified anticompetitive conduct is enjoined insofar as it is within the jurisdiction of the U.S. antitrust laws. The competitive effect of Pilkington's ability, also referred to in the portion of Pilkington's press release that you quote, to continue "normal licensing" of its "recent float bath technology," must be considered in the light of its ready concession to the United States during settlement negotiations that very little significant technology of that kind exists. A good measure of the near-absence of such significant recent technology is that float glass manufacture by those who have not been licensed to use this "recent technology" has been quite competitive with Pilkington's and its subsidiaries' production.

The standard we have applied in assessing your specific proposals for modification or clarification is whether it is in the public interest to enter that Judgment that has been submitted for entry by stipulation. Entry is in the public interest if the Judgment is adequate to remedy the antitrust violations alleged in the Complaint. *United States v. Bechtel Corp.*, 1979–1 Trade Cas. (CCH) ¶62,430 (N.D. Cal. 1979), *aff'd*, 648 F. 2d 660, 665 (9th Cir. 1981), *cert. denied*, 454 U.S. 1083 (1982).

Your first proposed change is to add, at the end of Subparagraph IV.A., a provision enjoining Defendants from entering, enforcing, or implementing any contract having the purpose or effect of preventing, interfering with, or otherwise handicapping efforts by U.S. NON-LICENSEES [1] to enter the float process technology market anywhere in the world. It is the Department's view that, although the conduct proscribed by the proposed amendment would clearly be unlawful, this proposed amendment would be redundant inasmuch as Subparagraph VI.B. adequately protects against such conduct by enjoining Defendants from employing the means it heretofore relied upon to achieve its anticompetitive ends, i.e., making unjustified assertions of intellectual property rights against putative entrants and their customers, financing sources, suppliers, and the like.

Second, your Comments propose different conditions than those contained in Subparagraph IV.B.2. of the Judgment to govern the circumstances under which Defendants can avoid violating that provision's injunction against asserting certain know-how rights vis-a-vis U.S. NON-LICENSEES. The proposed amendment would require this Court, each time such an assertion is made, to appoint a Special Master to determine whether Defendants have proven an adequate basis for the assertion unless the matter is resolved by negotiation. (Your proposal would require "Pilkington [to] pay all costs should it not prevail" in such a proceeding, but is silent as to who would pay the Special Master's costs if Defendants do prevail.) Your proposal would thus delete from the Judgment provisions that require defendants to justify in writing to the Department of Justice assertions of the kind that your proposal would submit to Special masters. In the Department's view, requiring this Court to appoint a Special Master whenever such an assertion fails to be resolved by negotiation would not assure, to a sufficiently greater extent than the provisions of the proposed Final Judgment, that Defendants will henceforth desist from claiming know-how rights that are unjustified.

For the reasons stated above the Department of Justice does not believe that it would be in the public interest to forego entry of the Judgment for failure to incorporate any of your proposed changes. We nevertheless greatly appreciate your interest in this matter.

Sincerely,

K. Craig Wildfang,

Special Counsel to the Assistant Attorney General, Antitrust Division.

Kurt Shaffert,

Attorney, Antitrust Division.

August 10, 1994.

Ms. Gail Kursh,

Chief, Professions and Intellectual Property Section, Room 9903, U.S. Department of Justice, Antitrust Division, 555 4th Street, NW., Washington, DC 20001

Dear Ms. Kursh: These comments are given to the proposed Final Judgment set out in the Notice of the Department of Justice, Antitrust Division, dated June 14, 1994, respecting *United States* v. *Pikington plc and Pilkington Holdings, Inc.*, United States District Court for the District of Arizona, Civil Action No. 94–345, filed May 25, 1994 (the "Civil Action").

Definitions

Capitalized terms used in these comments without definition will have the meanings accorded to them by the proposed Final Judgment. The "Competitive Impact Statement" is the Competitive Impact Statement filed in the Civil Action pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. 15(b)).

Introduction

In Article I.A. of the Competitive Impact Statement, the Department of Justice ("DOJ") summarizes the seven (7) categories of activity allegedly engaged in by the Defendants in violation of the antitrust laws and the three (3) categories of relief sought by the Complaint to eliminate such activities. At Article III of the Competitive Impact Statement, DOJ summarizes how the competition favorable elements of the Final Judgment will, in effect, stop the seven (7) categories of activity and thereby "* * * eliminate any residual anticompetitive effects of the restrictive license agreements and other conduct challenged by the Complaint."

The competition favorable elements are:

Element Number 1: * * * [T]he Final Judgment would eliminate all territorial and use limitations [Defendants] imposed on [their] U.S. licensees and allow them to manufacture on their own or sublicense any third party to do so anywhere in the world * * *."

Element Number 2: The Final Judgment will create "* * * a similar 'safe harbor' for any other American individual or firm who is not a Pilkington float glass licensee to use any float technology *in its position* without liability to [Defendants]. (Emphasis supplied).

Element Number 3: The Final "* * * Judgment would enjoin certain conduct having the purpose or effect of restricting exports of float glass to the United States * * *."

Element Number 4: The Final "* * * Judgment would enjoin the [D]efendants from making certain adverse representations * * * and would require [certain disclosures].

DOJ has wrongly concluded that the issuance of an order embodying these four (4) elements will achieve the goal of "* * * eliminat[ing] any residual anticompetitive effects of the restrictive license agreements and other conduct challenged by the Complaint * * *." because its selection of the elements rests upon flawed premises, including at least the following:

1. The Pilkington License Agreements have terminated and no valuable rights other than "know-how" rights may be obtained under them by assignees or sublicensees.

2. The "safe harbor" as to Pilkington know-how created for U.S. Non-Licensees offers sufficient protection for prospective assignees and/or sublicensees of U.S. Licensees and their lenders to cause them to risk tens of millions of dollars in the construction of float glass plants.

3. The Defendants will take no retributive action after the ten (10) year term of the Final Judgment.

4. The Pilkington float technology that is in the public domain (expired Patents and proprietary know-how), if known to prospective competitors, is sufficient to enable prospective competitors to construct and/or operate competitive float plants. *See Article II.A.2. of the Competitive Impact Statement* which states "* * * Pilkington has no intellectual property rights of substantial value * * *."

Commenting Party is One of the New Entrants Sought by DOJ

Our client (the "Commenting Party") is an entity formed under the laws of one of the States of the United States which now owns a Float Glass plant at which it manufactures and sells Float Glass. Commenting Party is an assignee and/or sublicensee of two License Agreements entered into between a subsidiary and/or predecessor of one of the Defendants and one of AFG, Ford, Guardian, PPG or LOF (the "named Licensees").

[1] Capitalized terms have the meanings assigned to them in Paragraph II of the Judgment.

Under the License Agreements as to which the Commenting Party is an assignee and/or sublicensee, the "Licensed Patents" covered by such License Agreements are expansively defined to include all U.S. Patents issued during the "Term" of the relevant License Agreement, U.S. Patent applications filed during such Term and the U.S. Patents that may be issue thereunder, Patents as to which the contracting Pilkington entity has the right to grant a license or sub-license and continuations, divisions and reissues of such Patents. The Terms of License Agreements "expire" after 1985 but the license rights concerning the License Patents become "paid up" and remain vital. This vitality extends for the life of each of the License Patents and reaches into the 21st century.

The Commenting Party regarded and still regards these acquired and/or sublicensed rights to be essential to its continued operation of its Float Glass plant. It would not have expended the tens of millions of dollars it did for its Float Glass plant in the absence of its rights under such License Agreements.

The Final Judgment Does Not Adequately Protect New Entrants

In obtaining these valuable license rights by assignment and/or sublicensing, Commenting Party in effect stepped into the shoes of its assignor/sublicensor and may have inherited certain other features of the License Agreements that DOJ has described as characteristic of Defendents' allegedly unlawful activities. These features include:

1. Purported limitations on assignment and/or sublicensing.

2. Restrictive confidentiality provisions respecting allegedly confidential information *i.e.* know-how (confidentiality provisions do not apply to technology disclosed in Patents laws restrict competitive uses).

3. Choice of law provisions invoking the laws of England. (All Agreements deriving important rights from the Defendants, their predecessors or subsidiaries presumably invoke the laws of England as the "applicable law.").

4. Arbitration provisions requiring arbitration venued in England for all disputes. (All Agreements deriving important rights from the Defendants, their predecessors or subsidiaries presumably require arbitration in England.)

Commenting Party believes that other prospective entrants into the Float Glass industry will conclude, as Commenting Party did, that the construction and operation of a competitive Float Glass plant requires such entrant to become an assignee and/or sublicensee of Patent and other rights under a License Agreement derived from the Defendants, their predesessors or subsidiaries (the "Pilkington Group"). When they do so they may become subject to restrictive provisions like those described above. The Final Judgment appears to permit the enforcement of these allegedly anti-competitive provisions.

If a prospective entrant into the Float Glass industry requires institutional financing in order to construct a Float Glass plant having a cost, according to DOJ, of between $100 and $150 million dollars, will the protections allegedly afforded by the Final Judgment resolve the issues that institutional lenders, institutional lawyers and borrower's counsel will find in the License Agreements as modified by the Final Judgment? The answer simply stated is *no*.

Commenting Party believes the flawed assumptions have led to a flawed result. This conclusion is illuminated by the application of the elements of the Final Judgment to the facts of Commenting Party's case.

What Is Commenting Party's Assignor's/ Sublicensor's Status?

Does the Final Judgment classify the Named Licensee with whom Commenty Party contracted ("Commenting Party's Assignor/Sublicensor") as a "U.S. Licensee"? To be a U.S. Licensee, one must first be a person, company or entity who is a "Licensee." A person, company or entity is not a Licensee unless they have "* * * *entered into a License Agreement with Pilkington.*" (Emphasis added").

The phrase "* * * entered into * * * with Pilkington * * *" appears to require privity of contract. This privity is restricted, apparently, to persons, companies or entities in privity with "Pilkington." Since "Pilkington" is only Pilkington plc, this privity must be with the Defendant Pilkington plc.

Pilkington plc is not the name of the member of the Pilkington Group with whom Commenting Party's Assignor/Sublicensor contracted in the License Agreements. Therefore, it is possible that Commenting Party's Assignor/Sublicensor is neither a "Licensee" nor a "U.S. Licensee" because its contractual privity is with a subsidiary or predecessor of "Pilkington" instead of with Pilkington plc.

What is Commenting Party's and What Will Be Future Assignees'/Sublicensees' Status?

Even if a reader is to assume that the definitional flaw noted above does not exist, Commenting Party's and any other future assignee's/sublicensee's status apparently will not change because none of them will have privity of contract with "Pilkington" no matter how "Pilkington" is defined. Therefore, unless the Final Judgment is changed, Commenting Party and all future assignees/sublicensees will only be "U.S. Non-licensees."

Why Are U.S. Non-licensees Who Enter Into Assignments/Sublicenses Under Pilkington License Agreements Not Expressly Protected Against The Enforcement of Limitations?

It appears that DOJ believes that the prohibitions involving the enforcement of "Limitations" will result in the assignment/ sublicensing of "Float Technology" required to construct and operate competitive Float Glass plants. These prohibitions, however, apply only to the allegedly anti-competitive activities of the defendants against U.S. Licensees. *See* Final Judgment Article IV.A. The protections relevant to U.S. Non-licensees are set out in Article IV.B. of the Final Judgment. Article IV.B. does not prohibit the Defendants asserting Limitations against U.S. Non-licensees! Thus, if Article IV.A. permits U.S. Licensees to assign/ sublicense Float Technology, nowhere does Article IV.B. enable the prospective assignees/sublicensees who may become new owners/operators of Float Glass plants to exercise free from suit the rights they might hope to acquire in an assignment/sublicense.

Article IV.B.1 appears to apply only to a subclass of U.S. Non-licensees *e.g.* employees, contractors, suppliers, consultants, etc., who, as a group, have entirely different interests than prospective owner/operators of Float Glass plants. In substance Article IV.B.1. addresses only provisions of Agreements respecting Confidentiality or non-competition. Since only the protections of Article IV.B.2. appear to apply to assignees/sublicensees, the only subjects that the Defendants can't make claims about against such U.S. Non-licensees relate to proprietary Float Technology know-how rights that Pilkington *has in fact disclosed* to someone who in fact fits the definition of U.S. Licensee, and which are not bona-fide trade secrets under "applicable law" (as to which Pilkington may still enforce its rights under Article IV.B.2.). The protected class of intellectual property is far less than the body of intellectual property encompassed by the License Agreements under which Commenting Party and others similarly situated would want to derive rights.

If the Final Judgment is to be read these ways, the Defendants will be able to claim against assignees/sublicensees that their assignment/sublicense agreements and/or practice of Patents covered by such assigned/ sublicensed Pilkington License Agreements are, among other things: wholly invalid, were obtained in breach of Pilkington's Patent rights. (Article IV.H. of the Final Judgment expressly preserves all of Pilkington's Patent claims).

Why Do the Protections Intended By The Concept of Limitations Not Expressly And Literally Include Assignments and Sublicenses?

As noted above, DOJ appears to believe that the elements of the final judgment will lead to assignment/sublicense agreements concerning Float Technology. Surprisingly, the Final Judgment does not literally say anything of the kind. We could not find any reference to assignments or sublicenses. As DOJ has noted, the License Agreements with members of the Pilkington Group contain express, literal prohibitions respecting assignment and sublicensing. The Defendants have reserved their rights respecting matters not "expressly" covered by the Final Judgment. *See* Article IV.I. of the Final Judgment. Institutional lenders or investors who may be asked to lend to or invest in prospective Float Glass industry entrants can be expected to look for express, literal language in the Final Judgment to counter the express, literal provisions of the License Agreements. Finding them absent, they will refuse to lend or invest.

"Limitations" is defined by Article II.K. of the Final Judgment without any use of the words "assignment" or "sublicensing." The word "use" appears in the definition but as Commenting Party has shown above, the word "Limitations" is used only in Article IV.A. with respect to U.S. Licensees and not

their contracting parties, *i.e.* their prospective assignees/sublicensees are U.S. Non-licensees.

Article IV.A.1. of the Final Judgment uses the word "sublicensing" but appears to do so only in connection with "Subject Float Technology." As defined, "Subject Float Technology" appears to encompass only "know-how" (see above discussion). Therefore, Float Technology that is Patent technology or that was subject to disclosure by Pilkington but not in fact disclosed is not encompassed by Article IV.A.1. of the Final Judgment.

Commenting Party notes, in passing, that Article IV.A.3.(b) curiously refers to "transferring" and "transferees" of Float Technology without thereby telling the reader what such words encompass or connecting them to other Articles of the Final Judgment. This creates further ambiguity.

Assignments/sublicenses and the role DOJ expects them to play are too important for the Final Judgment to treat them ambiguously or even silently. As noted above, the Defendants seem to retain important rights to sue. These rights appear to be strongest on subject relating to Patents and provisions of the Final Judgment that are not "express" enough. Commenting Party believes that without changes to the Final Judgment no prospective assignee/sublicensee can be given any clear assurances that the Final Judgment prohibits the Defendants from suing them for attempting to enter the Float Glass industry. Why would anyone risk investing in or lending to an entity which cannot receive or provide assurances that its ostensible assignment/sublicense under a Licensee Agreement with a member of the Pilkington Group protects it from suits by the Defendants?

Unfortunately, even if "Limitations" is changed to literally permit assignments/sublicenses, under Article IV.A. its protections extend only to U.S. Licensees. As Commenting Party has shown above, the protections afforded to U.S. Non-licensees appear in Article IV.B. of the Final Judgment. Again, the needed words of art "assignment" or "sublicense" do not appear there.

In short, DOJ may intend that the Final Judgment will be interpreted to permit assignment/sublicensing of Float Technology that is either or both licensed Patent technology or know-how technology, but, under the express, literal terms of the Final Judgment, the assignee/licensee clearly has protection only with respect to non-Patented know-how that was in fact disclosed by Pilkington plc to a person, company or entity that is a U.S. Licensee. In Commenting Party's case, it appears the Final Judgment is too narrow in application to encompass Commenting Party's rights under its assignment and/or sublicense agreement. If Commenting Party were to consider further assigning/sublicensing its rights under the relevant Agreements, Commenting Party could not assure any prospective sub-assignee/sub-sublicensee that the Final Judgment affords them any protection against the restrictions contained in such Agreements.

Finally, the ambiguous phrase "* * * other than Float Technology * * *" in the definition of "Subject Float Technology" threatens the entire concept. Is it intended that if the Pilkington Group disclosed Flat Technology to LOF, then such Float Technology is not "Subject Float Technology" even though such Float Technology was also disclosed to AFG, PPG or Ford? This shouldn't be the case. Presumably, the intent was to exclude *only* the Float Technology that was *only* disclosed to a U.S. Licensee who was also a Pilkington plc subsidiary at the time of disclosure.

Commenting Party does not believe that DOJ intended any of these unfavorable interpretations. If DOJ wants there to be assignees and/or sublicensees of License Agreements deriving from Agreements between any of the named Licensees and any member of the Pilkington Group, then the prohibitions respecting "Limitations" must be extended to this class of persons, companies and entities. The defects noted in this analysis can be eliminated by modest changes to the definitions of "Pilkington", "U.S. Licensee", "U.S. Non-licensee", "Limitations" and "Subject Float technology."

Change #1. The Final Judgement should be changed so that the Named Licensees listed in Article II.A.2. of the Competitive Impact Statement are in fact encompassed by the definition of "Licensee/" This is best accomplished by expanding the definition of "Pilkington."

Article II.N. of the Final Judgment should be changed in its entirety to read as follows:

N. "Pilkington" means Defendants Pilkington plc, Pilkington Holdings Inc. and their past, present and future predecessors, affiliates and subsidiaries.

Change #2. If DOJ intends to vest in prospective assignees/sublicensee of U.S. Licensees the benefits of Agreements that grant rights under License Agreements entered into with a member of the Pilkington Group, then the term "U.S. Licensee" should include all persons, companies or entities who derive rights from any chain of Agreements that extend ultimately to a License Agreement with a member of the Pilkington Group. This will enable contracting parties to obtain licenses under patents whose vitality extends into the next century and protect such parties from any anti-competitive assertion of the Patent rights expressly reserved to the Defendants at Article IV.H. of the Final Judgment.

Article II.I. of the Final Judgment should be changed in its entirety to read as follows:

I. "Licensee" means any person, company, or entity that has either (1) entered into a License Agreement with Pilkington; (2) become an assignee and/or sublicensee under a License Agreement with Pilkington; or (3) become an assignee and/or sublicensee under a License Agreement with any Licensee.

Change #3. The definition of "Non-licensee" contains the overly restrictive concept of privity of contract, *i.e.* "* * * not entered into a[n] * * * Agreement with Pilkington." The definition should merely encompass all persons, companies or entities who are not in a chain of Agreements extending ultimately to an original Pilkington License Agreement.

Article II.L. of the Final Judgment should be changed in its entirety to read as follows:

L. "Non-licensee" means any person, company, or entity which is not a Licensee.

Change #4. Article II.K. of the Final Judgment should be changed in its entirety to read as follows:

K. "Limitations" means: (1) Any limitation or restriction, or purported restriction or limitation under any License Agreement with Pilkington or other Agreement or in any other form respecting territories, fields, markets, or customers for the design and construction, or supervision of construction, or ownership of Float Glass plants, or the manufacture and sale of Float Glass; and/or (2) any restriction or limitation, or purported restriction or limitation under any License Agreement with Pilkington or other Agreement or in any other form respecting the assignment, licensing, sublicensing or other use of Float Technology, whether the result of an affirmative prohibition or a limited authorization.

Change #5. Article II.P. of the Final Judgment should be changed in its entirety to read as follows:

P. "Subject Float Technology" means Patented or Unpatented Float Technology that in relation to any given Licensee was licensed, was subject to disclosure or was in fact disclosed to that Licensee under an Agreement with either Pilkington or any other Licensee other than Float Technology disclosed by Pilkington plc only to any U.S. Licensee while such U.S. Licensee was a subsidiary of Pilkington plc.

Why Will English Law Be Permitted To Govern All Important Questions of Law?

Persons, companies and entities who become assignees/sublicensees under License Agreements with a member of the Pilkington Group may become subject to the choice of law provisions contained in the original License Agreements. While DOJ has challenged the Pilkington Group's contracting practices, the Final Judgment does nothing to change a central feature of the License Agreements. Even more ominously, the Final Judgment introduces vagueness and ambiguity concerning these features leaving the Defendants free to argue entirely different meanings in venues outside the jurisdiction of the District Court.

Throughout the proposed Final Judgement, particularly in reference to the issue of Confidential Information, the phrase "applicable" law appears. Under the License Agreements available to Commenting Party, the Pilkington Group chose the laws of England to govern the interpretation and application of such License Agreements. It is highly likely that this choice of law appears in all relevant License Agreements and will through the assignment/sublicensing process sought by DOJ run through any future relevant Agreements.

For example, the words "applicable law" appears in the phrase" * * * trade secret under applicable law * * *." What does this mean? The learned treatise *The Legal Protection of Trade Secrets* (the "English Treatise"), at Section 2.2.5 says "The term trade secret is not really a term of art in English law in contrast with its usage in American law * * *. Thus, the effect of the Final Judgment appears to be that the laws

of England will apply to the interpretation of the concept of "trade secret" and such English law does not use such words as a "term of art." Does this mean that Defendants' lawyers will be free to fill in for English arbitrators (the Final Judgment makes no attempt to eliminate the London venue and English arbitrators that have apparently been used with such anti-competitive effect in litigation with licensees) what the term means?

The English Treatise offers two (2) formulations of the concept of "confidential information." Which of the two rules will apply? Which of them, if either, furthers the purposes of the Final Judgment? Why will the Defendants be left with the power to argue their interpretation of what "trade secret under applicable law" means to arbitrators sited in London? Why should the District Court be confident that the purposes of the Final Judgment will be given effect by English arbitrators interpreting the vague and ambiguous language of an order of, to them, a foreign court?

The issue also is raised in another context by Final Judgment Article IV.B.1. which refers to restrictions on competition under "applicable law." If English law governs this issue too, how will the District Court be assured that such law is consistent with the purposes of the Final Judgment?

In sum, these vague and ambiguous formulations favor the Defendants and the perpetuation of the contractual regime challenged by DOJ. The Final Judgment obscures this issue by not disclosing that English laws governs every Agreement that is important in the future assignment/sublicensing activity sought by DOJ. Nothing in the Final Judgment purpose to guide (much less control) the arbitrators in their interpretation of the License Agreements and assignments/sublicenses under them in light of the Final Judgement.

Change #6. The Final Judgment should expressly reserve jurisdiction to the District Court to decide what laws are applicable in any future litigation involving the Defendants and any person, company or entity that is an assignee/sublicensee under any Agreement derived from a License Agreement with a member of the Pilkington Group. The Final Judgment could permit interlocutory appeals to the District Court of any questions of interpretation and expressly subject the arbitrators to the District Court's jurisdiction. The Final Judgment could permit *de novo* judicial review by the District Court of any decisions of arbitrators respecting any such assignees/sublicensees.

Change #7. The Final Judgment could also replace the arbitration venue provisions of the License Agreements with the venue of the District Court. This would ensure that any arbitrators are subject to the District Court's jurisdiction. The Defendants are already subject to the District Court's jurisdiction and venue and there is no hint in the Stipulation that the venue is inconvenient to the members of the Pilkington Group.

Why Is Retributive Conduct Not Prohibited After Expiration of the Final Judgment?

Article VII.A. of the Final Judgment provides that the Final Judgment will expire on the tenth anniversary of its entry. What happens then to persons, companies or entities who have invested millions of dollars in obtaining the purported benefits of the Final Judgment by assignment and/or sublicensing under License Agreements? There will then be no prohibition against the Defendants enforcing their contract and other rights. Upon such expiration, can the Defendants enforce all of their suspended rights to the extent that they haven't lapsed by application of any applicable statute of limitations? What is the applicable statute? Does the phrase "applicable law" mean that this issue is governed by the laws of England. If English law governs, The Limitation Act of 1980 provides for a six (6) year statute of limitations for breach of contract claims. Will this not mean that assignments and/or grants of sublicenses by U.S. Licensees in year five (5) after the entry of the Final Judgement are subject to suit in year eleven (11)?

Is the applicable statute of limitations tolled during the effectiveness of the Final Judgment? Is it the intention of the Final Judgment to bar certain claims, not to suspend them? The Final Judgment should make this clear, whether by providing that the Defendants shall not assert that the Final Judgment has tolled any statute of limitations, or otherwise. Alternatively, the Final Judgment could simply be made permanent with respect to all facts and circumstances arising during the ten (10) year period the Final Judgment is effective.

Change #8. At the least, Article VII.A. of the Final Judgment should be changed in its entirety to read as follows:

A. This Final Judgment shall expire on the tenth anniversary of its entry provided, however, that not withstanding such expiration, the Defendants and their present and future affiliates and subsidiaries shall not thereafter take any action prohibited by this Final Judgment with respect to any License Agreement or any other Agreement entered into by any Licensee respecting assignment and/or sublicensing under any License Agreement prior to such expiration date. This Final Judgment does *not* toll any statute of limitations as to any *existing* claims or claims of the Defendants that, but for this Final Judgment, would have risen during the time this Final Judgment is in force.

Is the Necessary Float Technology Really in the Public Domain?

Change #9. What is the basis for the conclusion set our in press statements by DOJ that the Float Technology embodied in Patents expiring in 1982 and before and other technology in the public domain is sufficient to enable a prospective entrant to construct and operate a competitive Float Glass plant? There appear to be hundreds of Pilkington Group Patents in the United States and hundreds of others in foreign countries. Has DOJ in consultation with anyone in the Float Glass industry or who is a prospective entrant, determined that none of these Patents describes Float Technology needed for a competitive Float Glass plant?

Notwithstanding the Final Judgment and in the absence of an assignment or sublicense of rights under a License Agreement with a member of the Pilkington Group, a prospective entrant into the Float Glass industry will have to engage Patent lawyer(s) to understand each of the unexpired Patents and determine what Float Technology cannot be practiced. The review of hundreds of unexpired Patents promises significant costs to parties who cannot obtain rights by assignment or sublicensing.

Commenting Party believes that changes must be made in the Final Judgment if DOJ's goal is to be achieved. Commenting Party believes that without modification of the Final Judgment no prospective entrant will be able to provide the assurances that commercial lenders and institutional investors require on the serious issues raised by the express, literal provisions of the Pilkington License Agreements.

Sincerely yours,

John A. Grimstad.

Judiciary Center Building, 555 4th Street, NW, Washington, DC 20001.

October 6, 1994.

John A. Grimstad, Esq.,
Fredrikson & Byron, P.A., 1100 International Centre, 900 Second Avenue South, Minneapolis, MN 55402–3397

Re: *U.S. v. Pilkington plc et al.* (D. Ariz., *filed May 25, 1994), Civ 94–345 TUC WDB*

Dear Mr. Grimstad: This letter responds to your letter of August 10, 1994, commenting on and proposing changes in the proposed Final Judgment ("Judgment") in the above-captioned matter. You complained that (i) the Judgment rests on several "flawed assumptions" listed in your letter that you said "have led to a flawed result"; (ii) contrary to the Department of Justice's conclusion, the relief the Judgment provides does not eliminate the residual anticompetitive effects of the challenged agreements or behavior; and (iii) the Judgment is "too narrow in application to encompass [the] rights" of a domestic glass manufacturer you represent but declined to identify. In trying to support those complaints, you applied the precise provisions of the proposed Judgment to your anonymous client's vaguely and ambiguously described licensing arrangements, and then concluded there are gaps in the Judgment's coverage that do not in fact exist. We have addressed separately below each of the changes you recommended to the proposed Judgment. For the reason indicated, we believe there is no basis for modifying the Judgment. The standard applied in assessing your specific proposals is whether it is in the public interest to enter the judgment submitted by stipulation. Entry is in the public interest if the Judgment is adequate to remedy the antitrust violations alleged in the Complaint.

1. You proposed expanding the definition "Pilkington" to include the two named defendants' "past, present and future predecessors, affiliates and subsidiaries," so that the "named licensees (AFG, Ford, Guardian, PPG, and LOF) "are in fact encompassed by the definition of 'Licensee'." This change is necessary, you said, because your client is "an assignee and/or sublicensee of two license agreements * * * between [i] a subsidiary and/or predecessor

of one of the defendants" and (ii) one of the "named licensees," and because the Judgment's definition of Licensee requires contractual privity with Pilkington itself.

We believe the change is unnecessary to achieve your stated objective since each of the "named licensees" already is clearly a Licensee as defined in the proposed Judgment. All five of those companies entered into float licensee agreements with defendant Pilkington, not with a predecessor, affiliate, or subsidiary of Pilkington. Since execution of those agreements, only Pilkington's corporate name has been changed from "Pilkington Brothers Limited" to "Pilkington plc." Thus, Pilkington plc is the same corporate entity as, not a successor of, Pilkington Brothers Limited.

2. You also proposed expanding the definition of "Licensee" to include not only anyone who has entered into a license agreement with Pilkington, but also anyone who is "an assignee and/or sublicensee" under a license agreement with either Pilkington or any of the "named licensees." That is necessary, you said, so that anyone "who derive[s] rights from any chain of agreements that extend ultimately to a license agreement with [Pilkington]" will get the benefits of such a license agreement with Pilkington as "prospective assignees/sublicensees of U.S. Licensees" under the proposed Judgment. But this change, too, is unnecessary.

Subparagraph IV.A.1. of the proposed Judgment, subject to a narrow exception and certain conditions relating to maintaining the confidentiality of legitimate trade secrets, expressly permits any U.S. Licensee (including each of the five "named licensees") to sublicense anywhere in the world (including the U.S.) the float glass technology Pilkington disclosed and licensed to it, free of any license restrictions or limitations and without payment of any royalties, lump sum, or line fees for such sublicensing. Clearly then, for that provision of Subparagraph IV.A.1. to have any meaningful effect, anyone acquiring rights to use such technology under such a sublicense must be as free to use it anywhere without restriction or limitation by Pilkington or payment of royalties or fees to Pilkington, subject to the same conditions concerning confidentiality, as the U.S. Licensee from whom such rights were obtained. The same would be true too for any further sublicensing by such a sublicensee. Anything less than that, if the result of any action taken by Pilkington, would be a clear violation of the proposed Judgment, with which Pilkington is required by stipulation to comply pending its approval by the court.

It seems clear to us that the result would be the same, insofar as Pilkington is concerned, whether such a sublicense agreement were executed before or after entry of the proposed Judgment. As for assignments, the result should be the same, assuming, as a matter of law, the assignee effectively stands in the shoes of or is substituted for the assignor, and the rights involved are assignable. However, the proposed Judgment does not purport to address specifically the consequences of such assignments since they were not the principal focus of the challenged agreements or conduct involved here. Moreover, we cannot be any more definitive on their implications for your client because you have not provided enough information about its current licensing arrangements.

3. You proposed changing the definition of "Non-Licensee" from anyone who has not entered into a license agreement with Pilkington to anyone who is not a Licensee, because, you said, the current definition "contains the overly restrictive concept of privity of contract * * *." But since anyone who is not in contractual privity with Pilkington is not a Licensee, your proposal is the equivalent of the current definition. Moreover, since a Licensee is anyone who is in contractual privity with Pilkington, the proposed Judgment's definitions of "Licensee" and "Non-Licensee" together cover the entire universe of persons entitled to the benefits of the Judgment, without any gap between them. For purposes of the proposed Judgment, your client is either a "Licensee" or a "Non-Licensee," whatever else it may be (assignee, sublicensee, etc.) by reason of its current licensing arrangements. Thus, no need for the proposed change has been shown.

4. The change proposed in the definition of "Limitations" is to include references to sublicensing and assignment so as to permit those activities. But including such references in the definition of "Limitations" does not provided the authorization you seek and confuses the concept of "Limitations," which are restrictions on the exercise (*e.g.*, in certain territories or for certain uses) of rights already granted. Whether the separate right of sublicense or to make assignments also is authorized is, as noted above, already controlled by Subparagraph IV.A.1. of the proposed Judgment in the case of sublicensing and by operation of law for assignments.

You also complained that "the needed words of art 'assignment' or 'sublicense' do not appear" in Subparagraph IV.B., which provides certain injunctive relief for U.S. Non-Licensees (*i.e.*, those who have not entered into float glass license agreements with Pilkington). As you correctly observed, however, Subparagraph IV.B. does not enjoin Pilkington from enforcing limitations against them. But there is no need to do so; since U.S. Non-Licensees by definition are not in privity of contract with Pilkington, there is no contractual or other legitimate basis for Pilkington to enforce any license-agreement limitations against them. For the same reason, it is not necessary that Subparagraph IV.B. enjoin Pilkington from restricting or prohibiting the exercise of the right to sublicense or make assignments against persons with whom it is not in contractual privity under any float license agreement. Thus, neither the word "assignment" nor the word "sublicensee" is "needed as part of the definition or concept of "Limitations."

5. You proposed to expand the definition of "Subject Float Technology" to include patented as well as unpatented float technology and to include float technology that was "subject to disclosure" as well as that actually disclosed to any given Licensee. In support, you claimed, incorrectly, that "the protected class of intellectual property is far less than the body of intellectual property encompassed by the License Agreements * * *" (p. 6, your letter). Indeed, they are the same.

The purpose and effect of Subparagraph IV.A.1. of the proposed Judgment is to free U.S. Licensees from any restraints (other than confidentiality) concerning all intellectual property rights acquired from Pilkington, to the extent that has not already occurred. As noted in the Competitive Impact Statement (p. 9), all U.S. Licensees' float license agreements have terminated, and the royalty obligations thereunder have become fully paid up. Also, Pilkington has acknowledged that its basic patent protection relating to the original form of float process has largely expired, and has represented that all mutual exchanges between Pilkington and its U.S. licensees (whether patented or not) have been terminated, the latest ten years ago. Pilkington has represented further (as have some of its U.S. Licensees) that all of the U.S. float glass patents licensed by Pilkington to any U.S. Licensee, either under the original grant or the improvement exchange provisions of the licenses, have expired. It is simply unnecessary, therefore, to cover patented rights that essentially no longer exist.

As for technology that was "subject to disclosure," that language is so vague and indefinite it would be impossible to identify the technology involved. In any case, it seems wholly unnecessary. According to the relevant float glass license agreements, Pilkington was obliged to disclose to each licensee (i) all "necessary or useful" know-how Pilkington developed, owned, or controlled at the time and (ii) all patented and unpatented float process improvements Pilkington discovered, owned, or controlled during the term of the mutual exchange provisions. Together, those obligations likely covered whatever might have been "subject to disclosure." Of course, the proposed Judgment does not apply to any technology disclosed by a U.S. Licensee to your client (or to anyone else) that belongs to that U.S. Licensee rather than to Pilkington.

Finally, as you correctly observed (p. 8, your letter), the exclusionary language of the definition of "Subject Float Technology"—other than float technology disclosed by Pilkington to any U.S. Licensee while Pilkington owned 50% or more of that U.S. Licensee—excludes float technology disclosed to a U.S. Licensee who was a Pilkington subsidiary at the time of disclosure (*e.g.*, LOF) and not also disclosed to any other licensee who was not then a subsidiary (*e.g.*, AFG, PPG, or Ford). We believe that intent is clear from the plain meaning of the exclusion (especially considering the included language, "in relation to any given licensee," which limits the excluded technology), and so it is unnecessary to add the word "only" to the definition as you propose.

6/7. You objected to (i) language in the proposed Final Judgment for resolving trade secret issues under "applicable law," and (ii) the arbitration provisions of Pilkington's float license agreements plus the application of English law to disputes involving those

agreements; accordingly, you proposed that the Judgment expressly reserve to the District Court jurisdiction over questions of applicable law in future litigation involving the defendants (including provisions for interlocutory appeals) and over any designated arbitrators (including *de novo* review of their decisions). Alternatively, you also proposed replacing the choice of law provisions of the licenses with, for example, the Uniform Trade Secrets Act and replacing the arbitration provisions with the venue of the District Court.

Your proposal seems far too sweeping insofar as it would reach future litigation. Moreover, the proposed Judgment (Subparagraph VII.B) already provides that the Court retains jurisdiction over this action and the parties. In addition, any court can, as this Court did in a related case in which it referred antitrust claims to arbitration, retain jurisdiction over arbitration proceedings for purposes of reviewing the decisions in those proceedings. Finally, the language ("under applicable law") in the Judgment to which you objected requires application of the relevant conflict of laws rule, as to both U.S. Licensees and U.S. Non-Licensees, in determining the nature and existence of trade secrets, rather than, in the case of U.S. Licensees, merely following the license provision that requires application of English law. In any case, contrary to the implication of your letter based on the treatise cited therein (p. 10), we believe there is little, if any, substantive difference between the trade secret law of the United States and the comparable body of English law. Thus, we are unpersuaded that either of the alternative changes you propose should be adopted.

8. You proposed changing Subparagraph VII.A., which sets the term of the Judgment, in ways that effectively extend its duration beyond 10 years. In concluding that a period of 10 years is the appropriate life for most consent judgments, the Department has recognized that the anticompetitive effects of any challenged conduct or practices usually are fully dissipated within that time and that, because of the market changes likely to occur within that period, the operation of the judgment itself can have an undesirable competitive impact after 10 years. In this case, the Department believes that Pilkington technology is to a very substantial extent publicly known and therefore no longer of sufficient value to justify any restraints on its use, including obligations to maintain its confidentiality. Even more so would that be the case 10 years from now. Clearly, Pilkington would be subject to renewed antitrust challenge in the event it reinstituted, after expiration of the Judgment, the practices and conduct that led to this case in the first place. Thus, we believe Subparagraph VII.A. should remain unchanged.

9. You complained that a prospective entrant into the float glass industry who cannot obtain rights by assignment or sublicensing would incur significant costs to the extent it was necessary (i) to review what you said are hundreds of unexpired relevant Pilkington float glass patents not licensed to U.S. Licensees, and (ii) to determine what float glass technology in the public domain is sufficient to construct and operate a competitive float glass plant. By failing to propose a specific change to address this complaint, you implicitly acknowledged that there are none that would avoid this task entirely or eliminate all risks associated with entry. Of course, without any modification, the proposed Judgment will allow U.S. Licensees to sublicense the requisite technology they used to construct and operate competitive float glass plants in the United States.

In sum, we do not believe it would be in the public interest to forego entry of the proposed Judgment for failure to include therein any of your proposed changes. Nevertheless, we appreciate your interest in this matter and in the enforcement of the antitrust laws.

Sincerely,

K. Craig Wildfang,

Special Counsel to the Assistant Attorney General, Antitrust Division.

Thomas H. Liddle,

Attorney, Antitrust Division.

[FR Doc. 94–25820 Filed 10–18–94; 8:45 am]

BILLING CODE 4410–01–M

Proposed Modification of Final Judgment

Notice is hereby given that defendant United Artists Theatre Circuit, Inc. ("UATC") has filed with the United States District Court for the Eastern District of Wisconsin a motion to modify the Final Judgment in *United States v. Capitol Service, Inc. et al.*, No. 80–C–407, and the Department of Justice ("Department"), in a stipulation also filed with the Court, has consented to modification of the Final Judgment, but has reserved the right to withdraw its consent based on public comments or for other reasons. The Complaint in this case (filed on May 5, 1980) alleged that UATC and three other Milwaukee motion picture exhibitors had since 1977 engaged in a combination and conspiracy to restrain trade by "splitting", or allocating among themselves, the rights to negotiate for films released by motion picture distribution companies, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

The Final Judgment (entered on June 17, 1983) enjoins the defendants "from further engaging in any motion picture split agreements, in any form and with any person, in any motion picture exhibition market throughout the United States."

The Department has filed with the Court a memorandum setting forth the reasons why it believes that modification of the Final Judgment to permit a singular exemption from the Court's injunction for a UATC theatre in San Jose, California to be constructed under the auspices of the City's Redevelopment Agency, would be in the public interest. Copies of the Complaint, the Final Judgment, the defendant's motion papers, the Stipulation containing the Government's tentative consent, the Department's memorandum, and all further papers filed with the Court in connection with this motion will be available for inspection at Room 3235, Antitrust Division, Department of Justice, 10th Street and Pennsylvania Avenue, NW., Washington, DC 20530 (Telephone: (202) 514–2481), and at the Office of the Clerk of the United States District Court for the Eastern District of Wisconsin, in Milwaukee, Wisconsin. Copies of any of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department regulations.

Interested persons may submit comments to the Department regarding the proposed modification of the Final Judgment. Such comments must be received within the sixty-day period established by court order, and will be filed with the Court by the Department. Comments should be addressed to Gail Kursh, Chief, Professions and Intellectual Property Section, Antitrust Division, Department of Justice, 555 Fourth Street, NW., Washington, DC 20001 (telephone: (202) 307–5799).

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 94–25819 Filed 10–18–94; 8:45 am]

BILLING CODE 4410–01–M

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification

The following parties have filed petitions to modify the application of mandatory safety standards under section 101(c) of the Federal Mine Safety and Health Act of 1977.

1. Consolidation Coal Company

[Docket No. M–94–139–C]

Consolidation Coal Company, Consol Plaza, 1800 Washington Road, Pittsburgh, Pennsylvania 15241–1421 has filed a petition to modify the application of 30 CFR 75.380(d)(4) (escapeways; bituminous and lignite mines) to its Dilworth Mine (I.D. No. 36–04281) located in Greene County, Pennsylvania. The petitioner proposes to establish two separate and distinct primary intake escapeways during development of three-entry longwall gate sections; to have the total length of

unattended supply cars maintained on the end of the supply track at 150 feet and other rail vehicles readily mobile on the longwall development section; to have a clearance of 42 inches on the wide side of the cars when an unattended trip of supply cars is parked on the supply track/intake escapeway of the three-entry development section; to periodically test the wide side clearances along the supply cars to assure that a stretcher can move through the area; and to post a reflective sign that indicates limited clearance at both the inby and outby ends of the supply cars and at the entrance of the mine. The petitioner proposes to establish two separate and distinct secondary escapeways on retreat that would be identified with signs and markers in the belt entry from the longwall face to the track entry at a distance not to exceed 1000 feet, and the minimum width of the travelway in the belt entry at two feet and maintained clear and free of obstruction; to periodically test the wide side clearances along that portion of the belt entry designated as an alternate escapeway to assure that a minimum clearance of two feet is maintained; to instruct personnel working in the area to use the primary escapeway in an emergency; to deenergize the longwall machinery and belt line when transporting persons if the primary escapeway is impassable; and to train all personnel assigned to work in the area prior to implementation of the proposed alternate method and during annual refresher training. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

2. Ram Head Coal Company

[Docket No. M-94-140-C]

Ram Head Coal Company, 277 Main Street, Joliett, Pennsylvania 17981 has filed a petition to modify the application of 30 CFR 75.360 (preshift examination) to its Primrose Slope (I.D. No. 36-08454) located in Schuylkill County, Pennsylvania.

The petitioner proposes to examine each seal for physical damage from the slope gunboat during the preshift examination after an air quantity reading is taken in by the intake portal and to test for the quantity and quality of air at the intake air split locations off the slope in the gangway portion of the working section. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

3. Ram Head Coal Company

[Docket No. M-94-141-C]

Ram Head Coal Company, 277 Main Street, Joliett, Pennsylvania 17981 has filed a petition to modify the application of 30 CFR 75.364(b)(1), (4), and (5) (weekly examination) to its Primrose Slope (I.D. No. 36-08454) located in Schuylkill County, Pennsylvania. Due to hazardous conditions and roof falls, certain areas of the intake air course cannot be safely traveled. The petitioner proposes to examine the intake haulage slope and primary escapeway from the gunboat/slope car with an alternative air quality evaluation at the section's intake level, and to travel and thoroughly examine these areas for hazardous conditions once a month. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

4. Ram Head Coal Company

[Docket No. M-94-142-C]

Ram Head Coal Company, 277 Main Street, Joliett, Pennsylvania 17981 has filed a petition to modify the application of 30 CFR 75.1100-2(a)(2) (quantity and location of firefighting equipment) to its Primrose Slope (I.D. No. 36-08454) located in Schuylkill County, Pennsylvania. The petitioner proposes to use only portable fire extinguishers to replace existing requirements where rock dust, water cars, and other water storage are not practical. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

5. Ram Head Coal Company

[Docket No. M-94-143-C]

Ram Head Coal Company, 277 Main Street, Joliett, Pennsylvania 17981 has filed a petition to modify the application of 30 CFR 75.1200(d) & (i) (mine map) to its Primrose Slope (I.D. No. 36-08454) located in Schuylkill County, Pennsylvania. The petitioner proposes to limit the mapping of mines above and below mine workings to those present within 100 feet of the vein being mined except when veins are interconnected to other veins beyond the 100 feet limit through rock tunnels. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

6. Ram Head Coal Company

[Docket No. M-94-144-C]

Ram Head Coal Company, 277 Main Street, Joliett, Pennsylvania 17981 has filed a petition to modify the application of 30 CFR 75.1202-1(a) (temporary notations, revisions, and supplements) to its Primrose Slope (I.D. No. 36-08454) located in Schuylkill County, Pennsylvania. The petitioner proposes to revise and supplement mine maps on an annual basis instead of the required 6 month interval and to update maps daily by hand notations. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

7. The Pittsburg and Midway Coal Mining Company

[Docket No. M-94-145-C]

The Pittsburg and Midway Coal Mining Company, P.O. Box 6518, Englewood, Colorado 80155-6518 has filed a petition to modify the application of 30 CFR 75.1002-1(a) (location of trolley wires; trolley feeder wires, high-voltage cables and transformers) to its North River No. 1 Mine (I.D. No. 01-00759) located in Fayette County, Alabama. The petitioner proposes to use high-voltage (2400 volts) cable to power longwall equipment inby the last open crosscut and at least 150 feet from pillar workings. The petitioner states that all electrical personnel required to perform maintenance on the longwall will receive training in high-voltage safety and maintenance procedures before the proposed alternate method is implemented. The petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

8. Arch of Illinois

[Docket No. M-94-146-C]

Arch of Illinois, P.O. Box 308, Percy, Illinois 62272-0308 has filed a petition to modify the application of 30 CFR 77.206(c) (ladders; construction; installation and maintenance) to its Preparation Plant (I.D. No. 11-02948) located in Perry County, Illinois. Instead of using backguards, the petitioner proposes to use a SAF-T-CLIMB fall prevention system that meets Federal Specifications No. RR-S-001301, and complies with OSHA regulations 29 CFR 1910.27. The petitioner states that application of the mandatory standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternate method would provide at least the same

measure of protection as would the mandatory standard.

9. Leeco, Inc.

[Docket No. M-94-147-C]

Leeco, Inc., 100 Coal Drive, London, Kentucky 40741-8799 has filed a petition to modify the application of 30 CFR 75.1103-4(a)(1) (automatic fire sensor and warning device systems; installation; minimum requirements) to its Mine No. 68 (I.D. No. 15-17497) located in Perry County, Kentucky. The petitioner proposes to install a low-level carbon monoxide detection system as an early warning fire detection system in all belt entries used as intake air courses. The petitioner states that application of the mandatory standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

10. Leeco, Inc.

[Docket No. M-94-148-C]

Leeco, Inc., 100 Coal Drive, London, Kentucky 40741-8799 has filed a petition to modify the application of 30 CFR 75.350 (air courses and belt haulage entries) to its Mine No. 68 (I.D. No. 15-17497) located in Perry County, Kentucky. The petitioner proposes to use belt air to ventilate active working places to aid in controlling respirable dust and dissipating methane. The petitioner states that application of the mandatory standard would result in a diminution of safety to the miners. In addition, the petitioner asserts that the proposed alternate method would provide at least the same measure of protection as would the mandatory standard.

11. Genwal Coal Company

[Docket No. M-94-149-C]

Genwal Coal Company, P.O. Box 1201, Huntington, Utah 84528 has filed a petition to modify the application of 30 CFR 75.1002 (location of trolley wires, trolley feeder wires, high-voltage cables and transformers) to its Crandall Canyon Mine (I.D. No. 42-01715) located in Emery County, Utah. The petitioner proposes to use high-voltage (4160 volts) operated equipment inby the last open crosscut at the longwall sections. The petitioner states that application of the mandatory standard would result in a diminution of safety to the miners. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

12. Brush Creek Mining and Development Company, Inc.

[Docket No. M-94-40-M]

Brush Creek Mining and Development Company, Inc., 970 E. Main Street, Suite 200, Grass Valley, California 95945 has filed a petition to modify the application of 30 CFR 57.4431 (surface storage restrictions) to its Ruby Mine (I.D. No. 04-03108) located in Sierra County, California. The petitioner request a modification of the mandatory standard to allow the diesel fuel tank to remain in its present location. The petitioner states that the tank has been in this location since 1981, has a concrete foundation, and is completely bermed to contain the fuel within the tank if there is a complete failure of the tank. Further, the petitioner states that if fuel escapes from the berm, it would flow downhill away from the portal. The petitioner asserts that the proposed alternative method would provide at least the same measure of protection as would the mandatory standard.

Request for Comments

Persons interested in these petitions may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before November 18, 1994. Copies of these petitions are available for inspection at that address.

Dated: October 7, 1994.

Patricia W. Silvey,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 94-25821 Filed 10-18-94; 8:45 am]

BILLING CODE 4510-43-P

NUCLEAR REGULATORY COMMISSION

Documents Containing Reporting or Recordkeeping Requirements: Office of Management and Budget (OMB) Review

AGENCY: U.S. Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35).

1. Type of submission, new, revision or extension: Revision.

2. The title of the information collections: Proposed Section 100.23, "Geologic and Seismic Siting Factors," to 10 CFR Part 100, and Proposed Appendix S, "Earthquake Engineering Criteria for Nuclear Power Plants," to 10 CFR Part 50.

3. The form number if applicable: Not applicable.

4. How often the collection is required: On occasion.

5. Who will be required or asked to report: Applicants for a construction permit, operation license, early site permit, design certification, or combined license for nuclear power plants.

6. An estimate of the number of responses annually: 1.

7. An estimate of the total number of hours needed annually to complete the requirement or request: 163,000.

8. An indication of whether Section 3504(h). Public Law 96-511 applies: Not Applicable.

9. Abstract: Proposed Section 100.23 to 10 CFR Part 100 contains criteria associated with the selection of the nuclear power plant site and the establishment of the safe shutdown earthquake ground motion. Proposed Appendix S to 10 CFR Part 50 contains earthquake engineering criteria for nuclear power plants. Applicants after the effective date of this rule must comply with the updated source term, dose considerations, and the seismic and earthquake engineering considerations of reactor siting.

Copies of the submittal may be inspected or obtained for a fee from the NRC Public Document Room, 2120 L Street, NW (Lower Level). Washington, DC.

Comments and questions can be directed by mail to the OMB reviewer: Troy Hillier, Office of Information and Regulatory Affairs (3150-0093 and 3150-0011), NEOB-10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395-3084.

The NRC Clearance Officer is Brenda Jo. Shelton, (301) 415-7232.

Dated at Rockville, Maryland this 7th day of October 1994.

For the Nuclear Regulatory Commission.

Gerald F. Cranford,

Designated Senior Official for Information Resources Management.

[FR Doc. 94-25856 Filed 10-18-94; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50–424 and 50–425]

Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, Vogtle Electric Generating Plant, Unit 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from the requirements of 10 CFR 50, Appendix E, Section IV.F.2, regarding annual exercise of the emergency plan to Georgia Power Company (GPC or the licensee), for the Vogtle Electric Generating Station, Units 1 and 2, located in Dalton, Georgia.

Environmental Assessment

Identification of the Proposed Action

The proposed exemption would allow a one-time schedular exemption from the requirements of 10 CFR Part 50, Appendix E, Section IV.F.2 which states that each licensee at each site shall annually exercise its emergency plan. By letter dated July 21, 1994, the licensee requested a schedular exemption from the requirement for the Vogtle Power Station, based upon a request from the State of Georgia and local governments, to delay the exercise from July 27, 1994, to January 11, 1995, because of the flood disaster in Georgia.

The licensee had planned to conduct a full-participation exercise involving the States of Georgia and South Carolina and local response organizations on July 27, 1994. The licensee requested that an exemption be granted because the State of Georgia requested to delay the 1994 annual exercise from July 27, 1994, to January 11, 1995. The request to move the exercise date was originated by the Georgia Emergency Management Agency (GEMA) because they would be unable to participate on July 27 as GEMA personnel were required to respond to a federally-declared flood disaster in South Georgia. This proposed delay will prevent Vogtle from meeting the annual requirement to exercise the Vogtle emergency plan as specified in Appendix E to 10 CFR 50, and therefore, GPC requested a schedular exemption.

The previous emergency preparedness exercise at Vogtle was successfully conducted on August 4, 1993, and no violations, deviations or exercise weaknesses were identified. Offsite participation was limited to receiving Emergency Notification messages. A joint plume and ingestion exposure pathway exercise involving the States of Georgia and South Carolina and the four local governmental agencies was conducted on May 19, 1992.

The licensee had scheduled, planned and coordinated the 1994 exercise with participating Federal, State, and local agencies for mid-July. The scope and objectives, and the final scenario documentation for the July 1994 exercise were submitted to the NRC on April 14, 1994, and May 17, 1994, respectively, which is within the time frames established for their submittal in support of a July 1994 exercise.

The schedule for future exercise will not be affected by this exemption. GPC has stated it will conduct the previously scheduled 1995 exercise the week of July 19, 1995, as planned. The licensee states that concurrence for the proposed date of January 11, 1995, has been received from FEMA, NRC Region II, and the affected State and local agencies. FEMA confirmed its support for the revised exercise date on September 1, 1994.

Based upon a review of the licensee's request for an exemption from the requirement to conduct an exercise of the Vogtle emergency plan in 1994, the NRC staff finds that the underlying purpose of the regulation will not be adversely affected by the rescheduling of the July 27, 1994, exercise to January 11, 1995. The effective response capability demonstrated by the licensee during the 1993 emergency preparedness exercise, the activities in preparation for the 1994 exercise, including a table top exercise with the States and counties and the readiness of the licensee's emergency preparedness program as reflected in its SALP rating and the most recent inspection report, provide assurance that the resources and personnel necessary for proper emergency response are in place to respond to a nuclear emergency at the Vogtle site. Thus, an exercise in 1994 is not necessary to achieve the underlying purpose of the rule, and the requested exemption from the requirement in 10 CFR Part 50, Appendix E, Section IV.F, to defer the performance of an exercise of the Vogtle emergency plan until January 11, 1995, will not adversely affect the overall state of emergency preparedness at the Vogtle site.

The Need for the Proposed Action

The proposed exemption is needed because the Georgia Emergency management Agency (GEMA) was required to respond to a federally-declared flood disaster in South Georgia at the time of the scheduled annual emergency exercise.

Environmental Impacts of the Proposed Action

The NRC staff evaluation of the proposed exemption from 10 CFR 50, Appendix E, Section IV. F.2, indicates that the granting of the proposed exemption will not involve any measurable environmental impacts since the exemption deals with the exercise of the licensee's emergency plan. Plant configuration and operations are not changed. Therefore, the Commission concludes that there are no significant radiological or nonradiological environmental impacts associated with the proposed exemption.

Alternatives to the Proposed Action

Since the Commission has concluded there is no measurable environmental impact associated with the proposed exemption, any alternatives with equal or greater environmental impact need not be evaluated. The principal alternative to the action would be to deny the request. Such action would not enhance the protection of the environment and would result in diversion of plant resources from addressing important health and safety issues.

Alternative Use of Resources

This exemption from the scheduled exercise on July 27, 1994, does not reduce the use of resources since the schedule for future exercises will not be affected by this exemption. The licensee has stated it will conduct the previously scheduled 1995 exercise the week of July 19, 1995, as planned. Thus, the requested exemption would provide only temporary relief from the requirement to conduct an annual exercise.

Agencies and Persons Consulted

The NRC staff consulted with the Georgia State official regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

Based upon the environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed exemption, see the licensee's letter dated July 21, 1994, which is available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street,

NW., Washington, DC 20555, and at the local public document room located at the Burke County Library, 412 Fourth Street, Waynesboro, Georgia 30830.

Dated at Rockville, this 13th day of October 1994.

Herbert N. Berkow,

Director, Project Directorate II-3, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94-25855 Filed 10-18-94; 8:45 am]

BILLING CODE 7590-01-M

LLW Performance Assessment Workshop

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Workshop.

SUMMARY: The Nuclear Regulatory Commission (NRC) staff plans to conduct a Low-Level Radioactive Waste (LLW) Performance Assessment Workshop to provide opportunity to comment on and discuss NRC's Draft Branch Technical Position (BTP) on Performance Assessment for LLW Disposal Facilities and Development of NRC's Test Case Simulations. The workshop is jointly sponsored by NRC's Division of Waste Management and Office of State Programs in cooperation with the Host State Technical Coordinating Committee and the E-5 Committee of the Conference of Radiation Control Program Directors, Inc. Participants include State regulators, State authorities and developers, the Environmental Protection Agency and the U.S. Department of Energy. Members of the public attending will have opportunity to offer comments and participate in discussions.

DATES: The workshop will take place from 8:00 a.m., Wednesday, November 16, 1994, and conclude at 4:30 p.m. on Thursday, November 17, 1994.

LOCATION: The workshop will be held at NRC's Auditorium, Two White Flint North, 11545 Rockville Pike, MD 20852. Parking is limited. The White Flint Metro stop is within one block.

CONTACT: For further information, contact Dr. Stephen N. Salomon, Office of State Programs, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone (301) 504-2368; FAX (301) 504-3502; or INTERNET: SNSNRC.GOV.

SUPPLEMENTARY INFORMATION: The NRC staff published in January 1994 a draft BTP on Performance Assessment for LLW Disposal Facilities and copies were distributed for review by Agreement States. The BTP was based on the U.S. Code of Federal Regulations, Title 10, Chapter 1, Part 61 "Licensing Requirement for Land Disposal of Radioactive Waste," (Part 61) that specifies license requirements and performance objectives for LLW disposal facilities. The guidance objective of the BTP is to provide license applicants, licensees, States and compacts, and the NRC staff with an acceptable strategy and methodology for performing the technical analysis required to demonstrate compliance, in the post-closure time frame, with the performance objective in Part 61, governing radiological protection of the public health and safety and the environment. Participants in this workshop will discuss regulatory and technical issues in the draft BTP and the development of NRC's test case simulations Also, State regulatory and technical issues will be discussed. To achieve a more successful workshop, participants are encouraged to read the BTP before attending the workshop. Copies can be obtained from Dr. Salomon.

The proposed agenda identifies the following discussion topics for the morning of November 16: The Purposes and Goals of the LLW PA Workshop, Overview of the BTP, Overview of PA Modeling Technical Issues and Recommended Analytical Approaches, Open Discussion of Iterative PA Process, Overview of PA Modeling Technical Issues and Recommended Analytical Approaches, Open Discussion of Technical Issues, and Environmental Protection Agency draft LLW Standard, 40 CFR 193. In the afternoon, there will be sessions on Overview of Comments on Preliminary draft of BTP and Revisions, Discussions of Regulatory and Technical Issues in LLW PA [Treatment of Engineered Barriers; Role of Site-Scenarios, Conceptual Models, and Data Needs; Uncertainty/Sensitivity in Regulatory Decision Making; Timeframe for PA Analysis; and Role of Performance Assessment in Demonstrating Compliance]. The afternoon shows Panel Discussions of Regulatory and Technical Issues in LLW PA.

On November 17 in the morning, sessions include the NLLWMP technical assistance and computer modeling capability, Overview of NRC Staff LLWPA Modeling Efforts [Description of Test Case and Integrated Systems Model, Hardware/Software Requirements for LLWPA, Documenting Results, Test Case Results and Discussions of Important Conclusions, and Lessons Learned from Test case], PA Methodology Status Update, Panel discussion with State regulators and develops [Infiltration, Engineered Barriers, Source Term, Ground Water Transport and Dosimetry], and DOE approach to LLW PA Modeling.

The afternoon includes Breakout sessions on Key Technical Issues in Implementing the BTP [Infiltration, Source Term, Offsite transport and dose, and Aspects of computer modeling], and Reports of Breakout chairs on issues and approaches discussed. The Workshop will end with a Wrap Up, Conclusions and Summary session.

The workshop is a public meeting and members of the public attending will have opportunity to offer comments and participate in discussions. A transcript of the workshop will be available for inspection and copying for a fee, at the NRC Public Document Room, 2120 L Street, N.W. (Lower Level), Washington, D.C. 20555.

Dated at Rockville, Maryland this 12th day of October, 1994.

For the Nuclear Regulatory Commission.

Richard L. Bangart,

Director, Office of State Programs.

[FR Doc. 94-25854 Filed 10-18-94; 8:45 am]

BILLING CODE 7590-01-P-M

Advisory Committee on Reactor Safeguards; Subcommittee Meeting on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on November 2, 1994, Room T-2E13, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c) (2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of ACRS, and matters the release of which would represent a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows: *Wednesday, November 2, 1994-2:00 p.m. until the conclusion of business.*

The Subcommittee will discuss proposed ACRS activities and related matters. Also, it will discuss qualifications of candidates nominated for appointment to the ACRS. The purpose of this meeting is to gather information, analyze relevant issues and facts, and to formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman; written statements will be accepted and made available to the

Committee. Electronic recordings will be permitted only during those portions of the meeting that are open to the public, and questions may be asked only by members of the Subcommittee, its consultants, and staff. Persons desiring to make oral statements should notify the cognizant ACRS staff person named below five days prior to the meeting, if possible, so that appropriate arrangements can be made.

Further information regarding topics to be discussed, the scheduling of sessions open to the public, whether the meeting has been cancelled or rescheduled, the Chairman's ruling on requests for the opportunity to present oral statements, and the time allotted therefor can be obtained by contacting the cognizant ACRS staff person, Dr. John T. Larkins (telephone: 301/415–7360) between 7:30 a.m. and 4:15 p.m. (EST). Persons planning to attend this meeting are urged to contact the above named individual five days before the scheduled meeting to be advised of any changes in schedule, etc., that may have occurred.

Dated: October 13, 1994.

Medhat El-Zeftawy,

Acting Chief, Nuclear Reactors Branch.

[FR Doc. 94–25853 Filed 10–18–94; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–302]

In the Matter of: Florida Power Corporation Crystal River Nuclear Generating Plant Unit 3; Exemption

I

Florida Power Corporation (the licensee) is the holder of Facility Operating License No. DPR–72, which authorizes operation of the Crystal River Nuclear Generating Plant Unit 3. The license provides, among other things, that the licensee is subject to all rules, regulations, and orders of the Commission now or hereafter in effect.

The facility is of a pressurized water reactor type and is located in Citrus County, Florida.

II

Title 10 Code of Federal Regulations Part 50 (10 CFR Part 50), Appendix A, "General Design Criteria for Nuclear Power Plants," Criterion 3, "Fire protection," specifies that "Structures, systems, and components important to safety shall be designed and located to minimize, consistent with other safety requirements, the probability and effect of fires and explosions."

10 CFR Part 50, Appendix R, sets forth fire protection features required to satisfy general design Criterion 3 of the Commission's regulations. Pursuant to 10 CFR Part 50, Appendix R, Section III. O, "Oil collection system for reactor coolant pump," the reactor coolant pump (RCP) shall be equipped with an oil collection system which "* * * shall be capable of collecting lube oil from all potential pressurized and unpressurized leakage sites in the reactor coolant pump lube oil systems."

The licensee proposed to replace the existing RCP motors with a new motor and implement a re-designed RCP lube oil system. As a result of physical interferences and other design difficulties, four specific sites in the RCP motor lube oil system could not accommodate an oil collection systems for collecting potential oil leakage. The four potential leakage sites are: the anti-reverse device (ARD) vents, upper oil supply lines from the lift pump to the ARD, lower motor leak detection system piping, and lower guide bearing thermocouple wells.

An exemption from 10 CFR Part 50, Appendix R, Section III. O, is required to permit the four specific sites in the RCP lube oil systems not to be equipped with an oil collection system, and thus, exclude them from leakage protection.

By letter dated June 7, 1993, as supplemented March 28, 1994, the licensee submitted its exemption request for this purpose.

III

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. Special circumstances are present whenever, according to 10 CFR 50.12(a)(2)(ii), "Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule * * *".

The underlying purpose of 10 CFR 50, Appendix R, Section III. O, is to establish an oil collection system such that lube oil leakage from potential pressurized and unpressurized leakage sites in the RCP lube oil systems will not lead to fire during normal or design basis accident conditions and that there is reasonable assurance that the system will withstand the Safe Shutdown Earthquake (SSE).

The licensee's proposed RCP motor lube oil system could not accommodate an oil collection system for collecting potential oil leakage from four specific sites. The staff evaluation of these sites is as follows.

The RCP motor lube oil system, with its pumps and associated piping, supply oil to several parts of the RCP. The existing RCP lube oil system includes a high pressure and an induced flow system. The high pressure system consists of two independent pumps, and associated piping, and supplies oil, among other components, to the ARD. The induced flow system is driven by the rotation of the RCP motor and provides lube oil to the thrust bearings, guide bearings, and to the ARD.

In the new design, the ARD vents located at the top of each RCP motor would be equipped with demisters. According to the equipment vendor, the ARD vent lines only contain oil mist or foam during startup, shutdown, and normal operation. The demisters are equipped with a filter to prevent lube oil mist from escaping to the atmosphere. Two upper lube oil supply lines provide oil to the ARD from the low pressure lube oil system lift pump during startup and shutdown of the RCP motor. During normal operation, oil is provided to the ARD by the induced flow system.

The ARD vents are not part of a pressurized system. Therefore, spray shield protection for mechanical connections is not provided. If leakage were to occur during normal plant operations from the ARD demisters or from the mechanical connections, the oil would run down the side of the torque drum and bearing housing, be collected by a one-inch lip on the bottom of the upper RCP motor bearing housing, and then be channeled to the oil collection drain pan for the upper lube oil cooler. The two upper lube oil supply lines are part of a pressurized system and, therefore, lube oil spray from a leak at a mechanical connection may not be fully captured by this lip and could potentially run down the RCP motor onto hot Reactor Coolant System (RCS) surfaces.

The lower RCP motor leak detection system provides detection of water leakage from the RCP motor heat exchanger. Consequently, this system normally contains cooling water. However, oil may enter into the cooling water either from overfilling the lube oil reservoir or from leakage at the lower RCP motor bearing. The mixture of water/oil could potentially leak at the threaded connections of the leak detection system piping and run off onto hot RCS surfaces. It is not expected that this oil/water mixture would represent a fire hazard under these conditions. These lines are not part of

a pressurized system and are not provided spray protection for this potential leakage site.

The lower guide bearing and oil temperature thermocouples are located near the lower RCP motor bearing housing. Each of these instruments has two threaded connections. One of these connections is at the RCP motor lower bearing oil reservoir and the other is at the outer end of the thermocouple pipe where the thermocouple is inserted into the pipe. These thermocouple connections are located in a non-pressurized portion of the lube oil system and are not provided with spray shields. The innermost connections are located directly over the RCP motor lower oil drain pan and it is expected that leakage from these connections would be captured by the lower drain pan.

The new oil lubricating system would contain approximately 200 gallons of oil and would eliminate one of the two lift pumps and its components, which should result in a decrease in the number of potential leakage sites. Of the four potential leakage sites, ARD vents and lower RCP motor leak detection system piping do not contain oil under routine operating conditions. The upper oil supply lines from the lift pump to the ARD are pressurized only during a brief period of motor startups and shutdowns. The lower guide bearing thermocouple wells are passive in nature. If leakage were to occur during normal plant operations, the oil would channel to the drain pan. Any lube oil leak which may not have been fully captured could potentially run down the RCP motor onto hot Reactor Coolant System surfaces. However, the flammability characteristics of the oil, flashpoint of 452°F, and an auto ignition temperature of 500°F–700°F, that would be used in the lube oil system, reduce the likelihood that the oil will readily ignite upon coming in contact with hot RCS piping surfaces. Additionally, if the oil leak became ignited, the fire would be localized in the area of the leakage and detected by the thermal fire detectors.

Fire protection features for the RCP motors include three temperature heat detectors with 190°F setpoints located over each RCP. Any localized fire in the area would result in an alarm function in both the reactor building and annunciate in the main control room. Additional indications of potential RCP fire are provided by control room alarms on low level oil, low oil pressure or high vibrations. It is expected that the control room operators would evaluate these alarms associated with the RCP and its lube oil system and initiate fire brigade entry into the reactor building to investigate and fight the fire. The reactor building is equipped with an internal firefighting standpipe hose station system and fire extinguishers are appropriately distributed throughout the structure. RCP firefighting would be accomplished by using either portable fire extinguishers or water from a hose stream or a combination of both. Access to the four RCPs for firefighting can be accomplished by making entry into the "D" rings.

The existing Crystal River Unit 3 RCP motor lube oil system in a nonseismic system. The new RCP lube oil system and lube oil collection systems would be seismically qualified to withstand an SSE. Therefore, if an SSE were to occur, the system is not expected to fail.

Based on the design features of the new RCP motors and associated lube oil collection systems, there is reasonable assurance that the RCP lube oil system will not lead to fire during normal and design basis accident conditions or present a major fire hazard during a seismic event. In addition, based on the present level of fire protection provided for the RCPs and the fact that the plant has a trained fire brigade, if a fire were to occur in the area of RCP lube oil system ARD vents, upper oil supply lines from the lift pump to the ARD, lower motor leak detection system piping, and lower guide bearing thermocouple wells, there is reasonable assurance that the fire condition will be detected and mitigated.

IV

For the foregoing reasons, the NRC staff has concluded that the licensee's proposed implementation of the RCP lube oil system with the four potential leakage sites (the ARD vents, upper oil supply lines from the lift pump to the ARD, lower motor leak detection system piping, and lower guide bearing thermocouple wells not equipped with an oil collection system) will not present an undue risk to public health and safety and is consistent with the common defense and security. The NRC staff has determined that there are special circumstances present, as specified in 10 CFR 50.12(a)(2), such that application of 10 CFR Part 50, Appendix R, Section III. 0, as it relates to the oil collection at four specific sites in the RCP, is not necessary in order to achieve the underlying purpose of this regulation.

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), an exemption is authorized by law, will not endanger life or property or common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants Florida Power Corporation an exemption from those requirements of 10 CFR Part 50, Appendix R, Section III. 0, relating to oil collection in the RCP. This exemption is applicable only to the four potential leakage sites in the RCP lube oil system: the ARD vents, upper oil supply lines from the lift pump to the ARD, lower motor leak detection system piping, and lower guide bearing thermocouple wells.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not result in any significant adverse environmental impact (59 FR 48338).

Dated at Rockville, Maryland, this 7th day of October 1994.

For the Nuclear Regulatory Commission.

Steven A. Varga,

Director, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 94–25857 Filed 10–18–94; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy

Federal Acquisition Regulation (FAR) Rewrite

AGENCY: Office of Federal Procurement Policy, Office of Management and Budget.

ACTION: Request for comments.

SUMMARY: On May 24, 1994, the Board of Directors for the FAR Rewrite Project published a set of core guiding principles in the **Federal Register**. Comments from that notice have been reviewed and changes made to the principles. In the course of making these changes the Board added another principle to make it clear that if a policy or procedure is not addressed in the FAR, members of the Government acquisition team should not assume it is prohibited. Although the entire statement is being republished for comment, the Board is particularly interested in comments from the public on the new principle.

DATES: Written comments must be received in the Office of Federal Procurement Policy within 30 days after publication of this notice.

ADDRESSES: Susan E. Alesi, Office of Federal Procurement Policy, 725 17th Street, NW, Washington, DC, 20503.

FOR FURTHER INFORMATION CONTACT: Susan E. Alesi, Office of Federal Procurement Policy, at 202–295–6803.

SUPPLEMENTARY INFORMATION: On September 7, 1993, the Vice President

released the report of the National Performance Review which, among other things, required the Administration to simplify the procurement process by rewriting the FAR, shifting from rigid rules to guiding principles. As a first step, the Board drafted a set of core guiding principles intended to define and guide the Government's general vision for the Federal acquisition process.

The Board requested comments on the set of core guiding principles and the accompanying discussion through a notice issued in the **Federal Register** published on May 24, 1994. As a result of that notice the Board received approximately 50 comments from 19 different commentors. The comments ranged from general structural to specific substantive changes. Some editing was done and the Board added a new principle to the statement.

Some of the more significant changes included: the document was retitled as "Statement of Guiding Principles For The Federal Acquisition System"; the success paragraph was eliminated; the lead-in to the goals paragraph was changed; the term "customer" was clarified; the phrase "each level of the process" was changed to "throughout the process"; the phrase "using commercial products and services in preference to unique specification" was replaced with "maximizing the use of commercial products and services to meet Government requirements"; and the term "vendor" was replaced with "contractor."

In addition to these changes the Board is considering another concept under the role of the acquisition team. The intent of the Board is to make it clear that if a policy is not specifically addressed in the FAR, members of the Government acquisition team should not assume that it is prohibited. This concept was added to encourage members of the team to innovate in the course of their procurements.

Statement of Guiding Principles for the Federal Acquisition System

The VISION for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. Participants in the acquisition process should work together as a team and should be empowered to make decisions within their area of responsibility.

The Federal Acquisition System will:

*Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service, by, for example,

**Maximizing the use of commercial products and services,

**Using contractors with a track record of successful past performance or who demonstrate a current superior ability to perform, and

**Promoting competition;

*Minimize administrative operating costs;

*Conduct business with integrity, fairness, and openness; and

*Fulfill public policy objectives.

The acquisition team consists of all participants in Government acquisition including not only representatives of the technical, supply and procurement communities but also the customers they serve, and the contractors who provide the products and services.

The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, members of the Government acquisition team may assume that if a specific policy or procedure is not prohibited by the FAR, law (statute or case law), Executive Order or other regulation, that the policy or procedure is a permissible exercise of authority.

Discussion on the Statement of Guiding Principles for the Federal Acquisition System

Introduction

The Statement of Acquisition Guiding Principles for the Federal Acquisition System (System) represents a concise statement designed to be user-friendly for all participants in Government acquisition. The following discussion of the principles is provided in order to illuminate the meaning of the terms and phrases used. The framework for the System includes the Guiding Principles for the System and the supporting policies and procedures provided in the Federal Acquisition Regulation (FAR).

Discussion

Vision

All participants in the System are responsible for making acquisition decisions that deliver the best value product or service to the customer. Best value must be viewed from a broad perspective and is achieved by balancing the many competing interests in the System. The result is a system which works better and costs less.

Performance Standards for the Federal Acquisition System

• Satisfy the Customer in Terms of Cost, Quality, and Timeliness of the Delivered Product or Service

The principal customers for the product or service provided by the System are the users and line managers, acting on behalf of the American taxpayer.

The System must be responsive and adaptive to customer needs, concerns, and feedback. Implementation of acquisition policies and procedures, as well as consideration of timeliness, quality, and cost throughout the process, must take into account the perspective of the user of the product or service.

When selecting contractors to provide products or perform services, the government will use contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform.

The government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the government determine the capabilities available in the commercial marketplace. The government will maximize its use of commercial products and services in meeting Government requirements.

It is the policy of the System to promote competition in the acquisition process.

The System must perform in a timely, high quality, and cost-effective manner.

All members of the Team are required to employ planning as an integral part of the overall process of acquiring products or services. Although advance planning is required, each member of the Team must be flexible in order to accommodate changing or unforeseen mission needs. Planning is a tool for the accomplishment of tasks, and application of its discipline should be commensurate with the size and nature of a given task.

• Minimize Administrative Operating Costs

In order to ensure that maximum efficiency is obtained, rules, regulations, and policies should be promulgated only when their benefits clearly exceed the costs of their development, implementation, administration, and enforcement. This applies to internal administrative processes, including reviews, and to rules and procedures applied to the contractor community.

The System must provide uniformity where it contributes to efficiency or where fairness or predictability is

essential. The System should also, however, encourage innovation, and local adaptation where uniformity is not essential.

• Conduct Business With Integrity, Fairness, and Openness

An essential consideration in every aspect of the System is maintaining the public's trust. Not only must the System have integrity, but the actions of each member of the Team must reflect that integrity. The foundation of integrity within the System is a competent, experienced, and well-trained, professional workforce. Accordingly, each member of the Team is responsible and accountable for the wise use of public resources as well as acting in a manner which maintains the public's trust. Fairness and openness require open communication among team members, internal and external customers, and the public.

To achieve efficient operations, the System must shift its focus from "risk avoidance" to one of "risk management." The cost to the taxpayer of attempting to eliminate all risk is prohibitive. The Executive Branch will accept and manage the risk associated with empowering local procurement officials to take independent action based on their professional judgment.

• Fulfill Public Policy Objectives

The System must support the attainment of public policy goals adopted by the Congress and the President. In attaining these goals, and in its overall operations, the process shall ensure the efficient use of public resources.

Acquisition Team

The purpose of defining the Federal Acquisition Team (Team) in the Acquisition Guiding Principles is to ensure that participants in the System are identified—beginning with the customer and ending with the contractor of the product or service. By identifying the team members in this manner, teamwork, unity of purpose and open communication among the members of the Team in sharing the vision and achieving the goal of the System are encouraged. Individual team members will participate in the acquisition process at the appropriate time.

Role of the Acquisition Team

Members of the Government Acquisition Team must be empowered to make acquisition decisions within their areas of responsibility, including selection, negotiation, and administration of contracts consistent with the Guiding Principles. In particular, the Contracting Officer must have the authority, to the maximum extent practicable and consistent with law, to determine the application of rules, regulations, and policies, to a specific contract.

The authority to make decisions and the accountability for the decisions made will be delegated to the lowest level within the System, consistent with law.

The Team must be prepared to perform the functions and duties assigned. The government is committed to provide training, professional development, and other resources necessary for maintaining and improving the knowledge, skills, and abilities for all Government participants on the Team, both with regard to their particular area of responsibility within the System, and their respective role as a team member. The contractor community is encouraged to do likewise.

The System will foster cooperative relationships between the government and its contractors consistent with its overriding responsibility to the taxpayers.

The FAR outlines procurement policies and procedures that are used by members of the acquisition team. If a policy or procedure is not specifically addressed in the FAR, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority.

Steven Kelman,

Administrator.

[FR Doc. 94–25811 Filed 10–18–94; 8:45 am]

BILLING CODE 3110–01–M

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. 301–87]

Termination of Section 301 Action and Request for Public Comment: Canadian Exports of Softwood Lumber

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: The United States Trade Representative (USTR) has determined to terminate action taken under section 301 of the Trade Act of 1974 on certain entries of softwood lumber products from Canada. The USTR is taking this action in light of the completion of binational panel proceedings under Chapter 19 of the U.S.-Canada Free Trade Agreement concerning countervailing duty (CVD) determinations involving Canadian softwood lumber. During these proceedings, the binational panel directed the Department of Commerce to determine that imports of softwood lumber did not receive countervailable subsidies.

As a result of the termination of the Section 301 action, the Customs Service will: cease the extension of liquidation that was ordered pursuant to Section 301 on softwood lumber from Canada that entered from October 4, 1991 to March 12, 1992; de-obligate bonds collected on those entries pursuant to Section 301; and assess no Section 301 duties on those entries.

ADDRESSES: Office of the United States Trade Representative, 600 17th Street NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: David Weiss, Deputy Assistant United States Trade Representative for North American Affairs, (202) 395–3412; or William Kane, Assistant General Counsel, (202) 395–6800.

SUPPLEMENTARY INFORMATION: On December 15, 1986, the United States and Canada concluded a Memorandum of Understanding (MOU) under which, among other things, Canada agreed to impose a 15 percent export charge on certain softwood lumber products exported to the United States.

On September 3, 1991, Canada announced that it would unilaterally terminate the MOU in 30 days. In response, on October 4, 1991, Commerce announced that it would self-initiate a CVD investigation on softwood lumber from Canada. On the same date, USTR initiated an investigation under section 301, and determined under section 301(b) that Canada's acts, policies and practices in terminating the MOU were unreasonable and burdened or restricted U.S. commerce. 56 Fed. Reg. 50738 (October 8, 1991). USTR further determined that action was appropriate pursuant to section 304 to restore and maintain the status quo ante pending issuance of a preliminary CVD determination, and, if warranted, to impose duties to offset the effects of any subsidies found in the investigation.

USTR directed the Customs Service, *inter alia*, to: (1) impose bonding requirements on certain softwood lumber from Canada entering between October 4, 1991 and the date of Commerce's preliminary CVD determination; (2) withhold or extend, as appropriate, liquidation of all such

entries of softwood lumber until the imposition of duties; and (3) collect Section 301 duties at the rate specified in the MOU or the rate of subsidy found in the final Commerce CVD determination, whichever was lower. *Id.* USTR later issued an amended notice of initiation containing certain technical corrections to its original notice. 56 Fed. Reg. 58944 (Nov. 22, 1991).

On March 12, 1992, Commerce published its preliminary CVD determination. On May 28, 1992, Commerce published its final CVD determination, and determined an estimated subsidy rate of 6.51 per cent *ad valorem*. Both the domestic industry and affected Canadian parties appealed the final determination to binational panels established pursuant to Chapter 19 of the U.S.-Canada Free Trade Agreement (FTA).

As a result, on September 28, 1992, USTR published notice of a modification of the Section 301 action. 57 Fed. Reg. 44609 (Sept. 28, 1992). USTR directed Customs to inform importers that they may request extension of liquidation on entries covered by the Section 301 action, and that "any entries extended pursuant to such a request will be assessed 301 duties in accordance with the outcome of chapter 19 proceedings (*i.e.*, at the lower of the applicable MOU rate or the Commerce rate at the conclusion of chapter 19 proceedings)." *Id.* at 44610.

On May 6, 1993, the binational panel remanded the CVD determination to Commerce to reexamine certain of its findings. On September 17, 1993, Commerce responded by issuing a remand determination, finding a subsidy rate of 11.54 per cent *ad valorem*.

On December 17, 1993, the panel issued a second decision, again remanding the determination to Commerce, but this time with instructions to determine that countervailable subsidies were not being provided to Canadian producers of softwood lumber. On January 6, 1994, Commerce issued a second remand decision, complying with the panel's instructions.

On February 23, 1994, the panel affirmed Commerce's second remand determination. The binational panel's decision became final on March 17, 1994. 59 Fed. Reg. 12584 (March 17, 1994).

On April 6, 1994, USTR filed a request for the establishment of an Extraordinary Challenge Committee (ECC) pursuant to FTA Article 1904.13. The request challenged the panel's substantive determination as well as the conduct of two of the five panelists.

On August 3, 1994, the ECC, by a two-to-one decision, affirmed the panel's decision. On August 16, 1994, Commerce published notice of revocation of the CVD order on softwood lumber from Canada and termination of the suspension of liquidation on softwood lumber entered on or after March 17, 1994. 59 Fed. Reg. 42029 (Aug. 16, 1994).

USTR's previous notice of September 1992 indicated that covered entries would be assessed Section 301 duties at the lower of the MOU rate or the Commerce subsidy rate at the conclusion of Chapter 19 proceedings. Chapter 19 proceedings have now concluded with a determination of no countervailable subsidies. Accordingly, no Section 301 duties will be assessed on the covered entries.

The Customs Service is therefore directed to: cease the extension of liquidation that was ordered pursuant to Section 301 on softwood lumber from Canada that entered from October 4, 1991 to March 12, 1992; de-obligate bonds collected on those entries pursuant to Section 301; and assess no Section 301 duties on those entries. This action pertains only to the Section 301 action and is unrelated to the disposition of cash deposits collected pursuant to the lumber CVD order itself.

Under Section 307, the USTR may modify or terminate action, subject to the direction, if any, of the President, if, *inter alia*, the action was taken under section 301(b) and the USTR finds the action no longer to be appropriate. USTR has consulted with representatives of the affected domestic industry regarding this action.

Public Comment: Requirements for Submissions

Section 307(a)(2) requires USTR to provide an opportunity for comment by interested parties affected by a termination of action concerning the effects of the termination and whether the termination is appropriate. Accordingly, all interested persons affected by this termination may submit written comments concerning it. USTR will consider any comments submitted.

Comments must be filed in accordance with the requirements set forth in 15 CFR 2006.8(b). Comments must be in English and provided in twenty copies to: Chairman, Section 301 Committee, room 223, USTR, 600 17th Street NW., Washington, D.C. 20506. All comments should be submitted by November 18, 1994.

Comments will be placed in a file (Docket 301–87) open to public inspection pursuant to 15 CFR 2006.13, except for confidential business information exempt from public inspection in accordance with 15 CFR 2006.15. Confidential business information submitted in accordance with 15 CFR 2006.15 must be clearly marked "Business Confidential" in a contrasting color ink at the top of each page on each of the 20 copies, and must be accompanied by a nonconfidential summary of the confidential information. The nonconfidential summary shall be placed in the docket, which is open to public inspection.

Irving A. Williamson,

Chairman, Section 301 Committee.

[FR Doc. 94–25889 Filed 10–18–94; 8:45 am]

BILLING CODE 3190–01–M

PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT

The Sixth Meeting of the President's Council on Sustainable Development (PCSD) in Washington, DC

Summary: The President's Council on Sustainable Development, a partnership of industry, labor, government, environmental and civil rights organizations, will convene its sixth meeting in Washington, DC. Council members will further discuss PCSD's role in developing recommendations to the President toward the integration of environmental and economic policy and, ultimately, establishing a long-term path toward a sustainable United States by the year 2040.

The Council will address the problem statement, in terms of achieving a sustainable future—identifying what types of practices the United States has employed that have take us down a path of unsustainability.

Council members will discuss the report derived from the nearly 1,000 public responses to the draft vision statement and 15 defining principles of sustainable development. The PCSD received public comment to the draft vision statement and principles from nearly every state in the nation and a dozen countries around the world.

Date/Time: Thursday, 27 October 1994—1:00–5:00 p.m.

Place: U.S. Chamber of Commerce, 1615 H Street, NW., Washington, DC.

Status: Open to the Public.

Contact: Sarah McCourt, Director of Communications, 202–408–5296.

Molly Harriss Olson,

Executive Director, President's Council on Sustainable Development.

[FR Doc. 94–25879 Filed 10–18–94; 8:45 am]

BILLING CODE 4310–10–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–34829; File No. SR–CBOE–93–04]

October 12, 1994.

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Approving and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 1, 2, 3, and 4 to Proposed Rule Change Relating to the Listing and Trading of Capped Index Options With Quarterly Expiration ("Q–CAPS") Based on the Standard & Poor's 100 and 500 Stock Indexes

I. Introduction

On January 19, 1993, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b) of the Securities Exchange Act of 1934 ("Act",)[1] and Rule 19b–4 thereunder,[2] a proposed rule change to provide for the listing and trading of Quarterly Index Expiration, Capped Style Options ("Q–CAPS") based on the Standard & Poor's ("S&P") 100 and 500 Stock Indexes. On May 18, 1994, the CBOE filed Amendment No. 1 ("Amendment No. 1") to the proposal to provide for certain standards to be used with respect to the aggregation of FLEX options and Q–CAPS for purposes of FLEX option position limits.[3] On May 27, 1994, the CBOE filed Amendment No. 2 ("Amendment No. 2") to clarify that Q–CAPS will be subject to the same rules that govern capped-style options ("CAPS").[4] On September 16, 1994, the CBOE filed Amendment No. 3 ("Amendment No. 3") to clarify aggregation concerns with respect to options overlying the same index. On September 28, 1994, the CBOE filed Amendment No. 4 ("Amendment No. 4") to incorporate the substance of Amendment Nos. 1, 2 and 3 into the CBOE Rule book.[5] This order approves the CBOE's proposal, as amended.

Notice of the proposed rule change was published for comment and appeared in the **Federal Register** on March 24, 1993.[6] No comments were received on the proposal.

II. Description of the Proposal

A. CAPS and QIX Options

A capped-style option is an option that will be automatically exercised prior to expiration if the exercise settlement value[7] for the option on any trading day equals or exceeds (in the case of calls) or equals or is less than (in the case of puts), the cap price for the option.[8] CAPS based on the S&P 100 index ("OEX"), S&P 500 index ("SPX") and the Russell 2000 index are currently listed for trading on the CBOE. Quarterly Index Expiration ("QIX") options generally have the same contract terms as regular options, except that they expire on the first business day of the month following the end of a calendar quarter.[9] QIXs based on the SPX and OEX indexes are currently listed for trading on the CBOE.

B. Q–CAPS

A Q–CAP is an option possessing the same attributes as a capped-style index option contract that expires on the first business day of the month following the end of a calendar quarter. Q–CAPS will be subject to the same rules that presently govern the trading of existing CAPS, including, as more fully discussed below, position limits, exercise limits,[10] the setting of cap price intervals[11] and margin requirements.[12]

Under the proposal, Interpretation .03 to CBOE Rule 24.9 would be amended to provide for the listing of up to eight near-term quarterly expirations for Q–CAPS on the S&P 100 and 500 indexes.[13] New at-the-money series of Q–CAPS will be brought up every three months and/or after significant market movements.[14] Q–CAPS will feature European-style exercise and will have their exercise settlement value based upon the closing prices of applicable index component stocks on the last business day of the quarter.

For purposes of the Exchange's position limit framework, the CBOE proposes that Q–CAPS will be subject to the same position limits as standard CAPS. Accordingly, (1) Q–CAPS will be aggregated with and treated identically to A.M. Settled, European-style option contracts on the S&P 500 Index, including CAPS and QIX options on the S&P 500, for all position limit purposes, including being subject to the 25,000 contract index arbitrage limit;[15] (2) Q–CAPS on the S&P 100 Index will be treated like all other OEX options, including CAPS and QIX options, for all position limit purposes, except for the requirement that limits the number of contracts in the series of any broad-based index option with the nearest expiration ("telescoping requirement").[16] Additionally, aggregate P.M. Settled FLEX options based on the same index (*i.e.*, OEX or SPX), with the same expiration date as QIXs and Q–CAPS will be aggregated.[17] Q–CAPS will also be subject to the same hedge exemptions applicable to QIXs and CAPS.[18]

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of Section 6(b)(5),[19] and, therefore, approves the Exchange's proposal and grants accelerated approval of the amendments thereto. In particular, the Commission believes that Q–CAPS will provide additional choice and flexibility to investors in their use of derivatives and provide a tailored quarterly portfolio hedge that may be more suitable to their investment needs by allowing them to participate in the options markets at predetermined maximum gains or losses, on a quarterly basis. The Commission believes it is reasonable for the Exchange to set a cap interval of 30 in that the cap price is placed sufficiently far from the exercise price so that the Q–CAPS will not be exercised automatically on a frequent basis.[20]

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[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b-4 (1991).

[3] See Letter from Eileen Smith, Director, Product Development, CBOE, to Bradley S. Ritter, Staff Attorney, Division of Market Regulation, SEC, dated May 18, 1994.

[4] See Letter from Eileen Smith, Director, Product Development, CBOE, to Steve Youhn, Staff Attorney, Division of Market Regulation, SEC, dated May 27, 1994.

[5] See letter from Michael Meyer, Schiff Hardin & Waite, to Michael Walinskas, Derivative Products Regulation, dated September 28, 1994.

[6] See Securities Exchange Act Release No. 32002 (March 16, 1993), 58 FR 15086.

[7] The exercise settlement value for OEX and SPX capped options is the value of the OEX and SPX, respectively, determined for each trading day as of the close of trading, unless another time of day is specified by the CBOE.

[8] See Securities Exchange Act Release No. 29865 (November 1, 1991), 56 FR 56255 (order approving SPX and OEX CAPS on the CBOE) for a more complete description of CAPS.

[9] See Securities Exchange Act Release No. 31800 (February 1, 1993), 58 FR 7274 for a more detailed description of QIX options.

[10] See Amendment No. 3 and CBOE Rule 24.5, Interpretation .02.

[11] See CBOE Rule 24.9, Interpretation .03.

[12] See Amendment No. 3 and CBOE Rule 24.11.

[13] Any proposal to list or trade Q–CAPS with more than twelve months to expiration would be filed with the Commission for its review under Section 19(b)(2) of the Act. See Amendment No. 2.

[14] *Id.*

[15] See Amendment No. 3.

[16] See Amendment No. 3 and CBOE Rule 24.4(c).

[17] See CBOE Rule 24A.7(c) and Amendment No. 1.

[18] See CBOE Rule 24.4, Interpretations .01, .02 and .03.

[19] 15 U.S.C. 78f(b)(5) (1982).

[20] In addition, both the CBOE and the Options Price Reporting Authority ("OPRA") have represented that they have the necessary systems

The Commission also believes the CBOE's proposal to "bring up" new at-the-money series of Q–CAPS every three months and/or after significant market movements is consistent with the Act because it will not result in a significant proliferation of options series. Finally, the Commission notes that Q–CAPS will be subject to the same margin requirements as CAPS. Due to the economic similarities of the two products and because the Commission has previously approved the margin rules applicable to CAPS, no new or unique regulatory concerns are raised by extending this margin treatment to Q–CAPS.

The Commission also notes that Q–CAPS will be subject to the same position and exercise limit requirements that currently apply to CAPS. In particular, Q–CAPS on the SPX will be aggregated with SPX CAPS, SPX QIX options, and all other A.M. Settled SPX contracts, subject to a 45,000 contract limit under Rule 24.4(b), with a 25,000 contract limit for index arbitrage.[21] Q–CAPS on the OEX, under Rule 24.4(c), will be aggregated with OEX CAPS, OEX QIX options, and all other A.M. Settled OEX contracts, subject to a 25,000 contract limitation, however, with no telescoping requirement. The Commission also finds that, consistent with the treatment of CAPS, it is appropriate to exclude Q–CAPS from exercise limit requirements because holders have no control over when their positions will be exercised, except on the last business day before expiration of the options.

The Commission notes that Q–CAPS will have their exercise settlement value based upon the closing prices of component stocks on the last business day of the quarter. Although the Commission continues to believe that basing the settlement of index products on opening, as opposed to closing, prices on Expiration Fridays helps alleviate stock market volatility,[22] these concerns are reduced in the case of Q–CAPS, since expiration of these stock index options will not correspond to the normal expiration of stock index option, stock index futures and options on stock index futures.[23]

The Commission finds good cause for approving Amendment Nos. 1, 2, 3, and 4 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Amendment No. 1 addresses aggregation concerns with respect to P.M. Settled FLEX options by amending CBOE Rule 24A–7 to require aggregation of positions in P.M. Settled FLEX options with positions in Q–CAPS and QIXs based on the same index with the same expiration date. This amendment helps to prevent any resulting increase in position limits relating to P.M. Settled FLEX options and should help prevent an investor from using FLEX options for the purpose of avoiding the position limits applicable to QIXs and Q–CAPS.

Amendment No. 2 states that Q–CAPS will be subject to the same rules that currently govern CAPS regarding position and exercise limits and margin requirements. Additionally, the amendment provides that the listing of Q–CAPS with expirations greater than 12 months will require the filing of a rule proposal with the Commission, and approval of such filing pursuant to Section 19(b)(2) of the Act. The Commission believes that Amendment No. 2 helps to clarify the rules and procedures applicable to the listing and trading Q–CAPS and contains only minor variations from the original proposal.

Amendment No. 3 explains that Q–CAPS, CAPS, QIXs and standard options positions on the S&P 100 and 500, respectively, will be aggregated for determining position limit compliance. The Commission believes this amendment clarifies existing CBOE Rule 24.4 and helps to ensure that Q–CAPS comply with the existing position limit framework.

Amendment No. 4 incorporates the substance of Amendment Nos. 1, 2 and 3 into the CBOE's Rule book. Accordingly, the Commission does not believe the amendment raises any new or unique regulatory concerns.

Therefore the Commission believes it is consistent with Section 6(b)(5) and 19(b)(2) of the Act to approve Amendment Nos. 1, 2, 3, and 4 to the CBOE's proposal on an accelerated basis.

capacity to support those new series of index options that would result from the introduction of Q–CAPS. Telephone conversation between Eileen Smith, Director, Product Development, CBOE, and Stephen M. Youhn, Derivative Products Regulation, SEC, on September 20, 1994; and Memorandum from Joe Corrigan, Executive Director, OPRA, to Eileen Smith, CBOE, dated September 20, 1994.

[21] Specifically, CBOE Rule 24.4(b) states that no more than 25,000 contracts may be used for the purpose of taking advantage of any differential in price between the S&P 500 Index and the securities underlying the S&P 500. See also Amendment No. 3.

[22] See Securities Exchange Act Release No. 31330 (October 16, 1992), 57 FR 48408.

[23] In particular, Q–CAPS will never expire on an "Expiration Friday" or any other "Expiration Fridays" in March, June, September and December, thereby diminishing any impact that Q–CAPS could have on the market. Accordingly, the Commission preliminarily believes that Q–CAPS will not compromise the protection of investors or have an adverse market effect.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 1, 2, 3 and 4 to the Exchange's proposal. 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 CBOE. All submissions should refer to File No. SR–CBOE–93–04 and should be submitted by November 9, 1994.

It therefore is ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change (SR–CBOE 93–04) is approved, as amended.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[25]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–25887 Filed 10–18–94; 8:45 am]

BILLING CODE 8010–01–M

[24] 15 U.S.C. 78s(b)(2) (1982).

[25] 17 CFR 200.30–3(a)(12) (1991).

[Release No. 34–34828; File No. SR–DTC–94–10]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Extension of Comment Period for a Proposed Rule Change Establishing a Fee Schedule for Certain Inter-Depository Deliveries

October 12, 1994

On July 7, 1994, The Depository Trust Company ("DTC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR–DTC–94–10) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder. DTC filed the proposal to establish a fee schedule for certain interdepository deliveries.

[1] 15 U.S.C. 78s(b)(1) (1988).

Notice of the proposed rule change was published in the **Federal Register** on August 9, 1994.[2] In an earlier notice, the Commission granted an extension of the period for public comment on the proposed rule change until September 30, 1994.[3]

The Commission has received a request for an additional extension of the comment period on the proposed rule change and finds that the complexity and significance of the filing dictates a longer comment period to ensure that interested parties have sufficient time in which to conduct complete analyses of the proposal.

Thus, the Commission finds good cause to extend the period for public comment on the proposed rule change until November 15, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–25888 Filed 10–18–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34830; File No. SR–MCC–94–11]

Self-Regulatory Organization; Midwest Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Waive Certain Fees

October 12, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on October 3, 1994, the Midwest Clearing Corporation ("MCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change (File No. SR–MCC–94–11) as described in Items I, II, and III below, which Items have been prepared primarily by MCC. 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 purpose of the proposed rule change is to continue to waive through December 31, 1994, (1) trade recording fees for trades in the Chicago Stock Exchange's Chicago Basket ("CXM") and (2) secondary account maintenance fees for market-maker accounts opened for trading in the CXM.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, MCC included statements concerning the purpose of the 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. MCC 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

MCC proposes to amend a portion of its Services and Schedule of Charges by waiving certain fees associated with trades in the CXM through December 31, 1994. Proposed additions are italicized and proposed deletions are bracketed:

ACCOUNT MAINTENANCE

	Charge/ month
Participant Account Maintenance Fee:	
(Local and Out of Town Accounts)	$170.00
(Specialist, Trading and Market Maker Accounts)	160.00
Secondary Account (Specialist, Trading and Market Maker Accounts)	125.00
MCC Only Settlement Fee	200.00

Secondary Account Maintenance Fees for market maker accounts opened for trading in the Chicago Basket ("CXM") shall be waived through [September 30, 1994] December 31, 1994.

Trade Recording

In addition, a discount of $0.15 per trade side recorded will be applied to the trade recording fees for trades of 1,000 shares and larger when a participant exceeds 10,000 recorded trade sides each month (excluding inbound RIO trades).

All trade recording fees shall be waived for trades in the Chicago Basket ("CXM") through [September 30, 1994] *December 31, 1994.*

The proposed rule change is consistent with Section 17A of the Act[3] in that it provides for the equitable allocation of a reasonable fee among MCC's clearing members as required by Section 17A(b)(3)(D) of the Act.[4]

(B) Self-Regulatory Organization's Statement on Burden on Competition

MCC 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

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective on filing pursuant to Section 19(b)(3)(A)(ii)[5] of the Act and pursuant to Rule 19b–4(e)(2)[6] promulgated thereunder because the proposed rule change establishes or changes a due, fee, or other charge imposed by MCC. At any time within sixty days of the filing of this proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, D.C. 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the

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[2] Securities Exchange Act Release No. 34480 (August 2, 1994), 59 FR 40630.

[3] Securities Exchange Act Release No. 34594 (August 25, 1994), 59 FR 45317 [File No. SR–DTC–94–10].

[4] 17 CFR 200.30–3(a)(12) (1994).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] The waiver of these fees previously was approved in Securities Exchange Act Release Nos. 33156 (November 4, 1993), 58 FR 60076 [File No. SR–MCC–93–06] waiver of fees through December 31, 1993); 33601 (February 8, 1994), 59 FR 7275 [File No. SR–MCC–93–10] (waiver of fees through March 31, 1994); and 33828 (March 28, 1994), 59 FR 15956 [File No. SR–MCC–94–05] (waiver of fees through June 30, 1994); 34326 (July 7, 1994), 59 FR 35773 [File No. SR–MCC–94–08] (waiver of fees through September 30, 1994).

[3] 15 U.S.C. 78q–1.

[4] 15 U.S.C. 78q–1(b)(3)(D).

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] 17 CFR 240.19b–4(e)(2) (1994).

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filings will also be available for inspection and copying at the principal offices of MCC. All submissions should refer to File No. SR–MCC–94–11 and should be submitted by November 9, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–25886 Filed 10–18–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34834; File No. SR–MCC–94–12]

Self-Regulatory Organizations; Midwest Clearing Corporation; Notice of Filing of Proposed Rule Change Relating to Entering Into Contracts With Participants To Provide Transactional Processing Services on Behalf of Participants

October 13, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on October 11, 1994, the Midwest Clearing Corporation ("MCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Item has been prepared primarily by MCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organizations Statement of the Terms and Substance of the Proposed Rule Change

The purpose of the proposed rule change is to permit MCC to enter into contracts to provide transactional processing and related data-entry services with respect to certificated securities which are not depository eligible on behalf of participants.

II. Self-Regulatory Organizations Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, MCC 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. MCC has prepared summaries, set forth in section (A), (B) and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Purposed Rule Change

The purpose of the proposed change is to permit MCC to enter into contracts with any of its participants whereby MCC will provide transactional processing and data-entry services for a participant with respect to the participant's certificated securities which are not depository eligible. MCC shall not be obligated to enter into such contracts with any participant, and if it chooses to enter into such a contract, it shall not be obligated to do so on similar terms available to any other participant.

The proposed rule change is consistent with Section 17A of the Act in that it is designed to promote the accurate clearance and settlement of securities transactions.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The MCC does not believe that the proposed rule change will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the principal office of MCC.

All submissions should refer to File No. SR–MCC–94–12 and should be submitted by November 9, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–25884 Filed 10–18–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–34835; File No. SR–MSTC–94–12]

Self-Regulatory Organizations; Midwest Securities Trust Company; Notice of Filing of Proposed Rule Change Relating to Entering Into Contracts With Participants To Provide Custodial, Transactional and Related Processing Services on Behalf of Participants

October 13, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on October 11, 1994, the Midwest Securities Trust Company ("MSTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by MSTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organizations Statement of the Terms and Substance of the Proposed Rule Change

The purpose of the proposed rule change is to permit MSTC to enter into contracts to provide custodial, transactional and related processing and services on behalf of participants.

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[7] 17 CFR 200.30–3(a)(12) (1994).

[1] 15 U.S.C. 78s(b)(1).

[1] 15 U.S.C. 78s(b)(1).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, MSTC 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. MSTC has prepared summaries, set forth in section (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed change is to permit MSTC to enter into contracts with any of its participants whereby MSTC will provide custodial, transactional, and related processing services for the participant. MSTC shall not be obligated to enter into such contracts with any participant, and if it chooses to enter into such a contract, it shall not be obligated to do so on similar terms available to any other participant.

The proposed rule change is consistent with Section 17A of the Act in that it is designed to promote the accurate clearance and settlement of securities transactions.

(B) Self-Regulatory Organization's Statement on Burden on Competition

MSTC does not believe that the proposed rule change will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington D.C. 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the principal office of MSTC. All submissions should refer to File No. SR–MSTC–94–12 and should be submitted by November 9, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–25883 Filed 10–18–94; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34–34837; File No. SR–OCC–94–08]

Self-Regulatory Organizations; the Options Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to Flexibly Structured Index Options Denominated in a Foreign Currency

October 13, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on August 19, 1994, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. 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 purpose of the proposed rule change is to enable OCC to issue, clear, and settle new flexibly structured index options denominated in a foreign currency to be traded at the Chicago Board Options Exchange ("CBOE").[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC 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

On September 23, 1993, the Commission approved a proposed rule change filed by OCC which proposed to accommodate the clearance and settlement of flexibly structured index options.[3] Flexibly structured index options exhibit virtually the same characteristics as regular index options; therefore, OCC establishes long and short flexibly structured index option positions in clearing member accounts in precisely the same way it currently does for regular index options. OCC incorporates flexibly structured index options in its premium settlement, margin collection, exercise notice, exercise assignment, and exercise/expiration statement processes without significant changes to those processes. Premiums and exercise prices for the flexibly structured index options that are currently being traded are denominated in United States dollars. Parties to a transaction in such an option may customize certain terms of the option including: the expiration date, the exercise style, the exercise price, the cap interval in the case of capped-style options, and the method to be used for establishing the current index value for purposes of settling expiration date exercises.

The new flexibly structured index option product to be traded at the CBOE is similar to the existing flexibly

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[1] 15 U.S.C. 78s(b)(1) (1988).

[2] For a detailed description of the CBOE product, refer to Securities Exchange Act Release No. 34203 (June 13, 1994), 59 FR 31658 [File No. SR–CBOE–93–33] (order approving a proposed rule change relating to flexibly structured index options designated in foreign currencies).

[3] Securities Exchange Act Release No. 31912 (February 23, 1993), 58 FR 11879 [File No. SR–OCC–92–33] (order approving proposed rule change relating to flexibly structured index options).

structured index option product in that the underlying interest is an index and the parties to a transaction may customize certain terms of the option. However, the new product will have premiums and exercise prices denominated in foreign currencies rather than in United States dollars.[4] Accordingly, this new product is being called Flexibly Structured Index Options Denominated in a Foreign Currency ("FX Index Options").

To accommodate the clearance and settlement of FX Index Options, a new Article, Article XXIII, will be added to the OCC By-Laws. Because FX Index Options are a type of index option, the OCC By-Laws governing index options, Article XVII, will be incorporated into new Article XXIII and will be made applicable to FX Index Options. In addition, because FX Index Options will settle in a foreign currency, certain of the OCC By-Laws governing Cross-Rate Foreign Currency Options in Article XX also are being incorporated into new Article XXIII where appropriate. For example, those By-Laws governing extraordinary events, adjustments, and the payment of premiums will be incorporated into the new article.

A Chapter XXIV will be added the OCC Rules to accommodate FX Index Options. FX Index Options will be exercised pursuant to the rules governing existing index options. Accordingly, the rules governing exercise, assignment, allocation, and the exercise settlement date from Chapter XVIII, which pertains to index options, will be incorporated into new Chapter XXIV and will be made applicable to FX Index Options. In addition, the settlement procedure for FX Index Options will be the same as the procedure for existing index options. Exercised FX Index Options will be settled through the payment of an exercise settlement amount, which is the difference between the aggregate exercise price and the aggregate current index value. Accordingly, the rules governing exercise settlement and the exercise settlement date from Chapter XVIII will be incorporated into new Chapter XXIV and will be made applicable to FX Index Options. Because FX Index Options will settle in a foreign currency, certain settlement obligations of a party to a FX Index Option contract will be similar to the settlement obligations of a party to a cross-rate foreign currency option contract. Therefore, certain rules governing settlement obligations from Chapter XXI, which pertains to cross-rate foreign currency options, will be incorporated into new Chapter XXIV. Specifically, these include the obligation to set up bank accounts and the consequence of failing to pay a foreign currency. Finally, FX Index Options will be margined like cross-rate foreign currency options in that the margin requirement will be calculated in the applicable trading currency and then converted to United States dollars. Consequently, the language of Rule 2111 governing margin requirements for cross-rate foreign currency options will be incorporated into new Chapter XXIV.

Two additional changes to the OCC By-Laws and an additional change to OCC's Rules also will be made. Specifically, the term "FX index option clearing member" will be added to the definition of "clearing member" in Article I, Section 1 of the By-Laws. In addition, the reference to the term "FLEX" in the definition of clearing member will be changed to "flexibly structured option" in order to make that term more generic. Finally, OCC Rule 401 will be amended to require that the currency in which the option is denominated, the expiration date of the option contract as opposed to the month, and the cap price, if any, be included in the Report of Matched Trades.

OCC believes the proposed rule change is consistent with the purposes and requirements of Section 17A of the Act because it provides for the prompt and accurate clearance and settlement of transactions in flexibly structured index options denominated in a foreign currency and because it provides for the safeguarding of related securities and funds. The proposed rule change meets such requirements by establishing a framework in which existing OCC systems, rules, and procedures are extended to the processing of the new FX Index Options.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of OCC. All submissions should refer to File No. SR–OCC–94–08 and should be submitted by November 4, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–25882 Filed 10–18–94; 8:45 am]

BILLING CODE 8010–01–M

[4] Premium and exercise prices for these non-United States dollars flexibly structured index options may be denominated in any of the foreign currencies currently underlying foreign currency options. Those currencies include: (1) Australian dollars, (2) British pounds, (3) Canadian dollars, (4) European Economic Community currency units, (5) French francs, (6) German Deutsche marks, (7) Japanese yen and (8) Swiss francs.

[5] 17 CFR 200.30–3(a)(12) (1994).

[Investment Company Act Rel No. 20617; 812-8978]

Corporate Renaissance Group, Inc., et al.; Notice of Application

October 13, 1994.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application for order of exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: Corporate Renaissance Group, Inc. (the "Company") and M.D. Sass Investors Services, Inc. (the "Investment Adviser").

RELEVANT ACT SECTIONS: Order requested under sections 6(c) and 57(i) and rule 17d-1 thereunder permitting certain joint transactions otherwise prohibited by section 57(a)(4).

SUMMARY OF APPLICATION: Applicants request an order to permit the Company to co-invest with certain private investment companies either advised by the Investment Adviser or by certain affiliates of the Investment Adviser.

FILING DATE: The application was filed on May 6, 1994 and amended on September 6, 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 applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on November 7, 1994, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street NW., Washington, D.C. 20549. Applicant, 1185 Avenue of the Americas, 18th Floor, New York, New York 10036.

FOR FURTHER INFORMATION CONTACT: Fran Pollack-Matz, Senior Attorney, at (202) 942-0570 or Robert A. Robertson, Branch Chief, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. The Company, a Delaware corporation, is a newly formed non-diversified closed-end management company that has elected to operate as a business development company under the Act. The Company has filed a registration statement on Form N-2 (File No. 33-50424) with respect to an initial public offering of its common stock. The registration statement has not yet been declared effective by the SEC. The Company's primary investment objective will be to achieve long-term capital appreciation through controlling (25% or greater) investments in "eligible portfolio companies" (as defined in the Act). The Company will invest in portfolio companies with viable existing businesses generating substantial revenues in established markets, but that have recently completed, are in the process of undergoing, or are likely to undergo, a financial restructuring pursuant to bankruptcy or reorganization proceedings or on a negotiated basis outside of bankruptcy or reorganization proceedings.

2. The Investment Adviser is a registered investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act"). The Company has retained the Investment Adviser as the Company's investment adviser to identify, negotiate, manage and liquidate investments for the Company.

3. Martin D. Sass and Hugh R. Lamle, who are officers and directors of the Company, are principal stockholders, officers and directors of the Investment Adviser. James B. Rubin, an officer and director of the Company and Martin E. Winter, an officer of the Company, are also officers of the Investment Adviser. In addition, Messrs. Sass and Lamle are principal stockholders, officers, and directors of two other investment advisers registered under the Advisers Act, M.D. Sass Associates, Inc. ("Associates") and M.D. Sass Management, Inc. ("Management"). Messrs. Rubin and Winter are also officers of Associates and Management. The Investment Adviser, Associates and Management control other entities engaged in investing primarily in financially distressed companies (the "M.D. Sass Funds").

4. None of the M.D. Sass Funds has made or presently proposes to make a public offering of its securities. Each of the M.D. Sass Funds: (a) Is exempt from registration under the Act pursuant to section 3(c)(1) because its outstanding securities are beneficially owned by less than 100 persons; or (b) is not subject to registration under section 7(d) because it is not organized or otherwise created under the laws of the United States or any state and has not made use of the mails or any means or instrumentality of interstate commerce in connection with any public offering of its securities. The M.D. Sass Funds and those entities not subject to the registration requirements of the Act that may be subsequently created or otherwise organized by the Investment Adviser or affiliates of the Investment Adviser are referred to as the "M.D. Sass Affiliates." The Company proposes to co-invest with the M.D. Sass Affiliates in order to acquire a diversified portfolio of investments and to compete effectively for such investments with larger entities.

Applicants' Legal Analysis

1. Section 17(d) and rule 17d-1 thereunder provide, among other things, that it shall be unlawful for an affiliate person of an investment company, or an affiliated of such person, acting as principal, to participate in any joint enterprise or other joint arrangement in which any such investment company is a participant, unless the SEC has issued an order approving the joint enterprise or arrangement. Section 57(a)(4) applies the same prohibitions to affiliated persons of a business development company. Section 57(i) applies the rules adopted under section 17(d) to business development companies.

2. Applicants submit that the substantive ongoing obligations imposed on the independent directors of the Company provide significant protection to investors against possible conflicts of interest in co-investments by the applicants and the M.D. Sass Affiliates. Applicants also believe that the proposed conditions applicable to the operations of the Company governing the terms on which co-investments may be made and the disposition of investments held by any affiliate that co-invests with the Company (including the conditions set forth herein) are consistent with the policies underlying the Act and rule 17d-1 thereunder.

Applicants' Conditions

Applicants agree that the order shall be subject to the following conditions:

1. Before a co-investment transaction is effected, the Investment Adviser must make an initial determination on behalf of the Company regarding investment suitability. Following this determination, the Investment Adviser will make a written investment presentation regarding the proposed co-investment to the independent directors of the Company. Such information will include the identity of each affiliate that proposes to co-invest with the Company

(collectively, including the Company, the "Co-Investors").

2. The independent directors of the Company will review the Investment Adviser's initial determination. In doing so, the independent directors will request such additional information from the Investment Adviser as they deem necessary to the exercise of their reasonable business judgment, and will employ such experts, including lawyers and accountants, as they deem appropriate. Prior to committing to a co-investment, a "required majority" (as defined in section 57(o) of the Act) of the independent directors of the Company must conclude that:

(a) The terms, of the transaction, including the consideration to be paid, are reasonable and fair to the stockholders and the Company and do not involve overreaching of the stockholders and the Company on the part of any person concerned;

(b) The transaction is consistent with the interests of the stockholders of the Company and is consistent with the investment objective and policies of the Company as recited in its Registration Statement filed under the Securities Act of 1933 and subsequent reports filed under the Securities Exchange Act of 1934; and

(c) The investment by one or more of the other Co-Investors would not disadvantage the Company in the making of such investment, maintaining its investment position, or disposing of such investment and that participation by the Company would not be on a basis different from or less advantageous than that of other Co-Investors.

3. The other Co-Investors will be permitted to invest only to the extent that the total investment opportunity exceeds the amount that the Company determines to invest.

4. Co-Investments in securities by the Company with any other Co-Investor will consist of the same class of securities including the same registration rights (if any) and other rights related thereto, purchased at the same price on the same settlement date, and the approval of such transaction by the Company's independent directors will be made in the same time period.

5. If any Co-Investor determines to make an additional investment in an issuer whose securities were purchased in a co-investment transaction (a "Follow-On Investment"), notice of the proposed Follow-On Investment will be given to the Company at the earliest practical time. Follow-on investments will be reviewed, approved, allocated, and disposed of in the same manner as prescribed for initial co-investments under these conditions.

6. No co-investment will be made in the securities of any entity if any Co-Investor has previously acquired a security issued by such entity provided that this prohibition shall not apply to Follow-On Investments.

7. If any Co-Investor elects to sell, exchange, or otherwise dispose of any interest in a security purchased in a co-investment transaction, notice of the proposed disposition will be given to the Company at the earliest practical time. The Investment Adviser will provide a written recommendation to the independent directors of the Company concerning the proposed disposition. The Company will participate in the disposition at the same time as the other Co-Investors, on a proportionate basis, and on the same terms and conditions: provided that a required majority of the independent directors may decide that the Company will not participate in the proposed disposition or will dispose of less than its proportionate interest if they determine that such action is in the best interest of the Company, is reasonable and fair to the stockholders and the Company, and does not involve overreaching of the stockholders and the Company on the part of any person concerned.

8. The independent directors of the Company will be provided quarterly for review all information concerning co-investment transactions made by the Co-Investors, including co-investment transactions in which the Company has declined to participate, so that they may determine whether all co-investment transactions made during the preceding quarter, including those co-investment transactions that were declined, complied with the conditions set forth above. In addition, the independent directors of the Company will consider at least quarterly the continuing appropriateness of the standards established for co-investment transactions by the Company, including whether use of the standards continues to be in the best interest of the Company and its stockholders and does not involve overreaching of the Company and its stockholders on the part of any party concerned.

9. The independent directors of the Company will maintain the records described in section 57(f)(3) of the Act as if each of the transactions permitted under these conditions were approved by the independent directors of the Company under section 57(f). In addition, the Company will maintain, at its office, written records detailing the factors considered in each of its determinations or recommendations referred to in these conditions. All records referred to or required under these conditions will be available for inspection by the Commission and will be preserved permanently, the first two years in an easily accessible place.

10. No independent director of the Company shall participate in the consideration of any aspect of a co-investment transaction if he is affiliated with an M.D. Sass Affiliate that proposes to participate or has participated in the transaction.

For the Commission, by the Division of Investment Management under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–25885 Filed 10–18–94; 8:45 am]

BILLING CODE 8010–01–M

[Release No. IC–20616; 812–9134]

USAA Life Insurance Company, et al.

October 13, 1994.

AGENCY: Securites and Exchange Commission (the "SEC" or "Commission").

ACTION: Notice of Application for Exemptions under the Investment Company Act of 1940 (the "1940 Act").

APPLICANTS: USAA Life Insurance Company ("USAA Life"), Separate Account of USAA Life Insurance Company (the "Account"), any other separate account ("Other Account"; together with the Account, the "Separate Accounts," unless the context otherwise requires) established by USAA Life in the future to support certain variable annuity contracts, and USAA Investment Management Company ("USA IMCO").

RELEVANT 1940 ACT SECTIONS: Exemptions requested under Section 6(c) from Sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act.

SUMMARY OF APPLICATION: Applicants seek an order permitting them to deduct a mortality and expense risk charge from the assets of the Account and any Other Account under certain flexible premium deferred combination fixed and variable annuity contracts (the "Contracts").

FILING DATE: The application was filed on August 1, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests must be received by the Commission by

5:30 p.m. on November 7, 1994, and must be accompanied by proof of service on Applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests must state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Commission's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C., 20549. Applicants: 9800 Fredericksburg Road, San Antonio, Texas 78288.

FOR FURTHER INFORMATION CONTACT: C. Christopher Sprague, Senior Counsel, at (202) 942–0670, or Brenda D. Sneed, Assistant Director, at (202) 942–0670, Office of Insurance Products, Division of Investment Management.

Applicants' Representations

1. USAA Life was organized under Texas law as a stock life insurance company and is the depositor, for purposes of the 1940 Act, of the Account. USAA Life will be the depositor of any Other Account established by it.

2. The Account was established under Texas law as an insurance company separate account, and is registered under the 1940 Act as a unit investment trust. That portion of the assets of the Account equal to the reserves and other Contract liabilities of the Account will not be chargeable with liabilities arising out of any other business USAA Life may conduct. Any income, gains, or losses, realized or unrealized, from assets allocated to the Account will be, in accordance with the Contracts, credited to or charged against the Account without regard to other income, gains, or losses of USAA Life. The Account currently is divided into seven variable fund accounts (the "Variable Fund Accounts'), all of which will initially be available under the Contracts. Five of the Variable Fund Accounts will invest solely in the shares of five corresponding funds of USA Life Investment trust, which is registered under the 1940 Act as a diversified open-end management investment company. One Variable Fund Account will invest solely in the shares of the Capital Growth Portfolio of Scudder Variable Life Investment Fund, an open-end management investment company. Another Variable Fund Account will invest solely in the shares of the Alger American Growth Portfolio of the Alger American Fund, an open-end management investment company.

3. The Contracts will be distributed through USAA IMCO, which is a broker-dealer registered under the Securities Exchange Act of 1934 and a member of the National Association of Securities Dealers, Inc.

4. The Contracts will be flexible premium deferred combination fixed and variable annuity contracts to be issued by USAA Life on an individual basis. The Contracts are designed to provide retirement payments and other long-term benefits for persons covered under plans qualified for federal income tax advantages available under the Internal Revenue Code of 1986, and for persons desiring such benefits who do not qualify for such tax advantages. The Contracts will have a Fixed Fund Account option that will be funded through USAA Life's general account. USAA Life assesses a Contract maintenance charge of $30 per year against each Contract at each Contract anniversary or at the time of a full withdrawal from the Contract. The annual Contract maintenance charge will be made only during the accumulation phase of the Contract. Under all Contracts, USAA Life will assess each Variable fund Account with an administrative expense charge, on a daily basis, at an effective rate of 0.10% per annum of the average net assets. The administrative expense charge will be imposed during both the accumulation and distribution phases. Neither the contract maintenance charge nor the administrative expense charge may be raised during the life of a Contract. USAA Life does not expect that the total revenues from such administrative charges under the Contracts will exceed the expected costs of administering the Contracts, on average, excluding costs that are properly categorized as distribution expenses, over the period that the Contracts are in force. No sales charge is collected or deducted under the Contracts, although a charge will be assessed on full or partial withdrawals or on transfers from USAA Life's general account under specified circumstances.

5. USAA Life proposes to compensate itself for assuming certain insurance risks under the Contracts by deducting from the assets of the Account a daily charge for mortality and expense risks.

The mortality and expense risk charge would be a daily net asset charge at an aggregate nominal rate of 1.05% per annum, consisting of approximately .70% for mortality risks and .35% for expense risks. USAA Life will assume a mortality risk arising from its obligation to pay a death benefit prior to the annuity date. The death benefit payable is the greater of (a) the monetary value of the Contract (*i.e.*, the sum of the Contract values invested in the Variable Fund Accounts and in USAA Life's general account) on the date USAA Life receives proof of death or (b) the sum of all premium payments credited to the Contract, less the amount of any withdrawals and less any applicable premium tax. USAA Life assumes an additional mortality risk by its contractual obligation to continue to make annuity payments for the entire life of the annuitant under annuity options that involve life contingencies.

6. In addition to mortality risks, USAA Life will assume an expense risk because the administrative charges under the Contract, which cannot be raised, may be insufficient to cover actual administrative expenses. In this regard, USAA Life agrees not to raise, for the duration of the Contracts, the daily net asset value charge of 0.10% for administrative expenses and the annual Contract maintenance charge in the amount of $30 per year.

7. The order requested by Applicants would apply to the Contracts and also to substantially similar contracts issued by the Account or by any Other Account.

Applicants' Legal Analysis

1. Applicants request an order under Section 6(c) of the 1940 Act granting exemptions from Sections 26(a)(2)(C) and 27(c)(2) of the 1940 Act to the extent necessary to permit the deduction of the mortality and expense risk charge. Sections 26(a)(2)(C) and 27(c)(2) prohibit a registered unit investment trust and any depositor or underwriter thereof from selling periodic payment plan certificates unless the proceeds of all payments are deposited with a trustee or custodian having the qualifications prescribed by Section 26(a)(1) of the 1940 Act and are held under an agreement that provides that no payment to the depositor or principal underwriter shall be allowed except as a fee, not exceeding such reasonable amount as the Commission may prescribe, for bookkeeping and other administrative services. Applicants' proposed mortality and expense risk charge would not be considered a bookkeeping and administrative expense.

2. Applicants propose to assess against the assets of the Account a daily mortality and expense risk charge at an aggregate rate of 1.05% per annum. USAA Life guarantees that it will not raise the charge for the duration of the Contracts. USAA Life expects to make a profit from this charge. Applicants represent that the level of the mortality and expense risk charge is within the range of industry practice for comparable annuity contracts. Applicants state that they have reviewed publicly-available information

regarding products of other companies, taking into consideration such factors as guaranteed minimum death benefits, guaranteed annuity purchase rates, minimum initial and subsequent premium payments, other contract charges, the manner in which charges are imposed, market sector, investment options under the contracts, and availability to individual qualified and nonqualified plans. Based upon this review, Applicants have concluded that the mortality and expense risk charge is within the range of charges determined by industry practice. With respect to any Contracts offered by it, USAA Life will maintain at its principal offices a memorandum setting forth in detail the variable annuity products analyzed and the methodology, and results, of Applicants' comparative review. USAA Life will make this memorandum available to the Commission and its staff upon request.

3. If the mortality and expense risk charge is insufficient to cover the expenses and cost assumed, the loss will be borne by USAA Life. Conversely, if the charge deducted proves more than sufficient, the excess will be profit to USAA Life. USAA Life expects to earn a profit from the mortality and expense risk charge.

4. Applicants acknowledge that, in the absence of a specified charge for the costs of distributing the Contracts, all or a portion of any profit realized from the mortality and expense risk charge may be offset by distribution expenses. In such circumstances, a portion of the mortality and expense risk charge might be viewed as providing for a portion of the costs relating to distribution of the Contracts. Notwithstanding the foregoing, USAA Life has concluded that there is a reasonable likelihood that the proposed distribution financing arrangements made with respect to the Contracts will benefit the Account and Contract owners. The basis for such conclusion will be set forth in a memorandum which will be maintained by USAA Life at its principal offices and will be made available to the Commission and its staff upon request.

5. USAA Life represents that the Account will invest only in an underlying mutual fund that undertakes, in the event it should adopt any plan under Rule 12b–1 under the 1940 Act to finance distribution expenses, to have such plan formulated and approved by a board of trustees, a majority of the members of which are not "interested persons" of such fund within the meaning of Section 2(a)(19) of the 1940 Act.

6. Applicants submit that the requested relief is appropriate in the public interest, because it would promote competitiveness in the variable annuity contract market by eliminating the need for Applicants to file redundant exemptive applications, thereby reducing their administrative expenses and maximizing the efficient use of their resources.

Applicants' Conclusion

For the reasons discussed above, Applicants conclude that granting their requested order would be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94–25812 Filed 10–18–94; 8:45 am]

BILLING CODE 8010–01–M

SMALL BUSINESS ADMINISTRATION

[License No. 01/01–0361]

Canaan S.B.I.C., L.P.; Issuance of a Small Business Investment Company License

On June 7, 1994, a notice was published in the **Federal Register** (59 FR 29475) stating that an application had been filed by Canaan S.B.I.C., L.P., 105 Rowayton Avenue, Rowayton, Connecticut, with the Small Business Administration (SBA) pursuant to § 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1994)) for a license to operate as a small business investment company.

Interested parties were given until close of business July 6, 1994 to submit their comments to SBA. No comments were received.

Notice is hereby given that, pursuant to Section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information, SBA issued License No. 01/01–0361 on September 26, 1994, to Canaan S.B.I.C., L.P. to operate as a small business investment company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: September 13, 1994.

Robert D. Stillman,

Associate Administrator for Investment.

[FR Doc. 94–25801 Filed 10–18–94; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF STATE

[Public Notice 2095]

Renewal and Amendment of Charter of the Advisory Committee on International Economic Policy

The Department of State has renewed and amended the Charter of the Advisory Committee on International Investment Policy, now known as the Advisory Committee on International Economic Policy. The Advisory Committee on International Economic Policy (hereinafter, the Committee) will advise the United States Government on major issues and problems related to international economic policy. The amended Charter has been renewed for a period of two years.

The Committee will: (a) Provide information and advice on the effective integration of economic interests into overall foreign policy;

(b) Appraise the role and limits of international economic institutions; and

(c) Provide information and advice on the Department of State's role in advancing American commercial interests in a competitive global economy.

The Committee will provide advice and assistance in the formulation of U.S. policy, positions, proposals and strategies for multilateral and bilateral negotiations, particularly where the State Department has the lead negotiating authority.

The amended Charter of the Committee reflects the broader range of international economic issues the committee will consider than the previous Committee mandate to provide information and advice solely on investment policy.

Authority

The activities of the Committee are authorized under the general authority of the Secretary of State and the Department of State as set forth in the provisions of Title 22 of the U.S.C., including 22 U.S.C. 2656. The Committee Charter has been amended and renewed in accordance with the relevant provisions of the Federal Advisory Committee Act, Public Law 92–463. The approval of this Charter by the Under Secretary of State for Management under delegated authority constitutes the determination by the Secretary of State that the establishment of the Committee is in the public interest and essential to the conduct of business of the Department of State.

Committee meetings will be open to the public unless a determination is made in accordance with Section 10(d) of the Federal Advisory Committee Act,

5 U.S.C. 552(c)(1)(4) that a meeting or a portion thereof should be closed to the public. Notice of each meeting will be published in the **Federal Register** at least fifteen days prior to the meeting date.

For further information, contact Maria J. Ionata, Executive Secretary of the Committee at (202) 647–7951.

Daniel K. Tarullo,

Assistant Secretary of State for Economic and Business Affairs.

[FR Doc. 94–25805 Filed 10–18–94; 8:45 am]

BILLING CODE 4710–7–M

[Public Notice 2098]

United States International Telecommunications Advisory Committee (ITAC); Study Group D Meeting Notice

The Department of State announces that the United States International Telecommunications Standardization Sector Study Group D will meet on Wednesday, November 16, 1994, in room 1205 from 9:00 am to 2:00 pm at the U.S. Department of State, 2201 "C" Street, NW, Washington, DC 20520.

The agenda for Study Group D will include consideration of contributions for upcoming meetings of working parties of Study Group 14, and the March 1995 meeting of Study Group 8. Any other matters within the competence of Study Group D may be raised at this meeting. Persons presenting contributions should bring 20 copies to the meeting.

Please Note: Members of the Public are invited to attend and join in the discussion subject to the control of the Chair. Persons intending to attend the above U.S. Study Group Meeting must announce this not later than 5 days before the meeting to the Department of State, 202–647–0201 (fax: 202–647–7407). The announcement must include name, social security number, and date of birth. The above includes government and non-government attendees. All attendees must use the "C" Street entrance. A picture ID will be required for admittance.

Dated: October 3, 1994.

Earl S. Barbely,

Chairman, U.S. ITAC for ITU–T Telecommunications Standardization Sector.

[FR Doc. 94–25807 Filed 10–18–94; 8:45 am]

BILLING CODE 4710–45–M

[Public Notice 2096]

Shipping Coordinating Committee; Council and Associated Bodies; Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 11 a.m. on Wednesday, November 2, 1994, in room 4315, at U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001. The purpose of the meeting is to finalize preparations for the 73rd Session of Council and 40th Session of the Technical Cooperation Committee of the International Maritime Organization (IMO) which is scheduled for November 14–18, 1994, at the IMO Headquarters in London. The purpose of the meeting is to discuss the papers received and the draft U.S. positions. Among other things, the items of particular interest are:

a. Reports of the IMO committees

b. Review of the IMO technical cooperation activities

c. Report of the Conference of Parties to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto.

d. Report on the outcome of the Seventeenth Consultative Meeting of Contracting Parties to the 1972 London Dumping Convention

e. Relations with the United Nations and other organizations

f. Administrative and financial matters

Members of the public may attend the meeting up to the capacity of the room. Interested persons may seek information by writing: Mr. Gene F. Hammel, U.S. Coast Guard Headquarters (G–CI), 2100 Second Street, SW., Room 2114, Washington, DC 20593–0001 or by calling: (202) 267–2280.

Dated: October 3, 1994.

Charles A. Mast,

Chairman, Shipping Coordinating Committee.

[FR Doc. 94–25804 Filed 10–18–94; 8:45 am]

BILLING CODE 4710–07–M

[Public Notice 2097]

Shipping Coordinating Committee Subcommittee on Safety of Life at Sea, Working Group on Safety of Navigation; Meeting

The Working Group on Safety of Navigation of the Subcommittee on Safety of Life at Sea (SOLAS) will conduct an open meeting at 9:30 a.m. on Wednesday, November 9, 1994, in room 4315 at U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC.

The purpose of the meeting is to discuss the results of the 40th session of the Subcommittee on Safety of Navigation (NAV) of the International Maritime Organization (IMO) which met September 5–9, 1994, at the IMO Headquarters in London, and to prepare for the 41st NAV session which is tentatively scheduled for September 4–8, 1995.

Items of principal interest on the agenda are:

—Routing of Ships and related matters
—International Code of Signals
—Navigational aids and related matters
—Vessel Traffic Services (VTS) and ship reporting
—Revision of SOLAS chapter V
—Human element and bridge operations
—Review of World Meteorological Organization (WMO) handbooks on navigation in areas affected by sea-ice
—IMO standard marine communication phrases
—Removal of wrecks and towage of offshore installations, structures, and platforms
—Review of the Code for the Safe Carriage or Irradiated Nuclear Fuel (INF Code)
—Operational aspects of Wing in Ground (WIG)—craft
—Safety of passenger submersible craft
—Transponder systems

Members of the public may attend these meetings up to the seating capacity of the room. Interested persons may seek information by writing: Mr. Edward J. LaRue, Jr., U.S. Coast Guard (G–NSR–3), Room 1416, 2100 Second Street, SW., Washington, DC 20593–0001 or by calling: (202) 267–0416.

Dated: October 3, 1994.

Charles A. Mast,

Chairman, Shipping Coordinating Committee.

[FR Doc. 94–25806 Filed 10–18–94; 8:45 am]

BILLING CODE 47–10–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. 27649]

Supplemental Draft Environmental Impact Statement; Effects of Changes of Aircraft Flight Patterns Over the State of New Jersey; Public Hearings

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Notice of public hearings.

SUMMARY: The FAA intends to conduct hearings in New Jersey to gather comments on the supplemental draft environmental impact statement (EIS) released on September 30, 1994.

As a result of the analysis phase of the comment period associated with the Draft EIS, new information was developed by the FAA. Additionally, new information was received from the public during the comment period. Since this information is pertinent to the decision process leading to issuance of a final EIS, the public should have an opportunity to examine the new material and comment on it prior to completion of the EIS.

The supplemental draft EIS (SDEIS) was prepared in accordance with the National Environmental Policy Act. Copies have been mailed to individuals that participated in the EIS process as well as to libraries in select locations throughout New Jersey.

COMMENT PERIOD: Written comments, in triplicate, must be received at the following address by November 30, 1994: Federal Aviation Administration, Office of the Chief Counsel: Docket Number 27649, 800 Independence Avenue S.W., Washington, DC 20591.

During the comment period, the FAA will conduct three public hearings in New Jersey to solicit both written and oral comments on the SDEIS. All persons wishing to make oral presentations at the public hearings are strongly urged to provide a written copy of their statement at the hearing or at the FAA address provided in the above paragraph.

The following is a listing of the dates, times and locations of the hearings in New Jersey:

Date	Time/location
November 14, 1994.	1:00–4:00 pm and 7:00–10:00 pm, CRANFORD, Coachman Hotel (Days Inn), Exit 136 Garden State Parkway, 10 Jackson Drive, Cranford, NJ.
November 15, 1994.	1:00–4:00 pm and 7:00–10:00 pm, TINTON FALLS, Holiday Inn, Exit 105 Garden State Parkway, 700 Hope Road, Tinton Falls, NJ.
November 16, 1994.	1:00–4:00 pm and 7:00–10:00 pm, BRIDGEWATER, Holiday Inn, 1260 Rt. 22 (Rt. 22 west of Rt. 287), Bridgewater, NJ.

The FAA will consider and respond to all comments directly related to the scope of the SDEIS. The geographic scope delineated by Congress for the EIS was the environmental effects of the Expanded East Coast Plan over the State of New Jersey and adjacent coastal waters. Please note, however, that the most useful comments are those which provide facts and analyses to support the reviewer's recommendations or conclusions on specific topics contained in the document. Should any comments be received after the close of the comment period, FAA cannot assure they will be considered or addressed in the final EIS.

The FAA will issue a final EIS that will include corrections, clarifications and responses to comments on the SDEIS.

Issued in Washington, D.C., on October 14, 1994.

Richard A. Cox,

Deputy Director for Air Traffic System Management.

[FR Doc. 94–25894 Filed 10–14–94; 1:43 pm]

BILLING CODE 4910–13–M

National Highway Traffic Safety Administration

Amendment to Cooperative Agreement Announcement; Discretionary Cooperative Agreement To Foster the Development, Evaluation, and Deployment of a Heavy Vehicle Intelligent Commercial Vehicle Communication and Powering Enhancement System(s)

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Amendment to notice.

SUMMARY: The Cooperative Agreement Announcement entitled "Discretionary Cooperative Agreement to Foster the Development, Evaluation, and Deployment of a Heavy Vehicle Intelligent Commercial Vehicle Communication and Powering Enhancement System(s)" was published in the **Federal Register** on September 2, 1994; FR 59 45750. Inadvertently, a duplicate notice was published on September 12, 1994; FR 59 46880. An amendment was published on September 20, 1994 to extend the closing date for submittal of proposals to October 20, 1994; FR 59 48356. This amendment further extends the closing date for submittal of proposals to November 22, 1994.

FOR FURTHER INFORMATION CONTACT: Henrietta Mosley, Office of Contracts and Procurement, at (202) 366–9570, for general administrative questions; and C.J. Britell, Office of Crash Avoidance Research (NRD–53), (202) 366–5678 for programmatic questions; at the National Highway Traffic Safety Administration, 400 Seventh Street SW., Room 6220, Washington, DC 20590.

Dated: October 13, 1994.

George L. Parker,

Associate Administrator for Research and Development.

[FR Doc. 94–25800 Filed 10–18–94; 8:45 am]

BILLING CODE 4910–59–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Performance Review Board

AGENCY: Internal Revenue Service.

ACTION: Notice of Members of Senior Executive Service Performance Review Board.

EFFECTIVE DATE: Performance Review Board effective October 1, 1994.

FOR FURTHER INFORMATION CONTACT: DiAnn Kiebler, M:ES, Room 3515, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, Telephone No. (202) 622-6320, (not a toll free number).

SUPPLEMENTARY INFORMATION: Pursuant to section 4314(c)(4) of the Civil Service Reform Act of 1978, the members of the Internal Revenue Service's Senior Executive Service Performance Review Board for senior executives in the Appeals organization are as follows: Michael Dolan, Deputy Commissioner, Chair Roger Burgess, Chief, Headquarters Operations David Mader, Chief, Management and Administration Robert Wenzel, Chief, Strategic Planning and Communications.

This document does not meet the criteria for significant regulations set forth in paragraph 8 of the Treasury Directive appearing in the **Federal Register** for Wednesday, November 8, 1978 (43FR52122).

Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 94–25823 Filed 10-18-94; 8:45 am]

BILLING CODE 4830-01-P

UNITED STATES INFORMATION AGENCY

Reporting and Information Collection Requirements Under OMB Review

AGENCY: United States Information Agency.

ACTION: Notice of reporting requirements submitted for OMB review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed or established 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. The information collection activity involved with this program is conducted pursuant to the mandate given to the United States Information Agency in accordance with 40 U.S.C. 486(c) and Executive Order 12352, dated March 17, 1982. USIA is requesting approval for a three-year extension of an information collection entitled "Information Collection in Support of USIA Acquisition Process". Estimated burden hours per response is 240 hours. Respondents will be required to respond only one time.

DATES: Comments are due on or before November 18, 1994.

COPIES: Copies of the Request for Clearance (SF–83), supporting statement, transmittal letter and other documents submitted to OMB for approval may be obtained from the USIA Clearance Officer. Comments on the items listed should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for USIA, and also to the USIA Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Agency Clearance Officer, Ms. Debbie Knox, United States Information Agency, M/ADD, 301 Fourth Street SW., Washington, DC. 20547, telephone (202) 619–5503; and OMB review: Mr. Jefferson Hill, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC. 20503, Telephone (202) 395–3176.

SUPPLEMENTARY INFORMATION: Public reporting burden for this collection of information (Paper Work Reduction Project: OMB No. 3116–0185) is estimated to average 240 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the United States Information Agency, M/ADD, 301 Fourth Street SW., Washington, DC. 20547; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC. 20503.

Title: Information Collection in Support of USIA Acquisition Process.

Form Number: None.

Abstract: Information collection from the public is necessary to evaluate bids and responses from potential suppliers for supplies, services and hardware for the purpose of making awards in conformance with rules and regulations governing procurement by Federal Government departments and agencies.

Proposed Frequency of Responses:

No. of Respondents—965

Recordkeeping Hours—0

Total Annual Burden—231,600

Dated: October 12, 1994.

Rose Royal,

Federal Register Liaison.

[FR Doc. 94–25792 Filed 10–18–94; 8:45 am]

BILLING CODE 8230–01–M

Culturally Significant Objects Imported for Exhibition; Determination

Notice in hereby given of the following determination: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 F.R. 13359, March 29, 1978), and Delegation Order No. 85–5 of June 27, 1985 (50 F.R. 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "From the Ocean of Painting: A Survey of India's Popular Painting Traditions from 1589 A.D. to the Present" (See list),[1] imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to a loan agreement with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at The University of Iowa Museum of Art from on or about October 29, 1994 to on or about December 18, 1994; The Smart Museum from on or about January 19, 1995 to on or about March 12, 1995; Santa Barbara Museum from on or about June 10, 1995 to on or about August 13, 1995 is in the national interest. Public Notice of this determination is ordered to be published in the **Federal Register**.

Dated: October 14, 1994.

Les Jin,

General Counsel.

[FR Doc. 94–25880 Filed 10–18–94; 8:45 am]

BILLING CODE 8230–01–M

[1] A copy of this list may be obtained by contacting Mrs. Carol Epstein, Assistant General Counsel, at 619–6981, and the address is Room 700, U.S. Information Agency, 301 Fourth Street, SW., Washington, DC 20547.

Sunshine Act Meetings

Federal Register
Vol. 59, No. 201
Wednesday, October 19, 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: 11:00 a.m., Monday, October 24, 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: October 14, 1994.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 94–25974 Filed 10–17–94; 12:04 pm]

BILLING CODE 6210–01–P

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS

Operations and Regulations Committee Meeting

TIME AND DATE: The Legal Services Corporation Board of Directors Operations and Regulations Committee will meet on October 27–28, 1994. The meeting will commence at 10:00 a.m. on October 27, 1994, and at 9:00 a.m. on October 28, 1994.

PLACE: The Marriott at Metro Center, 775 12th Street, NW., Salaon "A", Washington, DC (202) 737–2200.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

Open Session

1. Approval of Agenda.
2. Approval of Minutes of September 30, 1994 Meeting.
3. President's Report.
4. Consider and Act on Proposed Committee Meeting Schedule for Calendar Year 1995.
5. Consider and Act on Proposed Changes to Part 1607 of the Corporation's Regulations.
6. Consider and Act on Proposed Changes to Part 1602 of the Corporation's Regulations.
7. Consider and Act on Proposed Changes to Part 1610 of the Corporation's Regulations.
8. Consider and Act on Proposed Changes to Part 1609 of the Corporation's Regulations.
9. Consider and Act on Proposed Changes to Part 1604 of the Corporation's Regulations.
10. Public Comment.
11. Consider and Act on Other Business.

CONTACT PERSON FOR INFORMATION: Patricia Batie, (202) 336–8800.

Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments.

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336–8800.

Date issued: October 17, 1994.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 94–26089 Filed 10–17–94; 3:36 pm]

BILLING CODE 7050–01–M

POSTAL RATE COMMISSION

TIME AND DATE: 10:00 a.m. and 2:00 p.m. on October 24, 25, 26, November, 7, 8, 9. 10:00 a.m. on November 1, 3, 14, 15, 16, 17, 18, 21, 22, 1994.

PLACE: Conference Room, 1333 H Street, NW, Suite 300, Washington, DC 20268.

STATUS: Closed.

MATTERS TO BE CONSIDERED: To discuss and decide issues in Docket No. R94-1, *Postal Rate and Fee Changes, 1994.*

CONTACT PERSON FOR MORE INFORMATION: Charles L. Clapp, Secretary, Postal Rate Commission, Suite 300, 1333 H Street, NW, Washington, DC 20268-0001, Telephone (202) 789-6840.

Charles L. Clapp,

Secretary.

[FR Doc. 94–26091 Filed 10–17–94; 3:46 pm]

BILLING CODE 7710–FW–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

TIME AND DATE: October 25, 1994, 1:00 pm–2:30 pm.

PLACE: Department of Agriculture, Room 107, North Building, 14th and Independence Avenues, SW., 20250.

STATUS: The meeting will be open to the public.

SUMMARY: The Board of Directors of the Corporation for National and Community Service will meet on October 25, 1994 to discuss the delegation of authority, formation and assignments of subcommittees, status of the strategic plan, status of the evaluation plan Fiscal Year 1995 priorities for AmeriCorp*USA future board meetings' schedule, and other business. The meeting will be open to the public up to the seating capacity of the room.

FOR FURTHER INFORMATION CONTACT: Mrs. Rhonda Taylor, Associate Director of Special Projects and Initiatives at 1100 Vermont Ave, NW., Washington, DC 20525: (202) 606–5000 ext. 282 or (202) 606–5256 (TTD) prior to October 23, 1994.

Dated: October 17, 1994.

Terry Russell,

General Counsel, Corporation for National and Community Service.

[FR Doc. 94–26074 Filed 10–17–94; 5:08 pm]

BILLING CODE 6060–28–M

Corrections

Federal Register
Vol. 59, No. 201
Wednesday, October 19, 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 COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 676

[Docket No. 940845-4245; I.D. 081794A]
RIN 0648-AG98

Limited Access Managment of Federal Fisheries In and Off of Alaska

Correction

In proposed rule document 94-24136 beginning on page 49637 in the issue of Thursday, September 29, 1994, make the following correction:

§ 676.24 [Corrected]

On page 49639, in the third column, in § 676.24 (i)(3), in the third line of the formula, the first minus sign should read "x".

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2551-MI; 2579-IN]

Indiana Michigan Power Co; Public Scoping Meetings

Correction

In notice document 94-21462 beginning on page 44977 in the issue of Wednesday, August 31, 1994 the docket number should read as set forth above.

BILLING CODE 1505-01-D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[SW-FRL-5075-6]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Final Amendment

Correction

In rule document 94-23114 beginning on page 47813, in the issue of Monday, September 19, 1994, make the following correction:

Table 1 of Appendix IX to Part 261 [Corrected]

On page 47814, in Table 1 of Appendix IX of part 261, under the heading "Waste description", in the second line, "[insert date of publication]" should read "September 19, 1994."

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 488 and 489

Office of Inspector General

42 CFR Part 1003

[BPD-393-IFC]

RIN 0938-AC58

Medicare Program; Participation in CHAMPUS and CHAMPVA, Hospital Admissions for Veterans, Discharge Rights Notice, and Hospital Responsibility for Emergency Care

Correction

In rule document 94-14926 beginning on page 32086, in the issue of Wednesday, June 22, 1994, in the first column, the CFR part headings should read as set forth above.

BILLING CODE 1505-01-D

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

Loan Interest Rates

Correction

In rule document 94-18658 beginning on page 39423 in the issue of Wednesday, August 3, 1993 make the following correction:

On page 39424, in the third column, in the **Authority** citation, in the first line "12 U.S.C 7152(5)" should read "12 U.S.C. 1752(5)".

BILLING CODE 1505-01-D

THE PRESIDENT PANAMA CANAL COMMISSION

35 CFR Part 135

RIN 3207-AA23

Tolls for Use of Canal and Rules for Measurement of Vessels

Correction

In rule document 94-20534 beginning on page 43254 in the issue of Monday August 22, 1994, make the following correction:

§ 135.42 [Corrected]

On page 43265, in the third column, in § 135.42, in paragraph (a)(2)(i), the formula should read "UDV={0.91 x [(LOA x MB) x (D-SLD)]} + (SLDISP/1.025)"

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 192 and 195

[Docket No. PS-126; Notice 2]
RIN 3137-AB71

Passage of Instrumented Internal Inspection Devices

Correction

In proposed rule document 94-24080 beginning on page 49896 in the issue of Friday, September 30, 1994, make the following correction:

On page 49897, in the second column, in the last paragraph, in the sixth line, "(insert date of publication of the NPRM)" should read "(September 30, 1994)."

BILLING CODE 1505-01-D

federal register

Wednesday
October 19, 1994

Part II

Department of Agriculture

Commodity Credit Corporation

7 CFR Part 1493

Export Credit Guarantee Program and the Intermediate Export Credit Guarantee Program; Final Rule

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1493

[RIN 0551–AA30]

CCC Export Credit Guarantee Program (GSM–102) and CCC Intermediate Export Credit Guarantee Program (GSM–103)

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: The Commodity Credit Corporation (CCC) is issuing this final rule which revises the regulations for the Export Credit Guarantee Program (GSM–102) and the Intermediate Export Credit Guarantee Program (GSM–103). In addition to making changes intended to improve and update the current regulations, this final rule also incorporates material required by the Agricultural Trade Act of 1978, as amended by Section 1531 of the Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 Act).

EFFECTIVE DATE: The provisions of this final rule are effective November 18, 1994.

FOR FURTHER INFORMATION CONTACT: L.T. McElvain, Director, CCC Operations Division, USDA, FAS, Ag Box 1035, Washington, DC., 20250–1035, telephone (202) 720–6211.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This final rule is issued in conformance with Executive Order 12866 and has been determined to be "not significant" as a regulatory action. For this action, the Office of Management and Budget has waived its review process in accordance with Executive Order 12866.

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule since CCC is not required by 5 U.S.C. 553 or any other provision of law to publish a notice of rulemaking with respect to the subject matter of this rule.

Paperwork Reduction Act

The paperwork requirements which would be imposed by this final rule were described in the interim final rule and approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. The Office of Management and Budget assigned number for those requirements is OMB No. 0551–0004. The public reporting burden for these collections is estimated to average 10.3 minutes per response, including time for reviewing instructions, searching existing sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspects of this collection, including any suggestions for reducing burden, to Department of Agriculture, Clearance Officer, OIRM, AG Box 7630, Washington DC. 20250–7600; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0551–0004), Washington, DC. 20503.

Executive Order 12372

These programs are not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with state and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115 (June 24, 1983).

Background

In the **Federal Register** of June 6, 1991 (56 FR 25993), the Commodity Credit Corporation (CCC) issued an interim rule to revise the regulations for the CCC Export Credit Guarantee Program (GSM–102) and the CCC Intermediate Export Credit Guarantee Program (GSM–103) administered by FAS, USDA on behalf of CCC, pursuant to program regulations codified at 7 CFR Part 1493 and through the issuance of "Program Announcements" and "Notices to Participants" that are consistent with, and in addition to, these program regulations. The interim rule incorporated or withdrew all previously outstanding operational requirements announced by FAS/USDA through Notices to Participants. The interim rule also incorporated requirements established by the 1990 Act. Finally, the interim rule clarified several provisions previously contained in 7 CFR Part 1493 to promote more efficient administration of the GSM–102 and GSM–103 programs. The deadline for comments on the interim rule was August 5, 1991. Comments were received from five U.S. exporters (one exporter submitted two separate responses), three producer associations, two U.S. financial institutions, one U.S. export trade association, and one U.S. Government agency. These thirteen parties made approximately 66 separate and significant comments regarding either the interim rule or the policy issues and the impact of policies involved in administering the GSM–102 and GSM–103 programs.

General Comments

One commenter disagreed with CCC's statement that it has been determined that this rule will not result in "significant adverse effects on competition, employment, investment, productivity, innovation or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets." This respondent shared that while the interim rule contained some improvements, some of the changes would restrict the competitiveness of, and be detrimental to, the sale of U.S. goods. The commenter argued that the interim rule was an overreaction resulting from the Iraqi default on GSM–102/103 guaranteed obligations. The commenter acknowledged that the U.S. Government must monitor the programs to prevent abuse but contended that, in general, free market conditions should prevail. While CCC agrees that the GSM–102/103 programs should avoid unduly restricting normal commercial practices, the Department has been mandated by Congress to implement measures to guard against program abuse. It is the Department's intention to adopt necessary program safeguards while still enhancing the ability of U.S. exporters to compete in foreign markets.

Four commenters supported and commended the USDA's efforts to catalogue and codify many of the operational features of the programs, to assure that the regulations are being met, and to create more accountability within the programs.

Four other commenters felt that the intention of the interim rule to "* * * simplify material, enhance clarity, eliminate duplication and facilitate their use * * *" has not been met. These commenters stated that the interim rule is complicated, unclear at some points, and unnecessarily duplicative. The commenter argued and that, more than ever, the regulations contain burdensome regulatory features which could constrain the programs' effectiveness.

One commenter felt that the interests of program simplification have been abandoned and that undue burdens are being placed on participants to protect the programs from a few perceived manipulations. This commenter suggested that the program is not "user friendly" when administrators focus only on protecting the programs from all risk, or on shifting all risk to the exporter or buyer. Another respondent felt that the lack of USDA guidance on pertinent issues is not only frustrating, but may have also compromised the strengths of the U.S. agricultural system.

CCC agrees that the interim rule contains regulatory features that place additional burdens on program participants, such as added certification statements, requirements to maintain arrival documentation, and longer retention time on transaction records. Although such requirements may compare unfavorably with the simplicity of the prior regulations, these requirements are mandated by the 1990 Act. On the other hand, CCC has also made changes that consolidate program requirements. For example, policy and additional program requirements previously contained in a number of Notices to Participants were incorporated into the interim rule.

Five commenters felt that the revised regulations are a response to criticism of the GSM–102/103 programs and pressure on program administration brought on by prior audits and investigations by the General Accounting Office and USDA's Office of the Inspector General. Another commenter stated that since auditors do not create exports for the U.S. economy and have no responsibility for market development there is a need to re-establish teamwork between FAS and the export community to resolve key issues. One commenter felt the intent of the 1990 Farm Bill was to streamline program procedures, but, in actuality, the programs are more bureaucratic than ever. This same commenter felt that the USDA has forgotten that the GSM–102/103 programs are commercial programs, that the programs must reflect commercial realities, and that recent studies and audits have not focused on the commercial and competitive viability of the GSM–102/103.

CCC acknowledges these concerns. In addressing audit and investigation reports on its commercial export programs, CCC has attempted to put in perspective the relatively low incidence of program violations in the programs. However, given that many of the requirements of the interim rule aimed at preventing program abuses were mandated by the 1990 Act, CCC cannot concur that the primary legislative intent was to "streamline procedures."

Three respondents recommended that the interim rule be revised to allow financial institutions to use the commercial banking practice of securitization as a financing technique for CCC-guaranteed credits. Securitization would involve the packaging of such credits by a U.S. financial institution for sale to third parties as U.S.-government guaranteed securities. It is asserted that securitization would expand sources, and perhaps reduce the cost, of financing for CCC-guaranteed credits. However, respondents point out that certain program regulations and CCC policies now make securitization infeasible. For example, regulations require that the guarantee holder who has experienced a default and filed a claim with CCC must turn all recoveries "from any source whatsoever" over to CCC for pro rata sharing (§ 1493.130(b)(1)). This provision is intended to ensure that the U.S. party financing the transaction always remains at risk for the portion of the credit and interest not guaranteed by CCC. Generally, this policy is seen as incompatible with the issuance of 100% U.S. Government-guaranteed securities since any collateral put up by the foreign borrower to cover the portion not guaranteed by CCC could be subject to pro-rata sharing with CCC.

Similarly, U.S. banks point out that the unwillingness of CCC to pre-approve export and other documents that must be submitted to support a claim on CCC in the event of default makes it impossible to issue high grade securities based on CCC-guaranteed credits. Without pre-approval, such securities could not be marketed with absolute assurance that claims on CCC for defaults on the underlying credits would be found in good order and honored.

CCC has considered these and other proposals for securitization of CCC-guaranteed credits. However, CCC remains of the view that, although the degree of risk-sharing may be adapted to meet program objectives, requiring risk-sharing with the holder of the guarantee (normally a U.S. bank) is an essential feature of the GSM–102/103 programs. It forces the private sector to engage in risk assessment relating to individual transactions, and thereby supplements the risk assessment done by CCC prior to announcing export credit guarantee programs for specific countries. Removing this requirement would also reduce the incentive banks now have to press for recovery of late payments from foreign banks rather than claiming immediately on CCC. CCC does not have the resources that would be required to pre-approve documents and to effectively manage the increase in claims and follow-up recovery efforts that would go hand-in-hand with changing the specified provisions of the GSM–102/103 regulations to facilitate securitization. For these reasons, CCC is not prepared at this time to propose program changes to facilitate securitization of its credit guarantees.

Two comments were received regarding republishing the rule. One respondent suggested that the USDA republish the regulations on a routine basis, requesting public comments, to insure that improvements in the programs may be continually advocated and effected. Another commenter suggested a redraft of areas of greatest controversy and republication with request for comments. CCC agrees that the GSM–102/103 program regulations are important and should be reviewed periodically. It is CCC's policy to do this. However, publication of an additional interim rule at this time would further delay implementation of a final rule which is needed to establish a basic permanent framework for the programs.

One commenter felt that the delays in the administrative process increase exporter risks and costs and inhibit the programs' effectiveness. This respondent recommended that the regulations include absolute deadlines governing the USDA's performance of administrative functions. CCC recognizes that administrative delays in processing applications and issuing guarantees may result in additional costs and risks to exporters, and CCC is, therefore, committed to expediting existing administrative procedures. However, it is not feasible to establish absolute time-frames for actions because many administrative delays may be due to the failure of participants to provide all required information, or are the unavoidable consequence of increased program activity during specific time periods.

One respondent recommended that a special trade advisory committee be established to address controversial provisions of program regulations. The commenter called on the Agricultural Policy Advisory Committee (APAC) and the Agricultural Technical Advisory Committee (ATAC) to devote attention to these programs. CCC disagrees that a special trade advisory committee is warranted. Considerable debate was aired when Congress developed the 1990 Act which mandated changes to the GSM–102/103 programs. The Department also has considerable experience in administering credit and credit guarantee programs, and has a continuing dialogue with private sector program participants on administrative and other program policies. CCC believes that the rulemaking process should remain the primary vehicle for obtaining views of interested parties. This process gives an equal opportunity to all parties, is part of the public record, and is required by law. The APAC and ATAC could consider GSM–102/103 issues if their members so choose.

A commenter suggested that solutions to some of the problems are simply to modify the regulations, but other problems require a comprehensive policy review by USDA policy officials. Another commenter supported a special credit facility separate from the regular GSM–102/103 programs for the former Republics of the Soviet Union. These comments, by their own admission, address concerns outside the content of the program regulations and therefore, are not considered in this final rule.

Section by Section Analysis of Subpart A and B

The numbering system of the final rule differs somewhat from that of the interim rule. Some sections were added, some were deleted. For the purposes of this discussion, the numbering system of the final rule will be used, except where otherwise indicated. In addition to changes resulting from comments from interested parties, some additional changes in language have been incorporated into the final rule for the purpose of clarification of specific provisions. These changes are minor and not of a substantive nature.

Subpart A: Restrictions and Criteria for Export Credit Guarantee Programs

Section 1493.1 General Statement

No public comment received on this section. No changes have been made in this section of the final rule.

Section 1493.2 Purposes of Program

One commenter felt that the purposes of the program are accurately conceived, well-prioritized and complete, and should serve as the key criteria to guide CCC in both the drafting of the final rule and the operation of the GSM–102/103 programs. No changes have been made in this section of the final rule.

Section 1493.3 Restrictions on Programs and Cargo Preference Statement

One commenter praised the USDA for its stand on this issue. No changes have been made in this section of the final rule.

Section 1493.4 Criteria for Country Allocations

One commenter felt that, because of problems which previously impeded the timely provision of the credits to the republics of the former Soviet Union, USDA needs to elaborate its "creditworthiness" criteria and should consider revising current restrictions and limits on credit that make it difficult for many debt-burdened countries to participate in the program. CCC notes that the 1990 Act prohibits export credit guarantees from being used "for foreign aid, foreign policy, or debt rescheduling purposes" and instructs that CCC "shall not make credit guarantees available in connection with sales of agricultural commodities to any country that the Secretary determines cannot adequately service the debt associated with such sale." Under this legislative mandate, CCC believes that the criteria of § 1493.4 cannot be changed in ways to meet the objective suggested by the commenter.

Section 1493.5 Criteria for Agricultural Commodity Allocations

No public comment received on this section. No changes have been made in this section of the final rule.

Section 1493.6 Additional Required Determinations for GSM–103

No public comment received on this section. No changes have been made in this section of the final rule.

Subpart B: CCC Export Credit Guarantee Program (GSM–102) and CCC Intermediate Export Credit Guarantee Program (GSM–103) Operations

Section 1493.10 General Statement

No public comment received on this section. No substantive changes have been made in this section of the final rule.

Section 1493.20 Definition of Terms

Eight respondents commented on § 1493.20(f), Discounts and Allowances. All comments, in one way or another, recommended changes to this section to permit discounts and allowances that are consistent with customary commercial trade practices. The commenters suggested specifically excluding from the definition of discounts and allowances:

(1) Cash payments, under the terms of the export sales contract, made by the exporter to the financing institution which reduce the amount financed and are notified to CCC as amendments to port value or export value as appropriate;

(2) Credits against the sales price, under the terms of the export sales contract, which reduce the amount of CCC coverage and are notified to CCC as amendments to the port value and exported value, as appropriate;

(3) Cash payments by the exporter to third parties for demurrage, detention and overage insurance premiums; and

(4) Adjustments for destination weights in cotton sales.

The payments or credits described in comments (1) and (2) above, are discounts or allowances to the importer; however, if properly reported to CCC and the amount of CCC's coverage consequently reduced, no program violation is involved. CCC has, therefore, determined not to include these suggested exemptions in 1493.20(f). Items (3) and (4) are addressed below.

One commenter recommended that the definition of discounts and allowances should be revised to delete reference to demurrage and detention settlements. The commenter stated that demurrage and detention settlements are normal costs which may be incurred in an export sales transaction. When settlement funds are paid to an importer, the importer is only acting as an intermediary in making these payments to a third party, i.e., the shipping line. Thus the financial transaction between exporter and importer is unaffected. Similarly, payments of over-age insurance premiums to underwriters because of an exporter's inability to otherwise charter a vessel of required specifications should not be considered a discount or allowance to the importer. CCC concurs with these comments and has therefore, deleted reference to demurrage and detention in the definition of discounts and allowances in this final rule.

Two respondents felt that there is a contradiction in the USDA's interpretation of § 1493.20(f). When a weight increase occurs at destination, CCC makes no provision for amending the exported value to increase coverage. However, when destination weights decrease, any adjustment by the exporter in favor of the importer is considered by CCC as a discount or allowance and CCC requires that the value of the guarantee be correspondingly reduced. The respondents argue that there should be consistent treatment in both cases, and that as long as there is coverage available from the country line, adjustments to exported value should be made for both weight increases or decreases. CCC disagrees. To guard against potential program abuse, CCC has instituted a system to price review all transactions for which GSM–102/103 guarantees are sought. The purpose of the price review is to insure that the sales price of the transaction being guaranteed falls within a reasonable and acceptable price range given market conditions in existence at the time of the sale. CCC's price review compares the particular price with representative prices at a U.S. export position, and is, therefore, based upon U.S. export weight and grade determinations.

Thus, determining the port value and guaranteed value of the transaction, and CCC's contingent liability under the guarantee, on the basis of destination

weights and grades would undermine the effectiveness of and could potentially invalidate, the price review process. CCC recognizes that, in certain markets, the use of destination weights and grades is a normal commercial term of contract and, therefore, will issue guarantees in connection with such transactions to facilitate the export trade. However, since CCC is not able to conduct price reviews on the basis of destination weights and grades (because the determination of destination weights and grades necessarily occurs only after the commodities have arrived at the port of destination and, therefore, long after the application for GSM–102/103 coverage has been approved), exporters will have to bear the varied risks involved with contracting on that basis. Those risks include the possibility that a decrease in weight or grade between export and destination will result in an adjustment or settlement in favor of the importer; or that an increase will result in an adjustment or settlement in favor of the exporter. In the former case, the adjustment in favor of the importer would qualify as a "discount or allowance" within the meaning of § 1493.20, requiring the exporter to report the occurence so that the guarantee can be amended to reflect a downward adjustment in CCC's liability made because to do so could invalidate the price review determination upon which the approval of the guarantee was initially made.

Two respondents felt that, in the case of cotton, a special exception should be made because of (1) the sensitivity of cotton to fluctuations in atmospheric conditions resulting in gains or losses in weight; and (2) the long standing practice of marketing cotton on the basis of landed weights and quality. Changing this practice, to comply with regulations, will deny the cotton exporters the flexibility to market cotton efficiently.

CCC has determined not to make an exception for destination weights for cotton. At this time there is insufficient evidence available to CCC that the interim rule has caused any significant problems. As previously noted, when reported properly to CCC, payment of allowances for destination weights is not a program violation.

Two commenters requested further clarification of what CCC considers discounts and allowances. Specifically, they ask whether the definition encompasses carrying charges and normal customer service such as visits to the customer (to inspect the product, observe its use in the market, etc.), technical assistance, and replacement of faulty or defective products? The regulation's definition of discounts and allowances includes "a promise to provide additional goods, services or benefits in the future." Thus, CCC considers an exporter's contractual obligation to provide technical assistance, or trade servicing, to be, by definition, a discount or allowance to the commodity price on which CCC price review is based (unless, at the time of price review, the exporter justifies to CCC how such service or assistance is incorporated into the price, and the price is thus approved by CCC). However, if an exporter does routine servicing of accounts and customer visits, without any contractual obligation to do so, no discount or allowance is provided under the definition. CCC has determined not to further modify the definition of discounts and allowances because there is an infinite variety of circumstances under which exporters could provide a wide range of services to importers. Exporters are obliged to report instances that may be discounts and allowances, and CCC will make a determination on a case-by-case basis.

One respondent suggested that: (1) the definition be changed to allow for normal customer services, and (2) the last phrase be changed to establish a minimum threshold of 2.5 percent of sales value for defining quality, weight and certain other settlements as discounts or allowances. CCC has determined it is inappropriate to set such a minimum threshold because it could permit circumvention of the price review process.

A comment was received regarding the definition of Eligible Interest in § 1493.20(g). The commenter felt that the phrase "the maximum interest rate stated in the payment guarantee, when determined or adjusted by CCC will not exceed the average investment rate of the most recent Treasury 52-week bill auction in effect at that time" seems to imply that CCC is able to adjust the guaranteed interest rate after the payment guarantee is issued. The respondent requested clarification.

CCC's maximum liability for interest coverage is indicated in the payment guarantee or any amendments thereof. CCC can issue payment guarantees at either a fixed rate of interest or at an adjustable rate of interest. In the case of a fixed interest rate, the rate of CCC's interest coverage is determined as of the date of application for that payment guarantee and is indicated on the face of the payment guarantee. This maximum eligible interest rate coverage will not change.

On adjustable rate coverage payment guarantees, the method or formula for determining the eligible interest rate coverage is established for specific time periods. The operative phrase in the definition is "when determined or adjusted by CCC." For example, currently on GSM–103 payment guarantees which allow for an adjustment in CCC's eligible interest coverage, the determination of maximum interest coverage is made on the date of export and adjusted only on the due dates for principal.

One commenter suggested that CCC adopt, at the option of the lender, a variable rate of interest coverage. CCC allows the assignee U.S. financial institution to provide credit to the foreign bank on the basis of a variable rate of interest. However, under the interim rule and prior regulations, CCC states in the Program Announcement for the applicable country whether its guarantee coverage will be offered with a fixed or adjustable rate of interest coverage. CCC has determined that if interest rate coverage were determined at the option of the lender, CCC would not be able to adequately control its risk exposure. Therefore, it has been determined not to make the suggested change.

Five respondents commented on the definition of § 1493.20(h)(1)(ii), Exported Value, where CCC's payment guarantee coverage is on the basis of FAS or FOB value on transactions sold on a CFR or CIF basis. All commenters expressed concern that under this requirement the FAS or FOB coverage will be reduced should the actual freight and/or insurance increase from what was anticipated at the time of the exporter's application for a payment guarantee. The commenters noted that the exporter may thus find a portion of the sale amount is uncollectable under the letter of credit because the financing institution will only pay the exporter the amount recoverable under the payment guarantee, plus the bank's proportion of shared risk. Other concerns raised were that this requirement is impractical and will cause problems for all parties because: (1) the actual amount of coverage may not be established until long after the sale has been made; (2) the values stated in the letter of credit and the import licenses will not reflect the value in final payment guarantee; and (3) the values in the final payment schedule will not reflect the values in the payment guarantee nor will they reflect the agreement between the buyers and sellers at the time the contract was made. Commenters stated that the requirement will reduce use of the programs because exporters may stop selling CFR and instead offer only on a

FOB basis. U.S. exporters could also be hurt if buyers, who previously purchased on a CFR basis, choose to charter ships for themselves.

The arguments made by the commenters are compelling. CCC's intent in framing the provision of the interim rule was not to expose exporters, importers or assignees to unmanageable risks. CCC has determined to revise § 1493.20(h)(1)(ii) and § 1493.80(a)(7) to return to the practice of using the exporter's valuation of freight and insurance costs at time of application for a payment guarantee as the basis for determining exported commodity value under the payment guarantee. CCC recognizes that this change may be viewed as exposing CCC to an added measure of liability in cases where actual freight costs turn out to be lower than estimated in the exporter's application. However, CCC notes that its price review procedure confirms that both the overall CFR or CIF price and the implied FOB or FAS commodity price are within acceptable ranges at the time of application. This ensures against exporters deliberately under-estimating freight cost at the time of application in order to finance indirectly a significant portion of freight costs in the commodity financing.

One commenter suggested that in § 1493.20(k), Foreign Bank Letter of Credit, the reference to International Chamber of Commerce (ICC), Uniform Customs and Practice for Documentary Credits, Publication No. 400 be replaced with "latest revision" to avoid the need for an amendment of the rule when the ICC updates this publication. CCC agrees to this technical change and has revised § 1493.20(k) to reflect the suggestion and the fact that ICC Publication No. 400 has been revised and issued as ICC Publication No. 500. We have also included the use of the copyright symbol, ©, to reflect the proprietary interest of the ICC in this publication.

Although no public comment was received regarding the definition of "Incoterms" found at § 1493.20(q), CCC has updated the final rule to reflect the current International Chamber of Commerce's abbreviation for the term "Cost and Freight". Accordingly, CCC uses the abbreviation "CFR," makes such correction to § 1493.20(q), and further acknowledges the alternative abbreviations, "C&F" and "CNF", because of their continued common commercial use. Additional language is also added to this definition to indicate CCC's position that contractual obligations are incurred by the use of these terms by program participants. Additionally, we have again included the use of the copyright symbol, ©, to reflect the ICC's proprietary interest.

One commenter suggested that the phrase in § 1493.20(s), Late Interest, " * * * beginning on the first day after which the claim for loss is found in good order by CCC * * * " be changed to " * * * beginning on the first day after receipt of a claim which CCC has determined to be in good order * * * " in order to be consistent with § 1493.120(c), Late Interest Payment. CCC has determined that the definition of "Late interest" contained in § 1493.20(s) be revised as suggested to avoid inconsistency.

Concerning § 1493.20(v)(3), Port Value, one commenter felt that when CCC announces CFR or CIF coverage, the cost of bulk destination bagging should be covered by the credit guarantee, provided that the total cost of ocean freight for bulk shipment plus all costs of bagging at the destination does not exceed the comparable cost of ocean freight for bagged cargo. CCC does consider that packaging materials for bulk commodities may be an integral part of the commodity sale. Hence, on a bulk commodity sale which includes destination bagging, CCC would permit the costs of bags, needles and twine exported from the U.S. with the commodity to be included in the payment guarantee. Further, CCC will issue payment guarantees on CFR or CIF sales with destination bagging, if all costs of the bagging at destination are deducted as provided in § 1493.20(h)(3) and § 1493.20(v)(3). However, CCC disagrees that CCC should cover the costs of foreign labor involved in destination bagging in its payment guarantee.

A comment regarding § 1493.20(x), Related Obligation, suggested that since draft(s) are not always used, the wording of the last sentence should be amended to read: "The U.S. financial institution is entitled to such payments because it has financed the obligation arising under the letter of credit." CCC agrees and has revised the language of § 1493.20(x) accordingly.

Section 1493.30 Information Required for Program Participation

One comment was received regarding the applicant's financial responsibility. The commenter was concerned that small European companies opening offices in the U.S. in order to take advantage of USDA agricultural programs can and will make corrupt payments or grant after sales services because their maximum exposure is limited to a small office and minimal assets. In its experience with participants under the GSM–102/103 programs, CCC finds no grounds for this concern. Of those few instances of corrupt payments or after sales services that have been identified in CCC guaranteed transactions (principally in connection with past sales to Iraq), such program violations have been no more prevalent in transactions entered into by the U.S. offices of small European-based companies.

This same commenter suggested that the determination of financial responsibility should be predicated on an applicant having a minimum net worth of $5 million, or of an amount relative to GSM business done, such as 10% of estimated annual business. It is CCC's view that setting minimum net worth requirements would unreasonably and unfairly exclude virtually all small export companies currently participating in the programs. Small exporters play a significant role, especially in relation to certain countries and certain commodities, and often where frequent small deliveries are desired by foreign buyers.

In general, CCC's experience with the financial responsibility requirement introduced in the interim rule has been unsatisfactory. The requirement appears to have little or no value in protecting CCC from financial exposure due to program violations by an exporter. Nor has this requirement enhanced CCC's ability to recapture financial losses by pursuing exporters for monetary judgments in the event of a program violation. CCC's potential financial liability in issuing a payment guarantee is the risk of default from the foreign bank issuing the letter of credit. The rates of transaction nonperformance and of program violations have been very low. CCC takes any program violation seriously and pursues administrative actions against exporters shown to have violated the program or other applicable U.S. laws. However, demonstrating a minimum level of financial assets, or meeting other financial tests, does not materially enhance CCC's ability to recover losses. Such tests are unreliable and quickly outdated. Therefore, CCC has decided to delete all references to financial responsibility from § 1493.30 and from § 1493.30(d)(1).

CCC has revised the scope of the certification statement required by § 1493.30(a)(6). This section has required applicants to certify that "the applicant; any owner, in whole or in part; or any employee is not currently debarred or suspended from contracting with or participating in programs administered by any U.S. Government Agency." CCC has determined that this certification requirement should be eased in recognition that large

companies, especially publicly-traded ones with many shareholders, cannot make the certification with absolute knowledge of its truth. Section 1493.30(a)(6) now requires the following certification: "I certify, to the best of my knowledge and belief, that neither [name of applicant] nor any of its principals has been debarred, suspended, or proposed for debarment from contracting with or participating in programs administered by any U.S. Government agency. ("Principals," for the purpose of this certification, means officers; directors; owners of five percent of or more stock; partners; and persons having primary management or supervisory responsibility within a business entity (e.g., general manager, plant manager, head of a subsidiary division, or business segment, and similar positions)). I further agree that, should any such debarment, suspension, or notice of proposed debarment occur in the future, [name of applicant] will immediately notify CCC."

In keeping with the above change in certification, § 1493.30(d), Ineligibility for Program Participation, has been revised to delete subparagraph (4) which made ineligible any applicant employing any individual who is debarred or suspended. This change recognizes that some applicants will not be in a position to determine whether or not a single employee is debarred or suspended.

Section 1493.40 Application for Payment Guarantee

Three respondents commented on the description and value of discounts and allowances, § 1493.40(a)(10). The commenters suggested that this requirement is impractical because most discounts and allowances are not known until the date of export and many times are not quantifiable until the goods have been discharged. One commenter felt that if the intention of this requirement is to uncover any attempt to obtain coverage, through prior agreement, for an amount greater than the value of the commodity transaction, a better approach would be to prohibit any discounts or allowances which are not due to contingencies or acts which are not known at the time of sale. One commenter suggested that this requirement be deleted.

CCC has determined that to protect the integrity of the program and to limit CCC's contingent liability in the event of a default, the definition of discounts and allowances contained in § 1493.20(f) and the required reporting thereof under § 1493.40(a)(10) and § 1493.80(a)(8) is necessary and appropriate. Discounts or allowances that are unknown by the exporter at the time of application for a payment guarantee, of course, cannot be reported to CCC at the time of application. However, some discounts and allowances may be provided for in the sales contract. These discounts and allowances should be reported by the exporter at time of application. If known discounts or allowances are not reported to CCC at the time of application, CCC cannot adequately price review the transaction.

When a conditional or contingent discount or allowance is provided for under the terms of the export sales contract, it should be noted in the application, but not deducted from the port value unless agreed by CCC. This is because the exporter may not know, at the time, whether the condition(s) will arise and the discount or allowance will be paid. The exporter should report the value of the discount or allowance, if it has been paid, at the time of filing the evidence of export report. If a payment of a discount or allowance occurs after the submission of an evidence of export report, the exporter must report the value of the discount or allowance in an amended evidence of export report, and should notify the U.S. assignee, if any (see previous discussion of this point concerning the definition of "discounts and allowance," § 1493.20(f)). In the event of a claim under the payment guarantee, CCC may hold an exporter liable for value of the unreported discounts and allowances.

Section 1493.40(a)(14) has been revised in this final rule for the purpose of clarity. Applicants often were unable to report the address of the foreign bank issuing the letter of credit. The language of this subsection has been changed to now state "the address or location" of the foreign bank. CCC has determined this change will still provide sufficient information to identify the foreign bank issuing the letter of credit.

Section 1493.40(a)(15) has been revised in this final rule to delete the requirement to include the estimated principal payment due dates and amounts due. CCC is able to make this calculation using other information reported under this subsection.

Section 1493.40(a)(16) has been revised in this final rule to add the number of the Export Enhancement Program, Dairy Export Incentive Program, Sunflowerseed Oil Assistance Program or Cottonseed Oil Assistance Program Agreement assigned by USDA, as applicable. This added information is not a burdensome requirement for the exporter and assists CCC in tracking concurrent use of credit and subsidy programs.

One comment was received regarding USDA's price review process established under § 1493.40(b). The commenter questioned how USDA can properly determine a fair market price. The respondent felt that U.S. companies will lose the incentive to be innovative and aggressive in creating markets for their products if the USDA controls prices. This commenter felt that while high prices may indicate kickbacks or other improprieties and warrant a complete investigation, the practice of price review should be used as a tool to monitor the program, and should not constitute "price approval." The commenter recommended that the practice of price review should be eliminated from the regulations. CCC disagrees. The price review procedure under the GSM–102/103 programs is not a "price approval" mechanism. Although CCC does have the right to reject applications for a payment guarantee that, in CCC's opinion, do not reflect market parameters, in practice, when a sales price raises questions, the exporter is given the opportunity to explain the factors relating to the price. Often, after receiving such information, CCC has been able to approve the application. CCC's intention is not to control the price that an exporter may negotiate with an importer. However, CCC does have an obligation to review those sales prices which appear excessively high or low because they may be linked to possible program violations, such as kickbacks, extra sales services or the inclusion of lower value foreign content in the shipment. Therefore, the current practice of price review for GSM–102/103 program applications will continue.

Section 1493.50 Certification Requirements for Obtaining Payment Guarantees

One commenter questioned whether CCC considered normal customer service, e.g., visits to the customer to inspect the product, to observe its use in the market, to provide technical assistance, or to replace faulty or defective products to be extra sales services under § 1493.50(b). The respondent requested that CCC clarify and give examples or guidelines of what is considered to be extra sales services. CCC cautions exporters that any extension of extra sales services provided to an importer that can be directly linked to a GSM–102 or GSM–103 payment guarantee may be construed as a discount or allowance which, although permissible, must be reported and deducted from the value of

the guarantee. On the other hand, an extra sales service not linked to the basic commercial intent of the transaction (i.e., that is extraneous to the transaction) is prohibited. The instance, type, nature, and the extent of linkage to the sales transaction must be examined on a case-by-case basis. As previously discussed in relation to comments received concerning the definition of "Discounts and Allowances," § 1493.20(f), CCC will review the specific circumstances when they are reported. Therefore, CCC has determined not to provide specific examples of extra sales services—extraneous and otherwise—in the regulations.

Two respondents made comments regarding § 1493.50(a), which requires the exporter to certify that the agricultural commodity or product exported under the payment guarantee is a U.S. agricultural commodity or product as defined by § 1493.20(z). While both commenters fundamentally agree with the U.S. origin requirement, they felt that because of the changes in the U.S. market environment, particularly the U.S.-Canada Free Trade Agreement, a rigid interpretation of the U.S. origin requirement will interfere with the normal operation of the U.S. grain marketing system. The commenters suggested that an alternative to the U.S. origin requirement might be a "transit billing" system similar to the Agricultural Stabilization and Conservation Service's current policy for all commodity purchases, except dairy products. Under transit billing, in the commenter's opinion, domestic origin requirements should be satisfied if a grain handling facility containing commingled domestic and foreign origin commodities, has quantities of domestic origin commodities equal to or greater than the quantity called for in the contract.

CCC has reviewed the "transit billing" system and has determined that such a system will not meet the statutory requirements of the 1990 Act because the definition of a U.S. agricultural commodity contained in Section 102(7) of the Act requires that an agricultural commodity exported under the GSM-102/103 programs be "entirely produced in the United States." Transit billing would permit unlimited commingling of U.S. and imported grains with rules that would maximize the likelihood that a warehouseman would always have a sufficient theoretical U.S.-origin stock position to be able to fill export orders for U.S. grain. It would be a formula accounting system which would be unrelated to the actual identity of the grain being handled. Therefore, it has been determined that transit billing would not meet the statutory requirement.

Another alternative proposed by one of the commenters is for CCC to allow foreign agricultural components to be exported but to provide no guarantee coverage on the value of any such components. The commenter proposed this option in reference to bulk grains, an agricultural commodity, not a product of an agricultural commodity. As previously noted, Section 102(7) of the Agricultural Trade Act of 1978, as amended by the 1990 Act does not, in CCC's view, permit any foreign content to be included in the U.S. agricultural commodity exported under the GSM-102/103 programs.

Section 1493.60 Payment Guarantee

One respondent asked if under § 1493.60(b), Period of Guarantee Coverage, the language "the payment guarantee will apply to the period beginning either on the date(s) of export(s) or on the date when interest begins to accrue, whichever is earlier," implies that CCC will guarantee credits on which interest accrues prior to disbursement of funds to the U.S. exporter. The answer is yes. CCC will provide a payment guarantee that includes interest coverage which begins before the date of export from the U.S. in circumstances where the exporter has sold the commodity at an U.S. interior point of loading of the export carrier (e.g., railcar or truck for export to Mexico). However, interest coverage begins no earlier than the date interest begins to accrue under the guaranteed credit. This date could be earlier than the date of disbursement of funds to the U.S. exporter if this was provided for in the foreign bank's letter of credit or related obligation.

Comments were received suggesting changes in § 1493.60(e), Reserve Coverage for Loading Tolerances. Three respondents believed the purpose of this provision is to allow the exporter to pay the guarantee fee only on the actual amount of the coverage required, and recommended that the section be changed to allow the exporter to apply for a payment guarantee (and pay the guarantee fee) based on any quantity, within the sales contract specifications, reserving coverage up to the maximum contract tolerance. One of the commentors also felt that, as a result of the requirement in the interim rule, exporters would pay excessive fees for coverage not used and credit availability would be encumbered without product exported. CCC agrees with these comments and has revised the language of § 1493.60(e) to permit exporters to apply for guarantee coverage, and pay the guarantee fee, on the basis of any quantity within the upper and lower tolerance and to reserve coverage up to the upper tolerance. After export, when coverage has been reserved, the exporter will be permitted to amend the payment guarantee and pay an additional fee based upon the difference between the original payment guarantee quantity and the actual quantity exported.

Two comments were received regarding § 1493.60(i), Amendments. One commenter, a financial institution, felt that a request for an amendment of the payment guarantee should not be restricted to the exporter, and that the assignee should also be able to submit a request for an amendment. CCC disagrees. To do so would place CCC in the position of unilaterally agreeing to amend, and possibly breach, a contractual agreement with exporters at the request of a third party.

The second comment received on § 1493.60(i) concerned interpretation of the phrase " * * * any amendment to the payment guarantee may result in an increase of the guarantee fee." The commenter felt if it is the intention of CCC to assess fees for amendments, which are not always within the exporter's control, then this language should be deleted. It is not CCC's intention to assess additional fees for all amendments. In response to the comment, the language of § 1493.60(i) has been clarified to provide the possibility that CCC may charge a fee for a requested amendment when, as a consequence of the request, CCC may incur additional liability.

Section 1493.70 Guarantee Rates and Fees

No public comment was received on this section. No changes have been made in this section of the final rule.

Section 1493.80 Evidence of Export

Several comments were received on this section. A general comment was made regarding the proprietary nature of the information submitted by the exporter. The commenter felt that any information submitted should be deemed confidential and access restricted; neither foreign buyers nor competitors should have access. CCC has not included in the Interim Rule or Final Rule provisions on the protection of participant information because this matter is governed by the Freedom of Information Act (FOIA) and the Privacy Act. Moreover, section 402(a)(3) of the Agricultural Trade Act of 1978, as amended by the 1990 Act (7 U.S.C. 5662(a)(3)) provides that "the personally

identifiable information contained in reports under subsection (a) [records of the exporter] may be withheld in accordance with section 552(b)(4) of title 5, United States Code." This section further provides that "any officer or employee of the Department of Agriculture who knowingly discloses confidential information as defined by section 1905 of Title 18, United States Code, shall be subject to section 1905 of Title 18, United States Code. Nothing in this subsection shall be construed to authorize the withholding of information from Congress."

Three respondents requested that § 1493.80(a), Report of Export, be amended to allow 60 days for submitting evidence of export reports for truck or rail export shipments because it is difficult to obtain the required entry certificate into Mexico within the 30–day filing period. CCC recognizes that experience validates this comment. In the past it has often been necessary for the exporter to obtain an amendment to the payment guarantee allowing an extension of the time period for filing the evidence of export report. In a study of this problem, CCC determined that an extension of the filing time limit from 30 days to 60 days for truck and rail exports would decrease the number of this type of amendment request by approximately one-half. Accordingly, in this final rule § 1493.80(a) has been simplified and § 1493.80(b) revised to provide a time limit of 60–days for filing evidence of export reports for truck and rail exports. With this revision, § 1493.80(b) continues to provide for the filing of evidence of export reports for shipments by other types of carriers within a 30 day time limit.

Further, for the sake of simplicity and expediency, CCC has deleted the requirement previously contained in § 1493.80(a)(9) of the interim rule requiring the exporter or its assignee to report a final payment schedule showing the payment dates and the amounts separately for both principal and interest. CCC now has computer capability to calculate this information from the other information submitted in the evidence of export report and the terms of the payment guarantee. The requirement for the payment schedule information has often been a hindrance to the timely filing of complete evidence of export reports because exporters routinely must have their assignee submit this information. It is expected that this change will expedite filings of evidence of export reports.

Two commenters requested clarification regarding § 1493.80(b), Time Limit for Submission of Evidence of Export. This sub-part allows for an extension of the time limit if it is determined to be in the best interests of CCC (but not if payments by the foreign bank are past due under the payment guarantee). The commenters would like to see clarification of CCC's policies once a defaulting foreign bank is again current with its account. It was suggested that a sentence be added stating that CCC will reconsider the payment guarantee status once the foreign bank resumes payments and becomes current in its obligations.

CCC has determined to address this comment by revising the language of § 1493.80(b) to indicate that if the report required by paragraph (a) of § 1493.80 is not received by the time limit specified, the payment guarantee will become null and void, but only if failure to make timely filing resulted, or would be likely to result, in: (1) significant financial harm to CCC; (2) the undermining of an essential regulatory purpose of the program; (3) obstruction of the fair administration of the program; or (4) a threat to the integrity of the program. Section 1493.80(b) will still permit CCC to extend the time limit for filing of evidence of export reports if such extension is determined by the General Sales Manager to be in the best interests of CCC.

Section 1493.90 Certification Requirements for the Evidence of Export

Two respondents commented on § 1493.90(c), which requires the exporter to certify that the exporter or exporter's assignee has, and will retain, documents evidencing the obligation of the foreign bank for five years after the final installment due date. Both commenters said that the exporter can make the certification for themselves, but that they have no legal recourse at their disposal, to require the third parties to comply with this provision. The commenters recommended that the certification be deleted. CCC has considered the comments made and agrees that the certification can be deleted because the exporter or the exporter's assignee is already bound by § 1493.140(e)(1) to retain documentation evidencing the obligation of the foreign bank for a period of five years after the final installment date. This document retention requirement is further strengthened because evidence of the foreign bank related obligation is necessary to submit a claim to CCC under the payment guarantee. Therefore, a certification that such records are being maintained has little practical value. CCC has determined to delete the certification previously found at § 1493.90(c) of the interim rule from this final rule.

Section 1493.100 Proof of Entry

A comment received on § 1493.100(a), Diversion, pointed out that while the exporter may contractually preclude diversion of an FOB shipment, the exporter has no control over the importer's vessel; unless the exporter knowingly abetted the diversion, there should be no implication of potential exporter liability to CCC under such circumstances. Under § 1493.130(d) of the interim rule, "the exporter may be liable to CCC for any amount paid under a payment guarantee when it is determined by CCC that the exporter has engaged in fraud, or has been or is in breach of any contractual obligation, certification or warranty made by the exporter * * *" Further, the exporter's assignee may be held liable to CCC under the same standard. However, § 1493.130(e), Good Faith, provides that a violation by an exporter of the certifications, particularly § 1493.100 (Proof of Entry), will not affect the validity of any payment guarantee with respect to an assignee who had no knowledge of such violation or failure to comply at the time the exporter applied for the payment guarantee or at the time of assignment of the payment guarantee.

CCC recognizes the burden placed on exporters with FOB sales in ensuring compliance with program requirements concerning diversion. However, in view of the legislative mandate imposed on CCC to ensure arrival of program shipments in destination countries (Title IV, Subtitle A, Section 401 of the Agricultural Trade Act of 1978, as amended by the 1990 Act), and in view of the fact that CCC has a contractual relationship only with the exporter, not with the importer, CCC sees no feasible alternative to the present policy of holding exporters responsible for maintaining proof of entry documentation as a means of preventing diversion. This policy makes it in the interest of exporters to make every effort to obtain binding commitments from foreign buyers to provide such documentation on FOB/FAS sales and not to divert shipments. The strength of evidence of such efforts by exporters would undoubtedly be of material interest in any situation where CCC suffered a financial loss on a payment guarantee and found that diversion had taken place.

Two respondents commented on § 1493.100(b), Proof of Entry. One commenter was unsure what is intended by this section. Both commenters felt that the only reliable means of obtaining proof of entry is for the exporter to

retain a private surveyor at each location. They felt that this was an unnecessary cost and burden to the exporter and that there is little justification for this requirement. Clarification of the section was requested. In adding the requirement for proof of entry in the interim rule, CCC employed the basic requirements for proof of entry documents that are used for the Export Enhancement Program (EEP). Although a surveyor's report would be an acceptable means of meeting this requirement, CCC disagrees that it is the only reliable means of obtaining proof of entry. Many countries have provided such documentation with respect to the EEP program. Further, in the event that traditional forms of entry documentation are unobtainable, § 1493.100(b) permits CCC to consider other types of documents, which can be deemed acceptable by the GSM. Finally, as stated in the interim rule, the requirement for proof of entry documentation on GSM–102/103 transactions is mandated by the 1990 Act. Therefore, CCC has determined that no further clarification or change is necessary to § 1493.100.

Section 1493.110 Notice of Default and Claims for Loss

One commenter suggested that CCC adopt a "Payment Certificate" concept (currently incorporated in programs of the Export-Import Bank of the United States (Eximbank)) under which one claim is submitted covering the payment of the balance of the guarantee. In follow-up discussions with CCC, the commenter explained the "Payment Certificate" concept as being a mechanism where CCC would pre-approve documents that are normally submitted in the claim procedure and issue a payment certificate which, when submitted at the time of claim, would be evidence that CCC would pay the claim at a certain time interval after receipt of the payment certificate, notice of default, and subrogation agreement. CCC has determined that, at this time, it cannot adopt such a measure because it has insufficient resources to review and pre-approve all documents required for submission when filing a claim. One major difference between Eximbank and CCC export credit guarantee programs is the sheer number of payment guarantees that CCC issues during a program year, over 3,000 payment guarantees annually. Eximbank's guarantees are generally much larger in value and fewer in number. It would not be administratively feasible for CCC to review documentation in advance of issuance of all of its guarantees. CCC will continue to explore the possibility of adapting the "payment certificate" concept to permit, for certain countries or particular foreign banks, a mechanism that would address the "time certain for payment of claims" element necessary to facilitate securitization of CCC payment guarantees.

It should be recognized, however, that under existing CCC policy, only one claim need be filed (in the sense of providing full documentation relating to the transaction). Thereafter, only certified notices of failure to receive scheduled installments, reference to the original claim, and corresponding subrogation agreement need be submitted to CCC. Accordingly, CCC agrees that § 1493.110 should be clarified to reflect this fact and has added a new paragraph § 1493.110(c) to make this policy clearer.

A commenter suggested that the reference to "drafts drawn" in § 1493.110(b)(4)(i)(B)(1), be revised to read "obligations financed," since drafts are not always used as financial obligations. CCC agrees and has adopted this clearer language in the subsection.

One commenter questioned why, under Filing a Claim for Loss, § 1493.110(b)(4)(v), CCC requires a copy of the previously submitted report of export to accompany the claim for loss. CCC requires this in order to accelerate the claims payment process. CCC considers this a reasonable requirement and therefore, has determined that the requirement of § 1493.110(b)(4)(v) remain unchanged.

Section 1493.120 Payment of Loss

One commenter, a financial institution, made a comment pertaining to § 1493.120(a), Determination of CCC's Liability, which states that CCC, upon receipt in "good order" of the information and documents under § 1493.110(b), Filing a Claim for Loss, will determine whether or not a loss has occurred for which CCC is liable. The commenter states that in order for securities to be viewed as "government credit," there can be no risk that the payment under the guarantee would not be made. The commenter also argued that, due to the extensive list of documents and information required and the subjective judgement that such documents and information be in "good order," a risk of non-payment by CCC exists. The recommendation is to require that most documents and information be approved (or alternatively, that the proper forms be pre-agreed by CCC) prior to issuance of the guarantee. This recommendation would eliminate the subjective nature of "good order" and would eliminate the non-payment risk. This issue has already been addressed under General Comments (securitization) and in relation to § 1493.110. Again, although CCC is not now making changes to specifically address this concern, CCC will continue to look at possibilities to adapt mechanisms suitable to CCC programs to facilitate securitization.

Two comments were received on § 1493.120(c), Late Interest Payment. One respondent (a Federal agency) said that the late interest is short-term interest and that the rate factor should be based on the "91-day Treasury bill rate, not to exceed the 52-week bill rate." CCC agrees with the comment that it is more suitable to use a short-term interest instrument for late interest. Accordingly, CCC has changed § 1493.120(c) to provide that late interest is based on the 91-day Treasury bill. Similarly, changes have been made to § 1493.130(b)(1) and (2) to also reflect the use of a short-term interest instrument as the benchmark for "late interest" to be paid both on monies owed to CCC in a recovery, and on monies recovered by CCC and owed to an exporter or an exporter's assignee under pro rata sharing.

The other comment pertained to the securitization of payment guarantees. The commenter suggested that § 1493.120(c) establish CCC's obligation to pay a claim within a specified time period. The commentor stated that this was necessary because a risk of nonpayment or late payment by CCC would be unacceptable to rating agencies reviewing securitization proposals which include CCC payment guarantees. CCC has determined not to adopt this suggested change for reasons previously stated in relation to general comments on the interim rule and specifically on § 1493.20(s) and § 1493.110.

One commenter suggested that § 1493.120(d), Accelerated Payments, be changed to allow payments to be made on an accelerated basis at the option of the lender. CCC's policy is to not pay claims for losses in advance of a default unless it can be determined to be in CCC's best interest to do so. If CCC were to revise § 1493.120(d) to allow an accelerated payment mechanism at the option of the lender, CCC could be required to disburse funds to banks for installment defaults which have not yet occurred. CCC has determined that this obligation would not be in its best interest, and that § 1493.120(d) will not be changed.

One respondent expressed concern that under § 1493.120(e)(1), Action Against the Assignee, failure of the exporter to comply with the

requirement to file an amended report of export to reflect post-export adjustments might jeopardize the assignee's claim. CCC acknowledges the legitimacy of the commenter's concerns. Section 1493.120(e) does not specify as to what actions CCC may take against the assignee for the failure of the exporter to file amended evidence of export reports if, for example, later discounts or allowances are granted to the importer by the exporter. Section 1493.120(e) states that " * * * CCC will not hold the assignee responsible or take any action or raise any defense against the assignee for any action, omission or statement by the exporter over which the assignee has no knowledge, provided that: (1) the exporter complies with the reporting requirements under § 1493.80 and § 1493.90; and (2) the exporter or the exporter's assignee furnishes the statements and documents specified in § 1493.110." In a post-export adjustment (i.e., a previously unreported discount or allowance) the assignee would, most probably, have no knowledge of the exporter's action (consideration given to the importer) and omission (not filing a corrected evidence of export report). CCC has clarified § 1493.120(e) to indicate that assignees will not be held liable for failure of the exporter to submit to CCC any corrections or amendments to evidence of export reports.

Section 1493.130 Recovery of Losses

As previously discussed in relation to a comment made regarding § 1493.120(c), CCC has made revisions in this final rule to § 1493.130(b)(1) and (2) to provide that late interest is based on the 91-day Treasury bill rate.

One comment was received on § 1493.130(b)(1), Receipt of Monies. The commenter suggested eliminating CCC's requirement that all monies received by the lender from any source whatsoever after the payment by CCC of a claim be paid to CCC. CCC has addressed this issue under General Comment regarding securitization proposals. CCC has determined not to make this change.

Two respondents requested changes in the wording of § 1493.130(d), Liabilities to CCC, to take into account that a technical breach by the exporter may be inconsequential, and that the breach may not have been the cause for any payment made by CCC under the payment guarantee. The suggested rewording of this phrase is " * * * or has been or is in material breach of any contractual obligation, certification or warranty made by the exporter for the purpose of obtaining the payment guarantee or in fulfilling an obligation under GSM–102 or GSM–103 and such amounts paid by CCC under the payment guarantee resulted from such fraud or material breach by the exporter." CCC agrees with the comment and this final rule incorporates language in § 1493.130(d) similar to that suggested.

Section 1493.140 Miscellaneous Provisions

Two comments were received regarding the restrictions of § 1493.140(a), Assignment. The commenters felt that financial institutions should be able to place assets they originate into the world capitol markets and that CCC should facilitate this goal by permitting more than one assignment of the payment guarantee. One commenter, a financial institution, suggested that CCC allow the financial institution to extend the credit and assign such credit to a grantor trust or special purpose corporation, such as a Funding Vehicle, established by the financial institution, or let the Funding Vehicle itself take assignment and extend the credit. The same commenter also recommended that the language in § 1493.11(a) of the previous regulations be included in this section. The previous regulation stated that "The assignment shall cover all amounts payable under the payment guarantee not already paid and shall not be made to more than one party, and shall not be subject to further assignment, unless approved in advance by CCC. Any such assignment may be made to one party as agent or trustee for two or more parties participating in the financing." In § 1493.140(a) of the interim rule, CCC deletes the final sentence of the previous § 1493.11(a). However, by deleting this language from the interim rule, CCC did not intend to preclude its consideration of assignments of guarantees to various types of financial institutions. CCC will consider acknowledging assignments that facilitate securitization of guarantees and that are consistent with other program requirments. Therefore, although CCC has not restored the particular sentence in this final rule, § 1493.140(a) has been modified to clarify CCC's policy.

Two respondents requested that § 1493.140(a)(3) be modified so that when CCC determines a financial institution to be ineligible to receive an assignment of a payment guarantee, CCC will notify both the exporter and the financial institution. CCC concurs with this suggestion and has adopted such provision in § 1493.140(a)(3) of this final rule.

A third respondent felt that § 1493.140(a)(3) could create difficulties for financial institutions because the notice of ineligibility would reach them after they had extended credit. The commenter suggested that CCC notify a financial institution of its ineligibility before the institution extends credit under an anticipated CCC guarantee. CCC disagrees. CCC does not have the resources to continually monitor the thousands of U.S. financial institutions which are potentially eligible to receive assignments and to notify those that would be ineligible if they were to be assigned a CCC payment guarantee. Further, § 1493.140(b), Ineligibility of Financial Institutions to Receive an Assignment, explains the conditions under which an assignment to a financial institution would not be acknowledged by CCC. If a U.S. financial institution has reason to believe that it might not be eligible under this section of the regulations, it may contact the Treasurer, CCC to review its situation.

Several commenters suggested that the provisions in § 1493.140(e)(1), Maintenance of Records and Access to Premises, place unreasonable burdens on the parties involved in the transaction. One commenter, a financial institution, was concerned that the blanket requirement of access to records pertaining to transactions conducted outside the program may interfere with bank confidentiality. Although CCC understands this concern, section 402(a)(3) of the Agricultural Trade Act of 1978, as amended by the 1990 Act, provides that officers or employees of the U.S. Department of Agriculture are subject to criminal penalties for knowingly disclosing confidential information.

Another commenter felt that the records pertaining to transactions outside the program should be subject to review only if they are directly related to transactions made under the program, and that the General Sales Manager's opinion should not determine whether the outside transaction(s) pertain to program transactions. This commenter recommended that the regulation apply to outside transactions which "relate directly" rather than that "pertain" to the program transaction. CCC disagrees and has determined that the language of § 1493.140(e)(1) should remain unchanged. On a case-by-case basis, and as determined by the GSM, CCC may need to examine records not directly related to the GSM–102/103 transaction in order to determine whether a program violation has occurred (e.g., inventory records may be examined to determine whether foreign content exists in export shipment under the program).

Two commenters said that they can request agents, intervening purchasers, and related companies to make available documents or information requested by CCC, but cannot guarantee access to third party records, particularly those held by companies or persons located outside the U.S. This is particularly the case with documents which may be generated by agents of the exporter, or by companies with special arrangements with the exporter which are foreign entities. Because access to such records may be critical to CCC's efforts to monitor programs and to ensure their integrity, CCC expects that the exporter will use its contractual and other means of influence to obtain those pertinent records of the outside parties involved. CCC recognizes that exporters may only be able to obtain from such third parties copies of those records that pertain to the GSM–102/103 export transaction in question. The final rule does not require that the exporter retain all records of such third parties, nor those records pertaining to transactions conducted outside the program. Further, the final rule does not require that an agent of the exporter, an intervening purchaser, or parties with a special arrangement with the exporter must make available such records and grant access to their premises. CCC would expect the exporter to be able to provide copies of any and all records relating to the transaction held by these entities if so requested by government officials authorized to conduct program reviews.

Two comments recommended that § 1493.140(g), Submission of Documents by Principal Officers, be expanded to permit an authorized full time employee of the exporter to sign all required submissions. CCC agrees with the comment. On August 7, 1991, CCC issued a Notice to Program Participants which clarified the signatory requirements for submissions to CCC. The policy reflected in this Notice to Participants has been included in § 1493.140(g) of this final rule to permit principal officers or their designees to sign required submissions to CCC. However, the August 7, 1991 Notice is not being superseded because it also applies to other export programs and contains examples of how such authorizations by principals to their designees might be worded.

List of Subjects in 7 CFR Part 1493

Administrative practice and procedures, Agricultural commodities, Credit, Exports, Financing, Guarantees, Reporting and recordkeeping requirements.

Accordingly, 7 CFR Part 1493 is revised to read as follows:

PART 1493—CCC EXPORT CREDIT GUARANTEE PROGRAMS

Subpart A—Restrictions and Criteria for Export Credit Guarantee Programs

Sec.
1493.1 General statement.
1493.2 Purposes of programs.
1493.3 Restrictions on programs and cargo preference statement.
1493.4 Criteria for country allocations.
1493.5 Criteria for agricultural commodity allocations.
1493.6 Additional required determinations for GSM–103.

Subpart B—CCC Export Credit Guarantee Program (GSM–102) and CCC Intermediate Export Credit Guarantee Program (GSM–103) Operations

Sec.
1493.10 General statement.
1493.20 Definition of terms.
1493.30 Information required for program participation.
1493.40 Application for a payment guarantee.
1493.50 Certification requirements for obtaining payment guarantee.
1493.60 Payment guarantee.
1493.70 Guarantee rates and fees.
1493.80 Evidence of export.
1493.90 Certification requirements for the evidence of export.
1493.100 Proof of entry.
1493.110 Notice of default and claims for loss.
1493.120 Payment for loss.
1493.130 Recovery of losses.
1493.140 Miscellaneous provisions.

Authority: 7 U.S.C. 5602, 5622, 5661, 5662, 5663, 5664, 5676; 15 U.S.C. 714b(d), 714c(f).

Subpart A—Restrictions and Criteria for Export Credit Guarantee Programs

§ 1493.1 General statement.

This subpart sets forth the restrictions which apply to the use of credit guarantees under the Commodity Credit Corporation (CCC) Export Credit Guarantee Program (GSM–102) and the Intermediate Credit Guarantee Program (GSM–103) and the criteria considered by CCC in determining the annual allocations of credit guarantees to be made available with respect to each participating country. This subpart also sets forth the criteria considered by CCC in the review and approval of proposed allocation levels for GSM–102 and/or GSM–103 credit guarantees which may be made available in connection with export sales of specific U.S. agricultural commodities to these countries. These restrictions and criteria are interrelated and will be applied and considered together in the process of determining which sales opportunities under GSM–102 or GSM–103 will best meet the purposes of the programs.

§ 1493.2 Purposes of programs.

CCC may use export credit guarantees:

(a) To increase exports of U.S. agricultural commodities;

(b) To compete against foreign agricultural exports;

(c) To assist countries, particularly developing countries, in meeting their food and fiber needs; and

(d) For such other purposes as the Secretary of Agriculture determines appropriate, consistent with the provisions of § 1493.6.

§ 1493.3 Restrictions on programs and cargo preference statement.

(a) *Restrictions on use of credit guarantees.* (1) Export credit guarantees authorized under these regulations shall not be used for foreign aid, foreign policy, or debt rescheduling purposes.

(2) CCC shall not make credit guarantees available in connection with sales of agricultural commodities to any country that the Secretary determines cannot adequately service the debt associated with such sales.

(b) *Cargo preference laws.* The provisions of the cargo preference laws shall not apply to export sales with respect to which credit is guaranteed under these programs.

§ 1493.4 Criteria for country allocations.

The criteria considered by CCC in reviewing proposals for country allocations under the GSM–102 or GSM–103 programs, will include, but not be limited to, the following:

(a) Potential benefits that the extension of export credit guarantees would provide for the development, expansion or maintenance of the market for particular U.S. agricultural commodities in the importing country;

(b) Financial and economic ability of the importing country to adequately service CCC guaranteed debt;

(c) Financial status of participating banks in the importing country as it would affect their ability to adequately service CCC guaranteed debt;

(d) Political stability of the importing country as it would affect its ability to adequately service CCC guaranteed debt; and

(e) Current status of debt either owed by the importing country to CCC or to lenders protected by CCC's guarantees.

§ 1493.5 Criteria for agricultural commodity allocations.

The criteria considered by CCC in reviewing proposals for specific U.S. commodity allocations within a specific country allocation will include, but not be limited to, the following:

(a) Potential benefits that the extension of export credit guarantees

would provide for the development, expansion or maintenance of the market in the importing country for the particular U.S. agricultural commodity under consideration;

(b) The best use to be made of the export credit guarantees in assisting the importing country in meeting its particular needs for food and fiber, as may be determined through consultations with private buyers and/or representatives of the government of the importing country;

(c) Evaluation, in terms of program purposes, of the relative benefits of providing payment guarantee coverage for sales of the U.S. agricultural commodity under consideration compared to providing coverage for sales of other U.S. agricultural commodities; and

(d) Evaluation of the near and long term potential for sales on a cash basis of the U.S. commodity under consideration.

§ 1493.6 Additional required determinations for GSM–103.

Notwithstanding any other provision under this part, CCC shall not guarantee under the GSM–103 program the repayment of credit made available to finance an export sale unless the Secretary of Agriculture determines that such sale will:

(a) Develop, expand or maintain the importing country as a foreign market, on a long-term basis, for the commercial sale and export of U.S. agricultural commodities, without displacing normal commercial sales;

(b) Improve the capability of the importing country to purchase or use, on a long-term basis, U.S. agricultural commodities; or

(c) Otherwise promote the export of U.S. agricultural commodities.

Subpart B—CCC Export Credit Guarantee Program (GSM–102) and CCC Intermediate Export Credit Guarantee Program (GSM–103) Operations

§ 1493.10 General statement.

(a) *Overview.* (1) This subpart contains the regulations governing the operations of the Export Credit Guarantee Program (GSM–102) and the Intermediate Credit Guarantee Program (GSM–103). The GSM–102 and GSM–103 programs of the Commodity Credit Corporation (CCC) were developed to expand U.S. agricultural exports by making available export credit guarantees to encourage U.S. private sector financing of foreign purchases of U.S. agricultural commodities on credit terms. Under GSM–102, credit guarantees are issued for terms of up to three years. Under GSM–103, credit guarantees are issued for terms of from three to ten years.

(2) The programs operate in cases where credit is necessary to increase or maintain U.S. exports to a foreign market and where private U.S. financial institutions would be unwilling to provide financing without CCC's guarantee. The programs are operated in a manner intended not to interfere with markets for cash sales. The programs are targeted toward those countries where the guarantees are necessary to secure financing of the exports but which have sufficient financial strength so that foreign exchange will be available for scheduled payments. In providing this credit guarantee facility, CCC seeks to expand market opportunities for U.S. agricultural exporters and assist long-term market development for U.S. agricultural commodities.

(3) The credit facility created by these programs is the CCC payment guarantee. The payment guarantee is an agreement by CCC to pay the exporter, or the U.S. financial institution that may take assignment of the exporter's right to proceeds, specified amounts of principal and interest due from, but not paid by, the foreign bank issuing an irrevocable letter of credit in connection with the export sale to which CCC's guarantee coverage pertains. By approving an exporter's application for a payment guarantee, CCC encourages private sector, rather than governmental, financing and incurs a substantial portion of the risk of default by the foreign bank. CCC assumes this risk, in order to be able to operate the programs for the purposes specified in § 1493.2.

(b) *Credit facility mechanism.* Typically, in export sales of U.S. agricultural commodities, payment by the importer is made under an irrevocable letter of credit. For the purpose of the GSM–102 and GSM–103 programs, CCC will consider applications for payment guarantees only in connection with export sales of U.S. agricultural commodities where the payment for the agricultural commodities will be made in one of the two following ways:

(1) An irrevocable foreign bank letter of credit, issued in favor of the exporter, specifically stating the deferred payment terms under which the foreign bank is obligated to make payments in U.S. dollars as such payments become due; or

(2) An irrevocable foreign bank letter of credit, issued in favor of the exporter, that is supported by a related obligation specifically stating the deferred payment terms under which the foreign bank is obligated to make payment to the exporter, or the exporter's assignee, in U.S. dollars as such payments become due. The exporter may assign the right to proceeds under the letter of credit or related obligation to a U.S. bank or other financial institution so that the exporter may realize the proceeds of the sale prior to the deferred payment date(s) as set forth in the irrevocable foreign bank letter of credit or its related obligation. The GSM–102 and GSM–103 programs are designed to protect the exporter or the exporter's assignee against those losses specified in the payment guarantee resulting from defaults, whether for commercial or noncommercial reasons, by the foreign bank obligated under the letter of credit or related obligation.

(c) *Program administration.* The GSM–102 and GSM–103 programs will be administered pursuant to this part and any Program Announcements and Notices to Participants issued by CCC pursuant to, and not inconsistent with, this part. These programs are under the general administrative responsibility of the General Sales Manager (GSM), Foreign Agricultural Service (FAS/USDA). The review and payment of claims for loss will be administered by the Office of the Controller, CCC. Information regarding specific points of contact for the public, including names, addresses, and telephone and facsimile numbers of particular USDA or CCC offices, will be announced by a public press release (see § 1493.20(c), "Contacts P/R").

(d) *Country allocations and program announcements.* From time to time, CCC will issue a Program Announcement to announce a GSM–102 and/or GSM–103 program allocation for a specific country. The Program Announcement for a country allocation will designate specific allocations for U.S. agricultural commodities or products thereof. Exporters may negotiate export sales to buyers in that country for one of the commodities specified in the Program Announcement and seek payment guarantee coverage within the dollar amounts of specified coverage for that commodity. The Program Announcement will contain a requirement that the exporter's sales contract contain a shipping deadline within the applicable program year. The final date for a contractual shipping deadline will be stated in the Program Announcement. Program Announcements may also contain a specified "undesignated" or "unallocated" dollar amount for the purpose that if dollar amounts specified for a specific commodity for a country become fully used, an additional

allocation from the "unallocated" or "undesignated" portion of the total country allocation may then be designated for a specific commodity. Program Announcements that include an "allocated" or "undesignated" dollar amount will contain further information on the "unallocated" or "undesignated" portion of the country allocation.

§ 1493.20 Definition of terms.

Terms set forth in this part, in CCC Program Announcements and Notices to Participants, and in any CCC-originated documents pertaining to the GSM–102 and GSM–103 programs will have the following meanings:

(a) *Assignee.* A financial institution in the United States which, for adequate consideration given, has obtained the legal rights to receive the payment of proceeds under the payment guarantee.

(b) *CCC.* The Commodity Credit Corporation, an agency and instrumentality of the United States within the Department of Agriculture, authorized pursuant to the Commodity Credit Corporation Charter Act of 1948 (15 U.S.C. 714 *et seq.*), and subject to the general supervision and direction of the Secretary of Agriculture.

(c) *Contacts P/R.* A notice issued by FAS/USDA by public press release which contains specific names, addresses, and telephone and facsimile numbers of contacts within FAS/USDA and CCC for use by persons interested in obtaining information concerning the operations of the GSM–102 or GSM–103 program. The Contacts P/R also contains details about where to submit information required to qualify for program participation, to apply for payment guarantees, to request amendments of payment guarantees, to submit evidence of export reports, and to give notices of default and file claims for loss.

(d) *Date of export.* One of the following dates, depending upon the method of shipment: the on-board date of an ocean bill of lading or the on-board ocean carrier date of an intermodal bill of lading; the on-board date of an airway bill; or, if exported by rail or truck, the date of entry shown on an entry certificate or similar document issued and signed by an official of the Government of the importing country.

(e) *Date of sale.* The earliest date on which a contractual obligation exists between the exporter, or an intervening purchaser, if applicable, and the importer under which a firm dollar-and-cent price for the sale of agricultural commodities to the importer has been established or a mechanism to establish such price has been agreed upon.

(f) *Discounts and allowances.* Any consideration provided directly or indirectly, by or on behalf of the exporter or an intervening purchaser, to the importer in connection with a sale of an agricultural commodity, above and beyond the commodity's value, stated on the appropriate FOB, FAS, CFR or CIF basis. Discounts and allowances include, but are not limited to, the provision of additional goods, services or benefits; the promise to provide additional goods, services or benefits in the future; financial rebates; the assumption of any financial or contractual obligations; the whole or partial release of the importer from any financial or contractual obligations; or settlements made in favor of the importer for quality or weight.

(g) *Eligible interest.* The maximum amount of interest, based on the interest rate indicated in CCC's payment guarantee or any amendments to such payment guarantee, which CCC agrees to pay the exporter or the exporter's assignee in the event that CCC pays a claim for loss. The maximum interest rate stated in the payment guarantee, when determined or adjusted by CCC, will not exceed the average investment rate of the most recent Treasury 52-week bill auction in effect at that time.

(h) *Exported value.* (1) Where CCC announces coverage on a FAS or FOB basis and:

(i) Where the commodity is sold on a FAS or FOB basis, the value, FAS or FOB basis, U.S. point of export, of the export sale, reduced by the value of any discounts or allowances granted to the importer in connection with such sale; or

(ii) Where the commodity was sold on a CFR or CIF basis, point of entry, the value of the export sale, FAS or FOB, point of export, is measured by the CFR or CIF value of the agricultural commodity less the cost of ocean freight, as determined at the time of application and, in the case of CIF sales, less the cost of marine and war risk insurance, as determined at the time of application, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity; or

(2) Where CCC announces coverage on a CFR or CIF basis, and where the commodity is sold on a CFR or CIF basis, point of entry, the total value of the export sale, CFR or CIF basis, point of entry, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity.

(3) When a CFR or CIF commodity export sale involves the performance of non-freight services to be performed outside the United States (e.g., services such as bagging bulk cargo) which are not normally included in ocean freight contracts, the value of such services and any related materials not exported from the U.S. with the commodity must also be deducted from the CFR or CIF sales price in determining the exported value.

(i) *Exporter.* A seller of U.S. agricultural commodities or products thereof that has qualified in accordance with the provisions of § 1493.30.

(j) *FAS/USDA.* The Foreign Agricultural Service, U.S. Department of Agriculture.

(k) *Foreign bank letter of credit.* An irrevocable commercial letter of credit, subject to the current revision of the Uniform Customs and Practices for Documentary Credits (International Chamber of Commerce Publication No. 500, or latest revision), providing for payment in U.S. dollars against stipulated documents and issued in favor of the exporter by a CCC-approved foreign banking institution.

(l) *GSM.* The General Sales Manager, FAS/USDA, acting in his capacity as Vice President, CCC, or his designee.

(m) *GSM–102.* A CCC program, also referred to as the "Export Credit Guarantee Program," under which payment guarantees are approved for a credit period not exceeding 3 years from the date(s) of export or from the date interest begins to accrue, whichever is earlier.

(n) *GSM–103.* A CCC program, also referred to as the "Intermediate Export Credit Guarantee Program," under which payment guarantees are approved for a credit period no less than 3 years but not exceeding 10 years from the date(s) of export or from the date interest begins to accrue, whichever is earlier.

(o) *Guaranteed value.* The maximum amount, exclusive of interest, that CCC agrees to pay the exporter or assignee under CCC's payment guarantee, as indicated on the face of the payment guarantee.

(p) *Importer.* A foreign buyer that enters into a contract with an exporter, or with an intervening purchaser, for an export sale of agricultural commodities to be shipped from the U.S. to the foreign buyer.

(q) *Incoterms.* The following customary terms, as defined by the International Chamber of Commerce, Incoterms (current revision):

(1) Free Alongside Ship (FAS),

(2) Free on Board (FOB),

(3) Cost and Freight (CFR, or alternatively, C&F, C and F, or CNF), and

(4) Cost Insurance and Freight (CIF).

(r) *Intervening purchaser.* A party that agrees to purchase U.S. agricultural commodities from an exporter and sell the same agricultural commodities to an importer.

(s) *Late interest.* Interest, in addition to the interest due under the payment guarantee, which CCC agrees to pay in connection with a claim for loss, accruing during the period beginning on the first day after receipt of a claim which CCC has determined to be in good order and ending on the day on which payment is made on such claim for loss.

(t) *Payment guarantee.* An agreement under which CCC, in consideration of a fee paid, and in reliance upon the statements and declarations of the exporter, subject to the terms set forth in the written guarantee, this subpart, and any applicable Program Announcements or Notices to Participants, agrees to pay the exporter or the exporter's assignee in the event of a default by a foreign bank on its payment obligation under the foreign bank letter of credit issued in connection with a guaranteed sale or under the foreign bank's related obligation.

(u) *Notice to participants.* A notice issued by CCC by public press release which serves one or more of the following functions: to remind participants of the requirements of the program; to clarify the program requirements contained in these regulations in a manner which is not inconsistent with the regulations; to instruct exporters to provide additional information in applications for payment guarantees under specific country and/or commodity allocations; and to supplement the provisions of a payment guarantee, in a manner not inconsistent with these regulations, before the exporter's application for such payment guarantee is approved.

(v) *Port value.* (1) Where CCC announces coverage on a FAS or FOB basis and:

(i) Where the commodity is sold on a FAS or FOB basis, U.S. point of export, the value, FAS or FOB basis, U.S. point of export, of the export sale, including the upward tolerance, if any, as provided by the export sales contract, reduced by the value of any discounts or allowances granted to the importer in connection with such sale; or

(ii) Where the commodity was sold on a CFR or CIF basis, point of entry, the value of the export sale, FAS or FOB, point of export, including the upward tolerance, if any, as provided by the export sales contract, is measured by the CFR or CIF value of the agricultural commodity less the value of ocean freight and, in the case of CIF sales, less the value of marine and war risk insurance, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity; or

(2) Where CCC announces coverage on a CFR or CIF basis and where the commodity was sold on CFR or CIF basis, point of entry, the total value of the export sale, CFR or CIF basis, point of entry, including the upward tolerance, if any, as provided by the export sales contract, reduced by the value of any discounts or allowances granted to the importer in connection with the sale of the commodity.

(3) When a CFR or CIF commodity export sale involves the performance of non-freight services to be performed outside the United States (e.g., services such as bagging bulk cargo), which are not normally included in ocean freight contracts, the value of such services and any related materials not exported from the U.S. with the commodity must also be deducted from the CFR or CIF sales price in determining the port value.

(w) *Program announcement.* An announcement issued by CCC which provides information on specific country and commodity allocations and may identify eligible agricultural commodities and countries, length of credit periods which may be covered, specify dollar limitations for CCC exposure in particular countries, and include other information and requirements.

(x) *Related obligation.* A contractual commitment by the foreign bank issuing the letter of credit in connection with an export sale to make payment(s) on principal amount(s), plus any contractual interest, in U.S. dollars, to a financial institution in the United States on deferred payment terms consistent with those permitted under CCC's credit guarantee programs. The U.S. financial institution is entitled to such payments because it has financed the obligation arising under such letter of credit.

(y) *United States or U.S.* All of the 50 states, the District of Columbia, and the territories and possessions of the United States.

(z) *U.S. agricultural commodity.* (1) With respect to any agricultural commodity other than a product of an agricultural commodity, an agricultural commodity entirely produced in the United States; and

(2) With respect to a product of an agricultural commodity:

(i) A product all of the agricultural components of which are entirely produced in the United States; or

(ii) Any other product the Secretary may designate that contains any agricultural component that is not entirely produced in the United States if:

(A) Such component is an added, de minimis component;

(B) Such component is not commercially produced in the United States; and

(C) There is no acceptable substitute for such component that is commercially produced in the United States (For purposes of this paragraph, fish entirely produced in the United States include fish harvested by a documented fishing vessel as defined in title 46, United States Code, in waters that are not waters [including the territorial sea] of a foreign country).

(aa) *USDA.* United States Department of Agriculture.

§ 1493.30 Information required for program participation.

Before CCC will accept an application for a payment guarantee under either the GSM–102 program or the GSM–103 program, the applicant must qualify for participation in these programs. Based upon the information submitted by the applicant and other publicly available sources, CCC will determine whether the applicant is eligible for participation in the programs.

(a) *Submission of documentation.* In order to qualify for participation in the GSM–102 and GSM–103 programs, an applicant must submit to CCC, at the address specified in the Contacts P/R, the following information:

(1) The address of the applicant's headquarters office and the name and address of an agent in the U.S. for the service of process;

(2) The legal form of doing business of the applicant, e.g., sole proprietorship, partnership, corporation, etc.

(3) The place of incorporation of the applicant, if the applicant is a corporation;

(4) The name and U.S. address of the office(s) of the applicant, and statement indicating whether the applicant is a U.S. domestic corporation, a foreign corporation or another foreign entity. If the applicant has multiple offices, the address included in the information should be that which is pertinent to the particular GSM–102 or GSM–103 export sale contemplated by the applicant;

(5) A certified statement describing the applicant's participation, if any, during the past three years in U.S. Government programs, contracts or agreements; and

(6) A certification that: "I certify, to the best of my knowledge and belief, that neither [name of applicant] nor any of its principals has been debarred,

suspended, or proposed for debarment from contracting with or participating in programs administered by any U.S. Government agency. ["Principals," for the purpose of this certification, means officers; directors; owners of five percent or more of stock; partners; and persons having primary management or supervisory responsibility within a business entity (e.g., general manager, plant manager, head of a subsidiary division, or business segment, and similar positions).] I further agree that, should any such debarment, suspension, or notice of proposed debarment occur in the future, [name of applicant] will immediately notify CCC."

(b) *Previous qualification.* Any exporter that has previously qualified under this section may submit applications for GSM–102 or GSM–103 payment guarantees. Each application must include the statement required by § 1493.40(a)(18) incorporating the certifications of § 1493.50, including the certification in § 1493.50(e) that the information previously provided pursuant to paragraph (a) of this section has not changed. If the exporter is unable to provide such certification, such exporter must update the information required by paragraph (a) of this section which has changed and certify that the remainder of the information previously provided has not changed.

(c) *Additional submissions.* CCC will promptly notify applicants that have submitted information required by this section whether they have qualified to participate in the program. Any applicant failing to qualify will be given an opportunity to provide additional information for consideration by CCC.

(d) *Ineligibility for program participation.* An applicant may be ineligible to participate in the GSM–102 or GSM–103 programs if:

(1) Such applicant is currently debarred, suspended, or proposed for debarment from contracting with or participating in any program administered by a U.S. Government agency; or

(2) Such applicant is controlled or can be controlled, in whole or in part, by any individuals or entities currently debarred, suspended or proposed for debarment from contracting with or participating in programs administered by any U.S. Government agency.

§ 1493.40 Application for payment guarantee.

(a) A firm export sale must exist before an exporter may submit an application for a payment guarantee. An application for a payment guarantee may be submitted in writing or may be made by telephone, but, if made by telephone, it must be confirmed in writing to the office specified in the Contacts P/R. An application must identify the name and address of the exporter and include the following information:

(1) Name of the destination country.

(2) Name and address of the importer.

(3) Name and address of the intervening purchaser, if any, and a statement that the commodity will be shipped directly to the importer in the destination country.

(4) Date of sale.

(5) Exporter's sale number.

(6) Delivery period as agreed between the exporter and the importer.

(7) A full description of the commodity (including packaging, if any).

(8) Mean quantity, contract loading tolerance and, if necessary, a request for CCC to reserve coverage up to the maximum quantity permitted by the contract loading tolerance.

(9) Unit sales price of the commodity, or a mechanism to establish the price, as agreed between the exporter and the importer. If the commodity was sold on the basis of CFR or CIF, the actual (if known at the time of application) or estimated value of freight and, in the case of sales made on a CIF basis, the actual (if known at the time of application) or estimated value of marine and war risk insurance, must be specified.

(10) Description and value of discounts and allowances, if any.

(11) Port value (includes upward loading tolerance, if any).

(12) Guaranteed value.

(13) Guarantee fee.

(14) Name and location of the foreign bank issuing the letter of credit.

(15) The term length for the credit being extended and the intervals between principal payments for each shipment to be made under the export sale.

(16) A statement indicating whether any portion of the export sale for which the exporter is applying for a payment guarantee is also being used as the basis for an application for participation in any of the following CCC or USDA export programs: Export Enhancement Program, Dairy Export Incentive Program, Sunflowerseed Oil Assistance Program, or Cottonseed Oil Assistance Program. The number of the Agreement assigned by USDA under one of these programs should be included, as applicable.

(17) Other information as specified in Notices to Participants, as applicable.

(18) The exporter's statement, "All Section 1493.50 Certifications Are Being Made In This Application" which, when included in the application by the exporter, will constitute a certification that it is in compliance with all the requirements set forth in § 1493.50.

(b) An application for a payment guarantee may be approved as submitted, approved with modifications agreed to by the exporter, or rejected by the GSM. In the event that the application is approved, the GSM will cause a payment guarantee to be issued in favor of the exporter. Such payment guarantee will become effective at the time specified in § 1493.60(b). If, based upon a price review, the unit sales price of the commodity does not fall within the prevailing commercial market level ranges, as determined by CCC, the application will not be approved.

§ 1493.50 Certification requirements for obtaining payment guarantee.

By providing the statement in § 1493.40(a)(18), the exporter is certifying that the information provided in the application is true and correct and, further, that all requirements set forth in this section have been or will be met. The exporter will be required to provide further explanation or documentation with regard to applications that do not include this statement. The exporter, in submitting an application for a payment guarantee and providing the statement set forth in § 1493.40(a)(18), certifies that:

(a) The agricultural commodity or product to be exported under the payment guarantee is a United States agricultural commodity or a product thereof, as defined in § 1493.20(z);

(b) There have not been and will not be any corrupt payments or extra sales services or other items extraneous to the transaction provided, financed, or guaranteed in connection with the transaction, and that the transaction complies with applicable United States law;

(c) If the agricultural commodity is vegetable oil or a vegetable oil product, that none of the agricultural commodity or product has been or will be used as a basis for a claim of a refund, as drawback, pursuant to section 313 of the Tariff Act of 1930, 19 U.S.C. 1313, of any duty, tax or fee imposed under Federal law on an imported commodity or product;

(d) No person or selling agency has been employed or retained to solicit or secure the payment guarantee, and that there is no agreement or understanding for a commission, percentage, brokerage, or contingent fee, except in the case of bona fide employees or bona fide established commercial or selling

agencies maintained by the exporter for the purpose of securing business; and

(e) The information provided pursuant to § 1493.30 has not changed, the exporter still meets all of the qualification requirements of § 1493.30, and the exporter will immediately notify CCC if there is a change of circumstances which would cause it to fail to meet such requirements. If the exporter breaches or violates these certifications with respect to a GSM–102 or GSM–103 payment guarantee, CCC will have the right, notwithstanding any other rights provided under this subpart, to annul guarantee coverage for any commodities not yet exported and/or to proceed against the exporter.

§ 1493.60 Payment guarantee.

(a) *CCC's obligation.* The payment guarantee will provide that CCC agrees to pay the exporter or the exporter's assignee an amount not to exceed the guaranteed value, plus eligible interest, in the event that the foreign bank fails to pay under the foreign bank letter of credit or the related obligation. Payment by CCC will be in U.S. dollars.

(b) *Period of guarantee coverage.* The payment guarantee will apply to the period beginning either on the date(s) of export(s) or on the date when interest begins to accrue, whichever is earlier, and will continue during the credit term specified in the payment guarantee or amendments thereto. However, the payment guarantee becomes effective on the date(s) of export(s) of the agricultural commodities or products thereof specified in the exporter's application for a payment guarantee.

(c) *Terms of the CCC payment guarantee.* The terms of CCC's coverage will be set forth in the payment guarantee, as approved by CCC, and will include the provisions of this subpart, which may be supplemented by any Program Announcements and/or Notices to Participants in effect at the time the payment guarantee is approved by CCC.

(d) *Final date to export.* The final date to export shown on the payment guarantee will be one month, as determined by CCC, after the contractual deadline for shipping.

(e) *Reserve coverage for loading tolerances.* The exporter may apply for a payment guarantee and, if coverage is available, pay the guarantee fee, based at least on, the amount of the lower loading tolerance of the export sales contract; however, the exporter may also request that CCC reserve additional guarantee coverage to accommodate up to the amount of the upward loading tolerance specified in the export sales contract. If such additional guarantee coverage is available at the time of application and CCC determines to make such reservation, it will so indicate to the exporter. In the event that the exporter ships a quantity greater than the amount on which the guarantee fee was paid (i.e., lower loading tolerance), it may obtain the additional coverage from CCC, up to the amount of the upward loading tolerance, by filing for an amendment to the payment guarantee, and by paying the additional amount of fee applicable. If such amendment to the payment guarantee is not filed with CCC by the exporter within 30 days after the date of the last export against the sales contract, CCC may determine not to reserve the coverage originally set aside for the exporter.

(f) *Ineligible exports.* Commodities with a date of export prior to the date of receipt by CCC of the exporter's telephonic or written application for a payment guarantee, or with a date of export made after the final date for export shown on the payment guarantee or any amendments thereof, are ineligible for GSM–102 or GSM–103 guarantee coverage, except where it is determined by the GSM to be in the best interests of CCC to provide guarantee coverage on such commodities.

(g) *Foreign agricultural component.* CCC may approve payment guarantees under this subpart only in connection with sales of United States agricultural commodities as defined in § 1493.20(z). CCC may not provide guarantee coverage under this subpart on credit extended for the value of any foreign agricultural component.

(h) *Additional requirements.* The payment guarantee may contain such additional terms, conditions, and limitations as deemed necessary or desirable by the GSM. Such additional terms, conditions or qualifications, as stated in the payment guarantee are binding on the exporter or the exporter's assignee.

(i) *Amendments.* A request for an amendment of a payment guarantee may be submitted only by the exporter (with the concurrence of the assignee, if any). CCC will consider such a request only if the amendment sought is consistent with this subpart and any applicable Program Announcements and Notices to Participants. Amendments may include, but will not be limited to, a change in the credit period and an extension of time to export. Any amendment to the payment guarantee, particularly those that result in an increase in CCC's liability under the payment guarantee, may result in an increase in the guarantee fee. (Technical corrections or corrections of a clerical error which may be submitted by the exporter or the exporter's assignee are not viewed as amendments.)

§ 1493.70 Guarantee rates and fees.

(a) *Guarantee fee rates.* The payment guarantee fee rates will be based upon the length of the payment terms provided for in the export sale contract, the degree of risk that CCC assumes, as determined by CCC, and any other factors which CCC determines appropriate for consideration. A current schedule of the guarantee fee rates charged by CCC under GSM–102 and GSM–103 will be available upon request from the FAS/USDA office specified in the Contacts P/R.

(b) *Calculation of fee.* The guarantee fee will be computed by multiplying the guaranteed value by the guarantee fee rate.

(c) *Payment of fee.* The exporter shall remit, with his written application, the full amount of the guarantee fee. Applications will not be approved until the guarantee fee has been received by CCC. The exporter's check for the guarantee fee shall be made payable to CCC and mailed or delivered by courier to the office specified in the Contacts P/R.

(d) *Refunds of fee.* Guarantee fees paid in connection with approved applications will ordinarily not be refundable. CCC's approval of the application will be final and refund of the guarantee fee will not be made after approval unless the GSM determines that such refund will be in the best interest of CCC. If the application for a payment guarantee is not approved or is approved only for a part of the guarantee coverage requested, a full or pro rata refund of the fee remittance will be made.

§ 1493.80 Evidence of export.

(a) *Report of export.* The exporter is required to provide CCC an evidence of export report for each shipment made under the payment guarantee. This report must include the following:

(1) Payment guarantee number

(2) Date of export

(3) Exporter's sale number

(4) Exported value

(5) Quantity

(6) A full description of the commodity exported

(7) Unit sales price received for the commodity exported and the basis (e.g., FOB, CFR, CIF). Where the unit sales price at export differs from the unit sales price indicated in the exporter's application for a payment guarantee, the exporter is also required to submit a statement explaining the reason for the difference.

(8) Description and value of discounts and allowances, if any.

(9) Number of the Agreement assigned by USDA under another program if any portion of the export sale was also approved for participation in the following CCC or USDA export programs: Export Enhancement Program, Dairy Export Incentive Program, Sunflowerseed Oil Assistance Program, or Cottonseed Oil Assistance Program.

(10) The exporter's statement, "All § 1493.90 Certifications Are Being Made In This Evidence Of Export" which, when included in the evidence of export by the exporter, will constitute a certification that it is in compliance with all the requirements set forth in § 1493.90.

(b) *Time limit for submission of evidence of export.* The exporter must provide a written report to the office specified in the Contacts P/R within 60 calendar days if the export was by rail or truck; or 30 calendar days if the export was by any other carrier. The time period for filing a report of export will commence upon each date of export of the commodity covered under a payment guarantee. If the evidence of export report is not received by CCC within the time period for filing, the payment guarantee will become null and void only if and only to the extent that failure to make timely filing resulted, or would be likely to result, in:

(1) Significant financial harm to CCC;

(2) The undermining of an essential regulatory purpose of the program;

(3) Obstruction of the fair administration of the program; or

(4) A threat to the integrity of the program. The time limit for submission of an evidence of export report may be extended if such extension is determined by the GSM to be in the best interests of CCC.

(c) *Export sales reporting.* Exporters may have a mandatory reporting responsibility under Section 602 of the Agricultural Trade Act of 1978 (7 U.S.C. 5712), as amended by Section 1531 of the Food, Agriculture, Conservation, and Trade Act of 1990 for exports of wheat and wheat flour, feed grains, oilseeds, cotton, and other agricultural commodities and products thereof.

§ 1493.90 Certification requirements for the evidence of export.

By providing the statement contained in § 1493.80(a)(10), the exporter is certifying that the information provided in the evidence of export report is true and correct and, further, that all requirements set forth in this section have been or will be met. The exporter will be required to provide further explanation or documentation with regard to reports that do not include this statement. If the exporter breaches or violates these certifications with respect to a GSM–102 or GSM–103 payment guarantee, CCC will have the right, notwithstanding any other rights provided under this subpart, to annul guarantee coverage for any commodities not yet exported and/or to proceed against the exporter. The exporter, in submitting the evidence of export and providing the statement set forth in § 1493.80(a)(10), certifies that:

(a) The agricultural commodity or product exported under a payment guarantee is a United States agricultural commodity or a product thereof, as defined in § 1493.20(z);

(b) Agricultural commodities of the grade, quality and quantity called for in the exporter's sales contract with the importer have been exported to the country specified in the payment guarantee;

(c) A letter of credit has been opened in favor of the exporter by the foreign bank shown in the payment guarantee to cover the port value of the commodity exported;

(d) There have not been and will not be any corrupt payments or extra sales services or other items extraneous to the transaction provided, financed, or guaranteed in connection with the transaction, and that the transaction complies with applicable United States law; and

(e) The information provided pursuant to § 1493.30 has not changed, the exporter still meets all of the qualification requirements of § 1493.30 and the exporter will immediately notify CCC if there is a change of circumstances which would cause it to fail to meet such requirements.

§ 1493.100 Proof of entry.

(a) *Diversion.* The diversion of commodities covered by a GSM–102 or GSM–103 payment guarantee to a country other than that shown on the payment guarantee is prohibited, unless expressly authorized by the GSM.

(b) *Records of proof of entry.* Exporters must obtain and maintain records of an official or customary commercial nature and grant authorized USDA officials access to such documents or records as may be necessary to demonstrate the arrival of the agricultural commodities exported in connection with the GSM–102 or GSM–103 programs in the country that was the intended country of destination of such commodities. Records demonstrating proof of entry must be in English or be accompanied by a certified or other translation acceptable to CCC. Records acceptable to meet this requirement include an original certification of entry signed by a duly authorized customs or port official of the importing country, by the importer, by an agent or representative of the vessel or shipline which delivered the agricultural commodity to the importing country, or by a private surveyor in the importing country, or other documentation deemed acceptable by the GSM showing:

(1) That the agricultural commodity entered the importing country;

(2) The identification of the export carrier;

(3) The quantity of the agricultural commodity;

(4) The kind, type, grade and/or class of the agricultural commodity; and

(5) The date(s) and place(s) of unloading of the agricultural commodity in the importing country. [Records of proof of entry need not be submitted with a claim for loss, except as may be provided in § 1493.110(b)(4)(ii).]

§ 1493.110 Notice of default and claims for loss.

(a) *Notice of default.* If the foreign bank issuing the letter of credit fails to make payment pursuant to the terms of the foreign bank letter of credit or related obligation, the exporter or the exporter's assignee must submit a notice of default to CCC as soon as possible, but not later than 10 calendar days after the date that payment was due from the foreign bank (the due date). A notice of default must be submitted in writing to the Treasurer, CCC, at the address specified in the Contacts P/R. If the exporter or the exporter's assignee fails to promptly notify CCC of defaults in accordance with this paragraph, CCC may make the payment guarantee null and void with respect to any payment(s) applicable to such default. This time limit may be extended only under extraordinary circumstances and if such extension is determined by the Controller, CCC, to be in the best interests of CCC. The notice of default must include:

(1) Payment guarantee number;

(2) Name of the country;

(3) Name of the defaulting bank;

(4) Due date;

(5) Total amount of the defaulted payment due, indicating separately the amounts for principal and interest;

(6) Date of foreign bank's refusal to pay, if applicable; and

(7) Reason for foreign bank's refusal to pay, if known.

(b) *Filing a claim for loss.* A claim for a loss by the exporter or the exporter's assignee will not be paid if it is made later than six months from the due date

of the defaulted payment. A claim for loss must be submitted in writing to the Treasurer, CCC, at the address specified in the Contacts P/R. The claim for loss must include the following information and documents:

(1) Payment guarantee number;

(2) A certification that the scheduled payment has not been received;

(3) A certification of the amount of accrued interest in default, the date interest began to accrue, and the interest rate on the foreign bank obligation applicable to the claim;

(4) A copy of each of the following documents, with a cover document containing a signed certification by the exporter or the exporter's assignee that each page of each document is a true and correct copy:

(i) (A) The foreign bank letter of credit securing the export sale; and

(B) If applicable, the document(s) evidencing the related obligation owed by the foreign bank to the assignee financial institution which is related to the foreign bank's letter of credit issued in favor of the exporter. Such related obligation must be demonstrated in one of the following ways:

(1) The related obligation, including a specific promise to pay on deferred payment terms, may be contained in the letter of credit as a special instruction from the issuing bank directly to the U.S. financial institution to refinance the amounts paid by the U.S. financial institution for obligations financed according to the tenor of the letter of credit; or

(2) The related obligation may be memorialized in a separate document(s) specifically identified and referred to in the letter of credit as the agreement under which the foreign bank is obliged to repay the U.S. financial institution on deferred payment terms; or

(3) The letter of credit payment obligations may be specifically identified in a separate document(s) setting forth the related obligation, or in a duly executed amendment thereto, as having been financed by the U.S. financial institution pursuant to, and subject to repayment in accordance with the terms of, such related obligation; or

(4) The related obligation may be memorialized in the form of a promissory note executed by the foreign bank issuing the letter of credit in favor of the U.S. financial institution submitting the claim;

(ii) Depending upon the method of shipment, the negotiable ocean carrier or intermodal bill(s) of lading signed by the shipping company with the onboard ocean carrier date for each shipment, the airway bill, or, if shipped by rail or truck, the entry certificate or similar document signed by an official of the importing country;

(iii) (A) The exporter's invoice showing, as applicable, the FAS, FOB, CFR or CIF values; or

(B) If there was an intervening purchaser, both the exporter's invoice to the intervening purchaser and the intervening purchaser's invoice to the importer;

(iv) An instrument, in form and substance satisfactory to CCC, subrogating to CCC the respective rights of the exporter and the exporter's assignee, if applicable, to the amount of payment in default under the applicable export sale. The instrument must reference the applicable foreign bank letter of credit and the related obligation, if applicable; and

(v) A copy of the report(s) of export previously submitted by the exporter to CCC pursuant to § 1493.80(a).

(c) *Subsequent claims for defaults on installments.* If the initial claim is found in good order, the exporter or an exporter's assignee need only provide all of the required claims documents with the initial claim relating to a covered transaction. For subsequent claims relating to failure of the foreign bank to make scheduled installments on the same export shipment, the exporter or the exporter's assignee need only submit to CCC a notice of such failure containing the information stated in paragraph (b)(1), (2), and (3) of this section; an instrument of subrogation as per paragraph (b)(4)(iv) of this section, and including the date the original claim was filed with CCC.

§ 1493.120 Payment for loss.

(a) *Determination of CCC's liability.* Upon receipt in good order of the information and documents required under § 1493.110, CCC will determine whether or not a loss has occurred for which CCC is liable under the applicable payment guarantee, this subpart and any applicable supplemental Program Announcements and Notices to Participants. If CCC determines that it is liable to the exporter and/or the exporter's assignee, CCC will pay the exporter or the exporter's assignee in accordance with paragraphs (b) and (c) of this section.

(b) *Amount of CCC's liability.* CCC's maximum liability for any claims for loss submitted with respect to any payment guarantee, not including any late interest payments due in accordance with paragraph (c) of this section, will be limited to the lesser of:

(1) The guaranteed value as stated in the payment guarantee, plus eligible interest; or

(2) The guaranteed percentage (as indicated in the payment guarantee) of the exported value indicated in the evidence of export, plus eligible interest.

(c) *Late interest payment.* If a claim is not paid within one day of receipt of a claim which CCC has determined to be in good order, late interest will accrue in favor of the exporter or the exporter's assignee beginning with the first day after the day of reciept of a claim found by CCC to be in good order and continuing until and including the date that payment is made by CCC. Late interest will be paid on the guaranteed amount, as determined by paragraphs (b)(1) and (2) of this section, and will be calculated based on the average investment rate of the most recent Treasury 91-day bill auction as announced by the Department of Treasury as of the due date.

(d) *Accelerated payments.* CCC will pay claims only for losses on amounts not paid as scheduled. CCC will not pay claims for amounts due under an accelerated payment clause in the export sales contract, the foreign bank's letter of credit, or any obligation owed by the foreign bank to the assignee U.S. financial institution which is related to the foreign bank's letter of credit issued in favor of the exporter, unless it is determined to be in the best interests of CCC by the Controller, CCC. Notwithstanding the foregoing, CCC at its option may declare the entire amount of the unpaid balance, plus accrued interest, in default and make payment to the exporter or the exporter's assignee in addition to such other claimed amount as may be due from CCC.

(e) *Action against the assignee.* Notwithstanding any other provision in this subpart to the contrary, with regard to commodities covered by a payment guarantee, CCC will not hold the assignee responsible or take any action or raise any defense against the assignee for any action, omission, or statement by the exporter of which the assignee has no knowledge, provided that:

(1) The exporter complies with the reporting requirements under § 1493.80 and § 1493.90, excluding post-export adjustments (i.e., corrections to evidence of export reports); and

(2) The exporter or the exporter's assignee furnishes the statements and documents specified in § 1493.110.

§ 1493.130 Recovery of losses.

(a) *Notification.* Upon payment of loss to the exporter or the exporter's assignee, CCC will notify the foreign bank of CCC's rights under the subrogation agreement to recover all moneys in default.

(b) *Receipt of monies.* (1) In the event that monies for a defaulted payment are recovered by the exporter or the exporter's assignee from the importer, the foreign bank, or any other source whatsoever, such monies shall be immediately paid to the Treasurer, CCC. If such monies are not received by CCC within 15 business days from the date of recovery by the exporter or the exporter's assignee, the exporter or the exporter's assignee will owe to CCC interest from the date of recovery to the date of receipt by CCC. This interest will be calculated based on the latest average investment rate of the most recent Treasury 91-day bill auction, as announced by the Department of Treasury, in effect on the date of recovery and will accrue from such date to the date of payment by the exporter or the exporter's assignee to CCC. Such interest will be charged only on CCC's share of the recovery.

(2) If CCC recovers monies that should be applied to a payment guarantee for which a claim has been paid by CCC, CCC will pay the holder of the payment guarantee its pro rata share immediately, provided that the required information necessary for determining pro rata distribution has been furnished. If payment is not made by CCC within 15 business days from the date of recovery or 15 business days from receiving the required information for determining pro rata distribution, whichever is later, CCC will pay interest calculated on the latest average investment rate of the most recent Treasury 91-day bill auction, as announced by the Department of Treasury, in effect on the date of recovery and such interest will accrue from such date to the date of payment by CCC. The interest will apply only to the portion of the recovery payable to the holder of the payment guarantee.

(c) *Allocation of recoveries.* Recoveries made by CCC from the importer or the foreign bank, and recoveries received by CCC from the exporter, the exporter's assignee, or any other source whatsoever, will be allocated by CCC to the exporter or the exporter's assignee and to CCC on a pro rata basis determined by their respective interests in such recoveries. The respective interest of each party will be determined on a pro rata basis, based on the combined amount of principal and interest in default. Once CCC has paid out a particular claim under a GSM–102 or GSM–103 payment guarantee, CCC prorates any collections it receives and shares these collections proportionately with the holder of the guarantee until both CCC and the holder of the guarantee have been reimbursed in full. Appendix A to § 1493.130—Illustration of Pro Rata Allocation of Recoveries—provides an example of the methodology used by CCC in applying this paragraph (c).

(d) *Liabilities to CCC.* Notwithstanding any other terms of the payment guarantee, the exporter may be liable to CCC for any amounts paid by CCC under the payment guarantee when and if it is determined by CCC that the exporter has engaged in fraud, or has been or is in material breach of any contractual obligation, certification or warranty made by the exporter for the purpose of obtaining the payment guarantee or for fulfilling obligations under GSM–102 or GSM–103. Further, the exporter's assignee may be liable to CCC for any amounts paid by CCC under the payment guarantee when and if it is determined by CCC that the exporter's assignee has engaged in fraud or otherwise violated program requirements.

(e) *Good faith.* The violation by an exporter of the certifications in § 1493.50(b) and § 1493.90(d) or the failure of an exporter to comply with the provisions of § 1493.100 or § 1493.140(e) will not affect the validity of any payment guarantee with respect to an assignee which had no knowledge of such violation or failure to comply at the time such exporter applied for the payment guarantee or at the time of assignment of the payment guarantee.

(f) *Cooperation in recoveries.* Upon payment by CCC of a claim to the exporter or the exporter's assignee, the exporter or the exporter's assignee will cooperate with CCC to effect recoveries from the foreign bank and/or the importer.

Appendix A to § 1493.130—Illustration of Pro Rata Allocation of Recoveries

The following example illustrates CCC's policy, as set forth in § 1493.130(c), regarding pro rata sharing of recoveries made for claims filed under the GSM–102 and GSM–103 programs. A typical case might be as follows:

1. The U.S. bank enters into a $300,000 three-year credit arrangement with the foreign bank calling for equal annual payments of principal and annual payments of interest at a rate of 10 percent per annum and a penalty interest rate of 12 percent per annum on overdue amounts until the overdue amount is paid.

2. The foreign bank fails to make the final principal payment of $100,000 and an interest payment of $10,000, both due on January 31.

3. On February 10, the U.S. bank files a claim in good order with CCC.

4. CCC's guarantee states that CCC's maximum liability is limited to 98 percent of the principal amount due ($98,000) and interest at a rate of 8 percent per annum (basis 365 days) on 98 percent of the principal ($7,840).

5. CCC pays the claim on February 22.

6. The latest bond equivalent rate of the 52-week Treasury bill auction average which has been published by the Department of Treasury in effect on the date of nonpayment (January 31) is 9 percent. The latest investment rate of the 91-day Treasury Bill auction average which has been published by the Department of Treasury in effect on the date of nonpayment by CCC (February 11) is 7 percent.

Computation of Obligations

Using the above case, CCC's payment to the holder of the payment guarantee would be computed as follows:

1. CCC's Obligation under the Payment Guarantee:

(a)	Principal coverage—(98% × $100,000)	$98,000.00
(b)	Interest coverage—(8% × $98,000)	$7,840.00
		$105,840.00
(c)	Late interest due from CCC (7% per annum for 11 days × $105,840)	$223.28
(d)	Amount paid by CCC on February 22	$106,063.28

2. Foreign Bank's Obligation under the Letter of Credit or the Related Obligation:

(a)	Principal due January 31	$100,000.00
	Interest due January 31 (10% × $100,000)	$10,000.00
	Amount owed by foreign bank as of January 31	$110,000.00
(b)	Penalty interest due (12% per annum for 22 days × $100,000)	$795.62
(c)	Amount owed by foreign bank as of February 22	$110,795.62

3. Amount of Foreign Bank's Obligation Not Covered by CCC's Payment Guarantee: $4,668.55

Computation of Pro Rata Sharing in Recovery of Losses

In establishing each party's respective interest in any recovery of losses, the total amount due under the foreign bank obligation would be determined as of the date the claim is paid by CCC (February 22). Using the above example in which the amount owed by the foreign bank is $110,000, CCC would be entitled to 95.75 percent ($106,063.07 divided by $110,765.62) and the holder of the payment guarantee would be entitled to 4.21 percent ($4,668.55 divided by $110,795.62) of any recoveries of losses after settlement of the claim. Since in this example, the losses were recovered after the claim has been paid by CCC, § 1493.130(b) would apply.

§ 1493.140 Miscellaneous provisions.

(a) *Assignment.* (1) The exporter may assign the proceeds which are, or may become, payable by CCC under a payment guarantee or the right to such proceeds only to a financial institution

in the U.S. The assignment must cover all amounts payable under the payment guarantee not already paid, may not be made to more than one party, and may not, unless approved in advance by CCC, be:

(i) Made to one party acting for two or more parties or

(ii) Subject to further assignment.

(2) An original and two copies of the written notice of assignment signed by the parties thereto must be filed by the assignee with the Treasurer, CCC, at the address specified in the Contacts P/R.

(3) Receipt of the notice of assignment will ordinarily be acknowledged to the exporter and its assignee in writing by an officer of CCC. In cases where a financial institution is determined to be ineligible to receive an assignment, in accordance with paragraph (b) of this section, CCC will provide notice thereof, to the financial institution and to the exporter issued the payment guarantee, in lieu of an acknowledgment of assignment.

(4) The name and address of the assignee must be included on the written notice of assignment.

(b) *Ineligibility of financial institutions to receive an assignment.* A financial institution will be ineligible to receive an assignment of proceeds which may become payable under a payment guarantee if, at the time of assignment, such financial institution:

(1) Is not in sound financial condition, as determined by the Treasurer of CCC; or

(2) Is the financial institution issuing the letter of credit or branch, agency, or subsidiary of such institution; or

(3) Is owned or controlled by an entity that owns or controls the financial institution issuing the letter of credit; or

(4) Is the U.S. parent of the foreign bank issuing the letter of credit.

(c) *Ineligibility of financial institutions to receive proceeds.* A financial institution will be ineligible to receive proceeds payable under a payment guarantee approved by CCC if such financial institution:

(1) At the time of assignment of a payment guarantee, is not in sound financial condition, as determined by the Treasurer of CCC;

(2) Is the financial institution issuing the letter of credit or a branch, agency, or subsidiary of such institution; or

(3) Is owned or controlled by an entity that owns or controls the financial institution issuing the letter of credit; or

(4) Is the U.S. parent of the foreign bank issuing the letter of credit.

(d) *Alternative satisfaction of payment guarantees.* CCC may, with the agreement of the exporter (or if the right to proceeds payable under the payment guarantee has been assigned, with the agreement of the exporter's assignee), establish procedures, terms and/or conditions for the satisfaction of CCC's obligations under a payment guarantee other than those provided for in this subpart if CCC determines that those alternative procedures, terms, and/or conditions are appropriate in rescheduling the debts arising out of any transaction covered by the payment guarantee and would not result in CCC paying more than the amount of CCC's obligation.

(e) *Maintenance of records and access to premises.* (1) For a period of five years after the date of expiration of the coverage of a payment guarantee, the exporter or the exporter's assignee, as applicable, must maintain and make available all records pertaining to sales and deliveries of and extension of credit for agricultural commodities exported in connection with a GSM–102 or GSM–103 payment guarantee, including those records generated and maintained by agents, intervening purchasers, and related companies involved in special arrangements with the exporter. The Secretary of Agriculture and the Comptroller General of the United States, through their authorized representatives, must be given full and complete access to the premises of the exporter or the exporter's assignee, as applicable, during regular business hours from the effective date of the payment guarantee until the expiration of such five-year period to inspect, examine, audit, and make copies of the exporter's, exporter's assignee's, agent's, intervening purchaser's or related company's books, records and accounts concerning transactions relating to the payment guarantee, including, but not limited to, financial records and accounts pertaining to sales, inventory, processing, and administrative and incidental costs, both normal and unforeseen. During such period, the exporter or the exporter's assignee may be required to make available to the Secretary of Agriculture or the Comptroller General of the United States, through their authorized representatives, records that pertain to transactions conducted outside the program, if, in the opinion of the GSM, such records would pertain directly to the review of transactions undertaken by the exporter in connection with the payment guarantee.

(2) The exporter must maintain the proof of entry required by § 1493.100(b), and must provide access to such documentation if requested by the Secretary of Agriculture or his authorized representative for the five-year period specified in paragraph (e)(1) of this section.

(f) *Responsibility of program participants.* It is the responsibility of all program participants to review, and fully acquaint themselves with, all regulations, Program Announcements, and Notices to Participants relating to the GSM–102 or GSM–103 program, as applicable. Applicants for payment guarantees under these programs are hereby on notice that they will be bound by any terms contained in applicable Program Announcements or Notices to Participants issued prior to the date of approval of a payment guarantee.

(g) *Submission of documents by principal officers.* All required submissions, including certifications, applications, reports, or requests (i.e., requests for amendments), by exporters or exporters' assignees under this subpart must be signed by a principal or officer of the exporter or exporter's assignee or their authorized designee(s). In cases where the designee is acting on behalf of the principal or the officer, the signature must be accompanied by: wording indicating the delegation of authority or, in the alternative, by a certified copy of the delegation of authority; and the name and title of the authorized person or officer. Further, the exporter or exporter's assignee must ensure that all information/reports required under these regulations are submitted within the required time limits. If requested in writing, CCC will acknowledge receipt of a submission by the exporter or the exporter's assignee. If acknowledgment of receipt is requested, the exporter or exporter's assignee must submit an extra copy of each document and a stamped self-addressed envelope for return by U.S. mail. If courier services are desired for the return receipt, the exporter or exporter's assignee must also submit a self-addressed courier service order which includes the recipient's billing code for such service.

(h) *Officials not to benefit.* No member of or delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of the payment guarantee or to any benefit that may arise therefrom, but this provision shall not be construed to extend to the payment guarantee if made with a corporation for its general benefit.

(i) *OMB control number assigned pursuant to the Paperwork Reduction Act.* The information collection requirements contained in this part (7 CFR Part 1493) have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44 U.S.C. Chapter 35 and

have been assigned OMB Control Number 0551–0004.

Signed this 7th day of October, 1994 at Washington, DC.

Christopher E. Goldthwait,

General Sales Manager Commodity Credit Corporation.

[FR Doc. 94–25849 Filed 10–18–94; 8:45 am]

BILLING CODE 3410–10–F

federal register

Wednesday
October 19, 1994

Part III

Department of Health and Human Services

Public Health Service

National Institutes of Health Clinical Research Loan Repayment Program for Individuals From Disadvantaged Backgrounds; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

RIN 0905–ZA73

National Institutes of Health Clinical Research Loan Repayment Program for Individuals From Disadvantaged Backgrounds

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: Pending approval by the Office of Management and Budget (OMB) under the requirements of the Paperwork Reduction Act of 1980, the National Institutes of Health (NIH) announces the availability of educational loan repayment under the NIH Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds (the Program). The Program, which is authorized by Section 487E of the Public Health Service (PHS) Act (42 U.S.C. 288–5), as added by the National Institutes of Health Revitalization Act of 1993 (Pub. L. 103–43), provides for the repayment of the educational loan debt of health professionals who are from disadvantaged backgrounds, who have substantial debt relative to income, and who agree to conduct clinical research as employees of the NIH. The Program provides for the repayment of up to $20,000 of the principal and interest of the educational loans of such health professionals for each year of obligated service. The purpose of the Program is the recruitment and retention of highly qualified health professionals, who are from disadvantaged backgrounds, to clinical research careers at the NIH. Through this notice, the NIH invites health professionals, who are from disadvantaged backgrounds and interested in engaging in clinical research as NIH employees for at least two years, to apply for participation in the NIH Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds.

DATES: Interested persons may request information about the Program beginning on October 19, 1994.

ADDRESSES: Information regarding the requirements and application procedures for the Program may be obtained by calling or writing: Mr. Marc Horowitz, Director, NIH Loan Repayment Programs, National Institutes of Health, Federal Building, Room 102, 7550 Wisconsin Avenue, Bethesda, Maryland 20892–9905 (800–528–7689).

SUPPLEMENTARY INFORMATION: The National Institutes of Health Revitalization Act of 1993 (Pub. L. 103–43) was enacted on June 10, 1993, adding section 487E of the Public Health Service (PHS) Act (42 U.S.C. 288–5). Section 487E authorizes the Secretary to carry out a program of entering into contracts with appropriately qualified health professionals who are from disadvantaged backgrounds with substantial educational loan debt relative to income. Under such contracts, qualified health professionals agree to conduct clinical research as employees of the NIH for at least two years in consideration of the Federal Government agreeing to repay, for each year of service, not more than $20,000 of the principal and interest of the educational loans of such health professionals. This program is known as the NIH Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds (Clinical Research LRP).

Eligibility Criteria

Specific eligibility criteria with regard to participation in the Clinical Research LRP include the following:

(1) Participants must be United States citizens, nationals, or permanent residents;

(2) Participants must have a M.D., Ph.D., D.O., D.D.S., D.M.D., A.D.N./B.S.N., or equivalent degree;

(3) Participants must come from a disadvantaged background. An individual from a disadvantaged background is one who (a) comes from an environment that inhibited the individual from obtaining the knowledge, skill, and ability required to enroll in and graduate from a health professions school or (b) comes from a family with an annual income below a level based on low-income thresholds according to family size published by the U.S. Bureau of the Census, adjusted annually for changes in the Consumer Price Index, and adjusted by the Secretary for use in all health professions programs. The Secretary periodically publishes these income levels in the **Federal Register;**

(4) Participants must have qualifying educational debt in excess of 20 percent of their annual NIH salary at their expected date of program eligibility. In the case of U.S. Commissioned Corps officers, their NIH salary includes base pay plus quarters, subsistence, and variable housing allowances. Special and bonus pays, such as board certified, contract, and variable incentive pays, are not considered in the Clinical Research LRP's calculation of salary. For these employed under the Civil Service, salary does not include Physicians Comparability Allowances (PCAs). However, PCA recipients who are accepted into the Clinical Research LRP will have their PCAs reduced by the amount of loan repayments to be received. The expected date of program eligibility is the date by which the following conditions will be met: (a) An applicant agrees to begin clinical research as a NIH employee, and (b) the Secretary is expected to execute the Clinical Research LRP contract;

(5) Participants must be employees of the NIH. The following are NOT considered NIH employees: (a) Intramural Research Training Award (IRTA) recipients, (b) Visiting Fellows, (c) National Research Service Award (NRSA) recipients, (d) Guest Researchers or Special Volunteers, (e) NIH-National Research Council (NRC) Biotechnology Research Associates Program participants, and (f) Intergovernmental Personnel Act (IPA) participants;

(6) Participants may be appointed under a temporary or permanent employment mechanism, so long as their employment in a clinical research assignment has the potential to last a minimum of 2 years;

(7) Individuals with existing service obligations to Federal, State, or other entities will not be considered for the Program unless and until the existing service obligation is discharged or deferred for the length of Program participation;

(8) Applicants will not be excluded from consideration under the Program on the basis of age, race, culture, religion, gender, disability, or other non-merit factors.

Selection Process

Since program participation is contingent upon employment with the NIH, an individual who wishes to apply must obtain a written commitment from an Institute or Center (IC) Personnel Office of the NIH to be employed in a clinical research position. The Director, LRP, provides current deadlines, sources for assistance, and additional details regarding application procedures in an annual Applicant Information Bulletin.

Individuals submit their applications to the Director, LRP, who forwards those qualified to the Clinical Research Loan Repayment Committee (CR–LRC). The CR–LRC reviews, ranks, and approves or disapproves Clinical Research LRP applications. The LRC membership is made up of NIH scientific staff who are nominated by the Deputy Director, Intramural Research, NIH, and

appointed by the Director, NIH. The CR–LRC is co-chaired by the Associate Director for Clinical Research, NIH, and the Associate Director for Research on Minority Health, NIH. The CR–LRC reviews and selects applications for approval based upon the following:

(1) The merit of the clinical research assignment; and

(2) The credentials of both applicant and supervisor and other criteria the Secretary deems appropriate.

Clinical research activities are the biomedical and behavioral studies of etiology, epidemiology, prevention, prevention strategies, diagnosis, or treatment of diseases, disorders or conditions, including but not limited to clinical trials.

Funds for repayment will only be awarded to LRC-approved applications. Priority in funding will be given to qualified health professionals who are from disadvantaged backgrounds and who are underrepresented in biomedical/behavioral research including members from minority groups, disabled individuals, and women.

Program Administration and Details

Under the Clinical Research LRP, the NIH will repay a portion of the extant qualified educational loan debt incurred by health professionals to pay for their undergraduate, graduate, and/or health professional school educational expenses. Upon application, individuals must have total qualified educational debt which exceeds 20% of their anticipated annual NIH salary ("debt threshold") on the date of program eligibility.

Only qualified loan amounts in excess of 50 percent of the debt threshold will be considered for repayment ("repayable debt"). The repayable debt of qualified health professionals will be satisfied at the rate of one-half per year, subject to a statutory limit of $20,000 per year, for each year of obligated service. Obligated service requires selected individuals to serve at least 2 years as an NIH employee engaged in clinical research. Following conclusion of the initial two-year contract, participants may apply for renewal contracts to satisfy their remaining repayable debt. These continuation contracts may be submitted and approved on a year-to-year basis, subject to a finding by NIH that the applicant's clinical research accomplishments are acceptable. Funding of contracts is contingent upon appropriation and/or allocation of funds from the U.S. Congress and/or the NIH.

In return for the repayment of their educational loans, participants must agree to (1) engage in clinical research as employees of the NIH for a minimum period of 2 years; (2) make payments to lenders on their own behalf for periods of Leave Without Pay (LWOP); (3) pay monetary damages as required for breach of contract; and (4) satisfy other terms and conditions of the Clinical Research LRP's contract and application procedures.

Applicants must submit a signed contract, prepared by the NIH, agreeing to obligated service at the time they apply for consideration under the Clinical Research LRP. Substantial monetary penalties will be imposed for breach of contract.

The NIH will repay lenders for the principal, interest, and related expenses (such as the required insurance premiums on the unpaid balances of some loans) of qualified Government (Federal, State, local) and commercial educational loans obtained by participants for the following:

(1) Undergraduate, graduate, and health professional school tuition expenses;

(2) Other reasonable educational expenses required by the school(s) attended, including fees, books, supplies, educational equipment and materials, and laboratory expenses; and

(3) Reasonable living expenses, including the cost of room and board, transportation and commuting costs, and other living expenses as determined by the Secretary.

Repayments will be authorized for direct payment to lenders, following receipt of (1) the supervisor's verification of completion of the prior period of obligated service and (2) lender verification of the crediting of prior loan repayments, including the resulting account balances and current account status. The NIH will repay loans in the following order unless significant savings would result from repaying loans in a different priority order:

(1) Health Education Assistance Loans (HEAL);

(2) other loans guaranteed by the Federal Government; and

(3) other qualifying loans.

The following loans are NOT repayable under the Clinical Research LRP:

(1) Loans not obtained from a Government entity or commercial or other chartered lending institution, such as loans from friends and relatives, or other private individuals;

(2) Loans for which contemporaneous documentation is not available; and

(3) Loans, or those portions of loans, obtained for educational or living expenses which exceed a "reasonable" level as determined by a review of the standard school budget or additional contemporaneous documentation for the year in which the loan was made.

In addition, for other programs which provide loans, scholarships, loan repayments, or similar awards in exchange for a future service obligation, the NIH will NOT repay any sums that may result from failure to serve as required or conversion of the obligation to a loan under these programs. This includes, but is not limited to the following:

(1) Physicians Shortage Area Scholarship Program (Federal or State);

(2) National Research Service Award Program;

(3) Public Health Service and National Health Service Corps Scholarship Programs;

(4) Armed Forces (Army, Navy, or Air Force) Health Professions Scholarship Programs; and

(5) Indian Health Service Scholarship Program.

Finally, payments will not be made under the Clinical Research LRP for loans which participants have already repaid, delinquent loans, loans in default, loans not current in their payment schedule, or loans for which promissory notes have been signed after the program eligibility date. During lapses in loan repayments, due either to administrative complications or a break in service, Clinical Research LRP participants are wholly responsible for making payments or other arrangements which maintain loans in a current payment status such that increases in either principal or interest do not occur. Penalties assessed participants as a result of NIH administrative complications may be considered for reimbursement.

Additional Program Information

This program is not subject to the provisions of Executive Order 12372, Intergovernmental Review of Federal Programs.

This program is subject to OMB clearance under the requirements of the Paperwork Reduction Act of 1980. A Request for OMB Review and Approval of information collection associated with the program is being prepared by the NIH and will be sent to OMB for review and approval prior to implementation of the Clinical Research LRP.

The Catalog of Federal Domestic Assistance number for the Clinical Research LRP is 93.220.

Dated: September 7, 1994.

Ruth L. Kirschstein,

Deputy Director, NIH.

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